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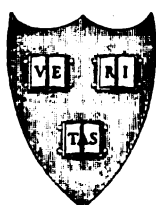
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# DEFINITIONS

OF

# WORDS AND PHRASES

COLLECTED, EDITED, AND COMPILED

BY MEMBERS OF THE  
EDITORIAL STAFF OF THE NATIONAL REPORTER SYSTEM

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## VOLUME 1

## A—CASTING VOTE

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# PREFACE.

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This compilation represents the first systematic attempt to present in complete and available form the vast quantity of judicial interpretation and construction of the meaning of words and phrases found in the reported decisions of the American appellate courts. It has been over ten years in preparation, and has involved enormous editorial labor and research. The effort has been made to secure all the words judicially defined and all the definitions of each word. In collecting the material recourse has been had in all cases to the opinions of the courts as the original sources, and the work is the result of a page-to-page examination of the reported American cases. A careful search for definitions for words and phrases has also been made in all the latest codes and revisions of statutes, state and federal.

Its scope and purpose can perhaps be best shown by explaining at the outset what it is *not*.

It is not a dictionary, in the ordinary sense, and it does not undertake to give the general or accepted meaning of all words and phrases; nor does it concern itself directly with their orthography, derivation, or pronunciation. It is not even intended to be a complete compendium of legal terminology. It does not, therefore, take the place of a law dictionary or a general lexicon. It includes legal or nonlegal terms only so far as they have been the subject of interpretation or definition in the decisions of the American courts or in the acts of the American legislatures.

It is not a digest, and it does not undertake to present the legal principles which have been enunciated and applied by the courts in their decisions. The interpretation and definition of particular words and phrases is a function quite apart from the presentation and discussion of the points of law and doctrine set forth in the decided cases. To find and state the latter is the prerogative of the digester, the text-writer, and the commentator. Sometimes, it is true, the judicial definition of words is intimately connected with the discussion of questions of law, and there are many instances in these pages where the two will be found in inseparable combination. But it has been the aim of the compilers to include legal questions only where they were incidental to definitions. When the question was "What constitutes" some legal term (as "contributory negligence," "burglary," "cruelty as a ground for divorce," etc.), the rule has been to omit it as belonging in the digest or text-book. So far as such matter has come into this compilation, it has been because of the difficulty of "drawing the line" closely, and from a desire to give all the matter that might reasonably be looked for in such a work as this.

"WORDS AND PHRASES," therefore, seeks to fill a field of its own, and to render a service to the legal profession which is fully performed by no other existing publication. This service is the setting out in available form of all the

judicial and statutory definitions which are to be found in American reports and statutes, whether the words and phrases defined are legal and technical or non-legal and general. Some of these definitions have been given in digests, some of them have been given in text-books, many of them have been collected and presented in more or less abridged form in the various "encyclopedias of law," but nowhere before have they been brought together with any attempt at exhaustiveness, nor given in such form as to make them practically available for direct use as authorities. The fact that some 132,000 separate definitions and constructions are here included shows at once how vast is the field and how incompletely it has been covered heretofore. It also shows how constant and universal must be the need in the legal profession of the information which is here given.

The judicial interpretation and definition of language has all the peculiar weight of authority which attaches to the judicial function, at least equally with the determination of technical legal issues. The question is not as to the meanings of a word in general, but as to its exact significance in some particular context or in connection with some particular statement of facts. In a doubtful case the previous construction of the disputed word by an appellate court will be of determining value as against the more generalized definitions of the lexicographer. These questions are determined by usage, common consent, agreement; and the searching examination of a court will most conclusively establish such usage as to any word used in any particular connection.

For obvious reasons no attempt has been made to limit the words defined to the technical terms of the law. Legal maxims have been excluded, except those that are so short as to resemble phrases, and where the courts have actually construed, and not merely translated, them. A comparatively small number of English cases have been included, but there has been no effort to bring these in exhaustively.

The plan has been to follow the language of the court, so that the definitions in the book will be authoritative, and to set out enough of the context or statement of facts in connection with which the word was used to enable the reader to see how far the definition is applicable to his own case. The reasoning of the court has also been incorporated so far as practicable. The idea has thus been to give the definitions themselves, carefully differentiating them where there are a number covering the same word, and not reducing them to any inferential statements of the "results" of the interpretation. Where the same definition is given *ipsissimis verbis* in several different cases, however, the cases are cumulated. Statutory definitions are as a rule given in full.

The arrangement of this material is of course alphabetical, and is made as simple as possible, with the one purpose of rendering all the matter easily accessible. An abundance of cross-references has therefore been provided to bring the words into connection with their synonyms and derivatives as well as analogous terms. Where there is no distinction in meaning between a verb and its derivative noun, these are treated together under a single head, as "Abandon—Abandonment"; but if the noun has also a distinctive meaning as a noun, this meaning is treated under the noun in addition to its treatment under the verb; thus, "Accept." "Acceptance." The same rule is followed in regard to ad-

jectives and adverbs. Wherever any large number of paragraphs are given under a single general heading, subclassification is given with appropriate sub-headings.

In the arrangement of the black-letter lines under the several words different methods have been followed, according to the varying requirements of the material. Sometimes words have a number of quite different meanings, regardless of the connection in which they are used. In such cases the paragraphs are arranged alphabetically according to these different meanings. Thus:

**"ACCRUE.**

**As arise or become enforceable.**  
**As become absolute or vested.**  
**As become due and payable.**  
**As exist."**

Sometimes the meaning of the word varies according to the connection in which it is used, in which case paragraphs are arranged alphabetically according to these several uses. Thus:

**"ABATE—ABATEMENT.**

**Of action.**  
**Of freehold.**  
**Of legacy.**  
**Of nuisance."**

When it has been necessary to follow both these methods under one word, the general definitions are placed first. Thus:

**"ADVANCE—ADVANCES.**

**Advancement distinguished.**  
**Change of title involved.**  
**Loan equivalent.**  
**As pecuniary advances.**  
**By factor.**  
**By owner.**  
**In marine insurance.**  
**On crops."**

Some technical terms have developed a large number of meanings, and each meaning contains a number of separate elements, some definitions emphasizing one element and others other elements. These definitions have been arranged alphabetically, according to the elements so emphasized, which are indicated in black-letter lines. Thus:

**"ADVERSE POSSESSION.**

**Actual occupation.**  
**Color of title.**  
**Continuousness.**  
**Disseisin.**  
**Good faith.**  
**Hostile character."**



The greatest difficulty has been experienced in dealing with phrases. In the construction of a statute or contract or other document the court often puts a phrase in quotations, and, while apparently dealing with the entire phrase, is really defining some particular word in it. These definitions have been placed with the other definitions of that particular word; and, where it has been difficult to determine which of two or more words in a phrase has been defined, the paragraph has been duplicated under each. Purely technical phrases have, however, been put under the phrase as a whole, that being the alphabetical place to which the reader would naturally turn; but in such cases cross-references have been introduced under the leading words of the phrase. Again, phrases have generally been made secondary heads, that is, printed in smaller type under the leading words as principal heads; but where they are uncommon, and have not become recognized as established phrases, they are placed under black-letter lines under the most important word.

No attention has been paid to different spellings of words, except that the word is placed under the spelling approved by the best modern usage. Other accepted spellings are often referred to by cross-references.

Citations are given to the Reporters, the State Reports, American Decisions, the American Reports, American State Reports, and the Lawyers' Reports Annotated. An investigator who wishes to go back to the full report is therefore placed in position to find the case in whichever of these series is most accessible to him. In the first report cited reference is made to the page on which the definition is found besides the usual citation to the page on which the case begins.

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St. Paul, Sept. 1, 1904.

# TABLE OF ABBREVIATIONS.

## A

Abb. Adm.....Abbott's Admiralty (U. S.)  
 Abb. Dec.....Abbott's Decisions (N. Y.)  
 Abb. N. C.....Abbott's New Cases (N. Y.)  
 Abbott's Law Dict.....Abbott's Law Dictionary.  
 Abb. Prac.....Abbott's Practice (N. Y.)  
 Abb. Prac. (N. S.)...Abbott's Practice, New Series (N. Y.)  
 Abb. Shipp.....Abbott on Shipping.  
 Abb. (U. S.).....Abbott's United States.  
 Abr. ....Abridgment.  
 Adams .....Adams (N. H.)  
 Adams, Eq.....Adams' Equity.  
 Add. ....Addams' Ecclesiastical Reports.  
 Add. ....Addison (Pa.)  
 Add. Cont. ....Addison on Contracts.  
 Add. Ecc.....Addams' Ecclesiastical Reports.  
 Add. Torts .....Addison on Torts.  
 Adol. & E.....Adolphus and Ellis' English King's Bench Reports.  
 Adol. & E. (N. S.)..Adolphus and Ellis' English Queen's Bench Reports, New Series.  
 Aik. Dig.....Aikin's Digest of Laws (Ala.)  
 Aikens .....Aikens (Vt.)  
 A. K. Marsh.....A. K. Marshall (Ky.)  
 Ala. ....Alabama.  
 Alb. Law J.....Albany Law Journal.  
 Allen .....Allen (Mass.)  
 Allison's Am. Dict..Allison's American Dictionary.  
 Amb. ....Ambler's English Chancery Reports.  
 Am. Bankr. Rep....American Bankruptcy Reports.  
 Am. Dec.....American Decisions.  
 Am. Ed.....American Edition.  
 Am. Law J.....American Law Journal.  
 Am. Law Rec.....American Law Record (Cin.)  
 Am. Law Reg. (N. S.) .....American Law Register, New Series.  
 Am. Law Reg. (O. S.) .....American Law Register, Old Series.  
 Am. Law Rev.....American Law Review.  
 Am. Law T. Rep...American Law Times Reports.  
 Am. Lead. Cas....American Leading Cases (Hare & Wallace's).  
 Am. Reg.....American Law Register.  
 Am. Rep.....American Reports.  
 Am. St. Rep.....American State Reports.  
 Am. & Eng. Enc. Law .....American and English Encyclopedia of Law.  
 Am. & Eng. Ry. Cas.American and English Railway Cases.  
 And. Law Dict....Anderson's Law Dictionary.  
 Ang. Car.....Angell on Carriers.  
 Ang. Ins.....Angell on Insurance.  
 Ang. Lim.....Angell on Limitation of Actions.  
 Ang. & A. Corp....Angell and Ames on Corporations.  
 Ann. ....Queen Anne (as 8 Ann. c. 19).

Ann. Code.....Annotated Code.  
 Ann. Codes & St...Bellinger and Cotton's Annotated Codes and Statutes (Or.)  
 Ann. St.....Annotated Statutes.  
 Ann. St. Ind. T....Annotated Statutes of Indian Territory.  
 Anstr. ....Anstruther's English Exchequer Reports.  
 Anth. N. P.....Anthon's Nisi Prius Reports (N. Y.)  
 App. ....Appleton (Me.)  
 App. Cas.....Appeal Cases, English Law Reports.  
 App. D. C.....Appeal Cases (D. C.)  
 App. Div.....Appellate Division (N. Y.)  
 Arch. Cr. Pl.....Archbold's Criminal Pleading.  
 Arch. N. P.....Archbold's Law of Nisi Prius.  
 Ariz. ....Arizona.  
 Ark. ....Arkansas.  
 Arn. Ins.....Arnold's Marine Insurance.  
 Ashm. ....Ashmead (Pa.)  
 Atk. ....Atkyns' English Chancery Reports.  
 Atl. ....Atlantic Reporter.

## B

Bac. Abr. ....Bacon's Abridgment.  
 Bac. Max.....Bacon's Maxims of the Law.  
 Bailey .....Bailey (S. C.)  
 Bailey, Eq.....Bailey's Equity (S. C.)  
 Baldw. ....Baldwin (U. S.)  
 Ballinger's Ann. Codes & St.....Ballinger's Annotated Codes and Statutes (Wash.)  
 Bankr. Act.....Bankruptcy Act.  
 Bankr. Form.....Bankruptcy Forms.  
 Ban. & A.....Banning & Arden's Patent Cases (U. S.)  
 Barb. ....Barbour (N. Y.)  
 Barb. (Ark.).....Barber (Ark.)  
 Barb. Ch.....Barbour's Chancery (N. Y.)  
 Barb. Ch. Pr.....Barbour's Chancery Practice.  
 Barn. & Adol.....Barnewall and Adolphus' English King's Bench Reports.  
 Barn. & Ald.....Barnewall and Alderson's English King's Bench Reports.  
 Barn. & C.....Barnewall and Crosswell's English King's Bench Reports.  
 Barr .....Barr (Pa.)  
 Battle's Revisal....Battle's Revisal of the Public Statutes of North Carolina.  
 Bart. ....Baxter (Tenn.)  
 Bay .....Bay (S. C.)  
 Bayley, Bills.....Bayley on Bills.  
 Beach, Contrib. Neg. Beach on Contributory Negligence.  
 Beach, Mod. Eq. Jur. Beach's Commentaries on Modern Equity Jurisprudence.  
 Beach, Priv. Corp. Beach on Private Corporations.  
 Beal. ....Beasley (N. J.)

Beav. .... Beavan's English Rolls Court Reports.

Bee ..... Bee (U. S.)

Ben. .... Benedict (U. S.)

Benj. Sales ..... Benjamin on Sales.

Benn. .... Bennett (Cal.)

Best, Ev. .... Best on Evidence.

Best & S. .... Best and Smith's English Queen's Bench Reports.

Bibb ..... Bibb (Ky.)

Bid. Ins. .... Biddle on Insurance.

Bigelow, Lead. Cas. .... Bigelow's Leading Cases on Bills and Notes, Torts, or Wills.

Bin. .... Binney (Pa.)

Bing. .... Bingham's English Common Pleas Reports.

Bing. N. C. .... Bingham's New Cases, English Common Pleas.

Bish. Cont. .... Bishop on Contracts.

Bish. Cr. Law. .... Bishop on Criminal Law.

Bish. Cr. Proc. .... Bishop on Criminal Procedure.

Bish. Mar., Div. & Sep. .... Bishop on Marriage, Divorce, and Separation.

Bish. Mar. & Div. .... Bishop on Marriage and Divorce.

Bish. New Cr. Law. .... Bishop's New Criminal Law.

Biss. .... Bissell (U. S.)

Bl. .... Henry Blackstone's English Common Pleas Reports.

Black ..... Black (U. S.)

Black, Const. Law. .... Black on Constitutional Law.

Black, Dict. .... Black's Law Dictionary.

Black, Judg. .... Black on Judgments.

Blackf. .... Blackford (Ind.)

Bland ..... Bland (Md.)

Blatchf. .... Blatchford (U. S.)

Blatchf. Prize Cas. .... Blatchford's Prize Cases (U. S.)

Blatchf. & H. .... Blatchford & Howland (U. S.)

Bl. Comm. .... Blackstone's Commentaries on the Laws of England.

Bliss, Code Pl. .... Bliss on Code Pleading.

B. Mon. .... B. Monroe (Ky.)

Bond ..... Bond (U. S.)

Bosw. .... Bosworth (N. Y.)

Bos. & P. .... Bosanquet and Puller's English Common Pleas Reports.

Bos. & P. (N. E.). .... Bosanquet and Puller's New Reports, English Common Pleas.

Bouv. Law Dict. .... Bouvier's Law Dictionary.

Bradf. Sur. .... Bradford's Surrogate (N. Y.)

Bradw. .... Bradwell (Ill.)

Branch ..... Branch (Fla.)

Brandt, Sur. .... Brandt on Suretyship and Guaranty.

Brayt. .... Brayton (Vt.)

Breese ..... Breese (Ill.)

Brev. .... Brevard (S. C.)

Brewst. .... Brewster (Pa.)

Brightly, Elect. Cas. .... Brightly's Leading Election Cases (Pa.)

Brightly, N. P. .... Brightly's Nisi Prius Reports (Pa.)

Brock. .... Brockenbrough (U. S.)

Brock. & H. .... Brockenbrough & Holmes (Va.)

Brod. & B. .... Broderip & Bingham's English Common Pleas Reports.

Brooke, Abr. .... Brooke's Abridgment.

Brown, Adm. .... Brown's Admiralty (U. S.)

Brown, Ch. .... Brown's English Chancery Reports.

Browne ..... Browne (Pa.)

Browne, Jud. Interp. .... Browne's Judicial Interpretation of Common Words and Phrases.

Brunner, Col. Cas. .... Brunner's Collected Cases (U. S.)

Bull. N. P. .... Buller's Law of Nisi Prius.

Bulst. .... Bulstrode's English King's Bench Reports.

Bump. Fraud. Conv. .... Bump on Fraudulent Conveyances.

Burge, Sur. .... Burge on Suretyship.

Burn. .... Burnett (Wis.)

Burr. .... Burrows' English King's Bench Reports.

Burrill, Circ. Ev. .... Burrill on Circumstantial Evidence.

Burr. L. Dict. .... Burrill's Law Dictionary.

Burt. Real Prop. .... Burton on Real Property.

Busb. .... Busbee (N. C.)

Busb. Eq. .... Busbee's Equity (N. C.)

Bush ..... Bush (Ky.)

B. & Ald. .... Barnewell and Alderson's English King's Bench Reports.

B. & C. .... Barnewell and Cresswell's English King's Bench Reports.

B. & C. Comp. .... Bellinger and Cotton's Annotated Codes and Statutes (Or.)

B. & P. .... Bosanquet & Puller's English Common Pleas Reports.

**C**

Cab. & Ell. .... Cababé and Ellis' Queen's Bench Reports.

Caines ..... Caines (N. Y.)

Caines, Cas. .... Caines' Cases (N. Y.)

Cal. .... California.

Call ..... Call (Va.)

Calvin, Lex. .... Calvin's Lexicon Juridicum.

Camp. .... Campbell's English Nisi Prius Reports.

Cam. & N. .... Cameron & Norwood's Conference (N. O.)

Car. .... Carolus (as 22 & 23 Car. II.)

Car. Law Repos. .... Carolina Law Repository (N. C.)

Carr. & M. .... Carrington and Marshman's English Nisi Prius Reports.

Cart. .... Carter (Ind.)

Car. & K. .... Carrington and Kirwan's English Nisi Prius Reports.

Car. & P. .... Carrington & Payne's English Nisi Prius Reports.

Casey ..... Casey (Pa.)

C. B. .... English Common Bench Reports (Manning, Granger & Scott).

C. B. (N. S.). .... English Common Bench Reports, New Series, by John Scott.

C. C. A. .... Circuit Court of Appeals (U. S.)

C. E. Green. .... C. E. Green (N. J.)

Cent. Dict. .... Century Dictionary.

Cent. Law J. .... Central Law Journal, St. Louis, Mo.

Chand. .... Chandler (Wis.)

Chan. Sentinel .... Chancery Sentinel (N. Y.)

Charlt., R. M. .... R. M. Charlton (Ga.)

Charlt., T. U. P. .... T. U. P. Charlton (Ga.)

Chase ..... Chase (U. S.)

Chase, Steph. Dig. .... Chase on Stephens' Digest of Evidence.

Ch. Div. .... Chancery Division, English Law Reports.

Chest. Co. Rep.....	Chester County Reports (Pa.)	Const. U. S. Amend.....	Amendment to the Constitution of the United States.
Cheves .....	Cheves (S. C.)	Con. Sur.....	Connolly's Surrogate (N. Y.)
Cheves, Eq.....	Cheves' Equity (S. C.)	Cooke .....	Cooke (Tenn.)
Chl. Leg. N.....	Chicago Legal News (Ill.)	Cook's Pen. Code ..	Cook's Penal Code (N. Y.)
Chip., D.....	D. Chipman (Vt.)	Cooley, Const. Lim.....	Cooley's Constitutional Limitations.
Chip., N.....	N. Chipman (Vt.)	Cooley, Tax'n .....	Cooley on Taxation.
Chit. Bills .....	Chitty on Bills.	Cooley, Torts.....	Cooley on Torts.
Chit. Bl.....	Chitty's Edition of Blackstone's Commentaries.	Coop. Eq. Pl.....	Cooper's Equity Pleading.
Chit. Cont.....	Chitty on Contracts.	Co. Rep.....	Coke's English King's Bench Reports.
Chit. Cr. Law .....	Chitty's Criminal Law.	Corn. Deeds .....	Cornish on Purchase Deeds.
Ch. Pl.....	Chitty on Pleading.	Cornish, Purch.....	Cornish on Purchase Deeds.
Cin. R.....	Cincinnati Superior Court Reports (Ohio)	Deeds .....	Cornish on Purchase Deeds.
Cin. Super. Ct. Rep'r .....	Cincinnati Superior Court Reporter (Ohio)	Cow.....	Cowen (N. Y.)
Cir. Ct. Dec.....	Circuit Decisions (Ohio)	Cow. Cr. Rep.....	Cowen's Criminal Reports (N. Y.)
Cir. Ct. R.....	Circuit Court Reports (Ohio)	Cowp. ....	Cowper's English King's Bench Reports.
City Ct. R.....	City Court Reports (N. Y.)	Cox .....	Cox (Ark.)
City Ct. R. Supp...	City Court Reports, Supplement (N. Y.)	Cox .....	Cox's English Chancery Cases.
City H. Rec.....	City Hall Recorder (N. Y.)	Cox, Cr. Cas.....	Cox's English Criminal Cases.
Civ. Code.....	Civil Code.	Coxe .....	Coxe (N. J.)
Civ. Code Practice...	Civil Code of Practice.	C. P. Div.....	Common Pleas Division, English Law Reports.
Civ. Prac. Act.....	Civil Practice Act.	C. P. Rep.....	Common Pleas Reporter (Pa.)
Civ. Proc. R.....	Civil Procedure Reports (N. Y.)	Crabbe .....	Crabbe (U. S.)
Clancy, Husb. & W.....	Clancy on Husband and Wife.	Crabb, Eng. Synonyms .....	Crabb's English Synonyms.
Clark .....	Clark (Pa.)	Cr. Act.....	Criminal Act.
Clarke .....	Clarke (Iowa)	Craig & P.....	Craig and Phillips' English Chancery Reports.
Clarke, Ch.....	Clarke's Chancery (N. Y.)	Cranch .....	Cranch (U. S.)
Clay's Dig.....	Clay's Digest of Laws of Alabama.	Cranch, C. C.....	Cranch's Circuit Court (U. S.)
Cleve. Law Rec.....	Cleveland Law Recorder (Ohio)	Cranch, Pat. Dec... ..	Cranch's Patent Decisions (U. S.)
Cleve. Law Rep....	Cleveland Law Reporter (Ohio)	Cr. Code.....	Criminal Code.
Cliff. ....	Clifford (U. S.)	Cr. Law Mag.....	Criminal Law Magazine (N. J.)
Co. ....	Coke's English King's Bench Reports.	C. Rob. Adm.....	Charles Robinson's English Admiralty Reports.
Code Civ. Proc.....	Code of Civil Procedure.	Cro. Car.....	Croke's English King's Bench Reports temp. Charles I (3 Cro.)
Code Cr. Proc.....	Code of Criminal Procedure.	Cro. Eliz.....	Croke's English King's Bench Reports, temp. Elizabeth (1 Cro.)
Code Prac.....	Code of Practice.	Cromp. Just.....	Crompton's Office of Justice of the Peace.
Code Proc.....	Code of Procedure.	Crompt. ....	Star Chamber Cases by Crompton.
Code Pub. Gen. Laws .....	Code of Public General Laws.	Cromp. & J.....	Crompton & Jervis' English Exchequer Reports.
Code Pub. Loc. Laws .....	Code of Public Local Laws.	Cr. Prac. Act .....	Criminal Practice Act.
Code R. (N. S.)....	Code Reports, New Series (N. Y.)	Cr. Proc. Act .....	Criminal Procedure Act.
Code Rep.....	Code Reporter (N. Y.)	Cr. St.....	Criminal Statutes.
Code Supp.....	Supplement to the Code.	Cruise's Dig.....	Cruise's Digest of the Law of Real Property.
Co. Inst.....	Coke's Institutes.	Ct. Cl.....	Court of Claims (U. S.)
Coke .....	Coke's English King's Bench Reports.	Curt.....	Curtels English Ecclesiastical Reports.
Cold.....	Coldwell (Tenn.)	Curt. ....	Curtis (U. S.)
Colem. Cas.....	Coleman's Cases (N. Y.)	Cush.....	Cushing (Mass.)
Colem. & C. Cas...	Coleman & Caines' Cases (N. Y.)	Cush. Law & Prac. Leg. Assem.....	Cushing's Law and Practice of Legislative Assemblies.
Co. Litt.....	Coke on Littleton.	Cushm. ....	Cushman (Mass.)
Collier, Partn.....	Collyer on Partnership.	Cyc. Law & Proc...	Cyclopedia of Law and Procedure.
Colly. ....	Collyer's English Chancery Cases.	Cyclop. Dict.....	Shumaker & Longsdorf's Cyclopedia Dictionary
Colo. ....	Colorado.	C. & K.....	Carrington and Kirwan's English Nisi Prius Reports.
Colo. App.....	Colorado Appeals Reports.	C. & P.....	Carrington and Payne's English Nisi Prius Reports.
Colo. Law Rep.....	Colorado Law Reporter.		
Com. Dig.....	Comyn's Digest of the Laws of England.		
Comm. ....	Commentaries.		
Comp. Laws .....	Compiled Laws.		
Comp. St.....	Compiled Statutes.		
Comst. ....	Comstock (N. Y.)		
Comyn .....	Comyns' English King's Bench Reports.		
Conf. R.....	Conference Reports (N. G.)		
Cong. ....	Congress.		
Conn. ....	Connecticut.		
Consol. St.....	Consolidated Statutes.		
Const. ....	Constitution.		
Const. Amend.....	Amendment to Constitution.		



## D

Dak.	Dakota.
Dall. (Pa.)	Dallas (Pa.)
Dall. (U. S.)	Dallas (U. S.)
Dall. Dig.	Dallam's Digest and Opinions (Tex.)
Daly	Daly (N. Y.)
Dana	Dana (Ky.)
Dane's Abr.	Dane's Abridgment of American Law.
Daniell, Ch. Pl. & Prac.	Daniell's Chancery Pleading and Practice.
Daniel, Neg. Inst.	Daniel's Negotiable Instruments.
Davis, Cr. Law.	Davis' Criminal Law.
Dawson's Code.	Dawson's Code of Civil Procedure (Colo.)
Day	Day (Conn.)
D. C.	District of Columbia.
D. Chip.	D. Chipman (Vt.)
Deady	Deady (U. S.)
De Gex, F. & J.	De Gex, Fisher & Jones' English Chancery Reports.
De Gex, M. & G.	De Gex, Macnaghten, and Gordon's English Chancery Reports.
Del.	Delaware.
Del. Ch.	Delaware Chancery.
Del. Co. R.	Delaware County Reports (Pa.)
Dem. Sur.	Demarest's Surrogate (N. Y.)
Denio	Denio (N. Y.)
Desaus.	Desaussure's Equity (S. C.)
Desty, Tax'n.	Desty on Taxation.
Dev.	Devereux (N. C.)
Dev. Ct. Cl.	Devereux's Court of Claims (U. S.)
Dev. Eq.	Devereux's Equity (N. C.)
Devl. Deeds.	Devlin on Deeds.
Dev. & B.	Devereux & Battle (N. C.)
Dev. & B. Eq.	Devereux & Battle's Equity (N. C.)
Dick.	Dickinson (N. J.)
Dickens	Dickens' English Chancery Reports.
Dict.	Dictionary.
Dig.	Digest.
Dig. Fla.	Thompson's Digest of Laws (Fla.)
Dig. L. K.	Littell and Swigert's Digest of Statute Law (Ky.)
Dill.	Dillon (U. S.)
Dillon, Mun. Corp.	Dillon on Municipal Corporations.
Disn.	Disney (Ohio)
Dom. Civ. Law.	Domat's Civil Law.
Doug.	Douglas' English King's Bench Reports.
Doug.	Dougllass (Mich.)
Dowl. & L.	Dowling & Lowndes' English Bail Court Reports.
Dowl. & R.	Dowling and Ryland's English King's Bench Reports.
Drake, Attachm.	Drake on Attachment.
Dud.	Dudley (Ga.)
Dud. Eq.	Dudley's Equity (S. C.)
Dud. Law.	Dudley's Law (S. C.)
Duer	Duer's Superior Court (N. Y.)
Dup. Jur.	Duponceau on Jurisdiction of United States Courts.
Dutch.	Dutcher (N. J.)
Duv.	Duvall (Ky.)
Dyer	Dyer's English King's Bench Reports.

## E

East	East's English King's Bench Reports.
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East, P. C.	East's Pleas of the Crown.
Eccl. R.	English Ecclesiastical Reports.
E. C. L.	English Common Law Reports (American Reprint).
Ed.	Edition.
Edm. Sel. Cas.	Edmonds' Select Cases (N. Y.)
E. D. Smith	E. D. Smith (N. Y.)
Edw.	King Edward (as 4 Edw. I.)
Edw. Bailm.	Edwards on the Law of Bailments.
Edw. Bills & N.	Edwards on Bills and Notes.
Edw. Brok. & F.	Edwards on Factors and Brokers.
Edw. Ch.	Edwards' Chancery (N. Y.)
El., Bl. & El.	Ellis, Blackburn, and Ellis' English Queen's Bench Reports.
Eliz.	Queen Elizabeth (as 13 Eliz.)
Elliot, Deb.	Elliot's Debates on the Federal Constitution.
Elliot, Supp.	Elliot Supplement to the Indiana Revised Statutes.
Elliott, Roads & S.	Elliott on Roads and Streets.
Elliott, R. R.	Elliott on Railroads.
El. & Bl.	Ellis and Blackburn's English Queen's Bench Reports.
Emerig. Ins.	Emerigon on Insurance.
Enc. Amer.	Encyclopædia Americana.
Enc. Brit.	Encyclopædia Britannica.
Enc. Ins. U. S.	Insurance Year-Book.
Enc. Pl. & Prac.	Encyclopedia of Pleading and Practice.
Endlich, Bldg. Ass'ns.	Endlich on Building Associations.
Eng.	English (Ark.)
Eng. C. L.	English Common Law Reports (American Reprint).
Eng. Ecc. R.	English Ecclesiastical Reports (American Reprint).
Eng. Law & Eq.	English Law and Equity Reports (American Reprint).
Eq.	Equity.
Ersk. Inst.	Erskine's Institutes of the Law of Scotland.
Escriche, Dict.	Escriche's Dictionary of Jurisprudence.
Ev.	Evidence.
Exch.	English Exchequer Reports (Weleby, Hurlstone & Gordon).
Ex. Sess.	Extra Session.
El. & B.	Ellis and Blackburn's English Queen's Bench Reports.

## F

Fairf.	Fairfield (Me.)
Fearne, Rem.	Fearne on Contingent Remainders.
Fed.	Federal Reporter (U. S.)
Fed. Cas.	Federal Cases (U. S.)
Fernald, Eng. Syn.	Fernald's English Synonyms.
Finch, Law.	Finch, Sir Henry; a Discourse of Law (1759).
Fish. Pat. Cas.	Fisher's Patent Cases (U. S.)
Fish. Pat. Rep.	Fisher's Patent Reports (U. S.)
Fish. Prize Cas.	Fisher's Prize Cases (U. S.)
Fla.	Florida.
Flip.	Flippin (U. S.)
Fost.	Foster (N. H.)

Foster ..... Foster's English Crown Law or Crown Cases.  
 Fort. & F. .... Foster and Finlason's English Nisi Prius Reports.  
 Freem. .... Freeman (Ill.)  
 Freem. Ch. .... Freeman's Chancery (Miss.)  
 Freem. Judgm. .... Freeman on Judgments.

## G

Ga. .... Georgia.  
 Gabb. Cr. Law. .... Gabbett's Criminal Law.  
 Ga. Dec. .... Georgia Decisions.  
 Gall. .... Gallison (U. S.)  
 Gantt's Dig. .... Gantt's (& Caldwell's) Digest of Statutes (Ark.)  
 Gav. & H. Rev. St. .... Gavin and Hord's Revised Statutes (Ind.)  
 Gen. Assem. .... General Assembly.  
 Gen. Laws. .... General Laws.  
 Gen. St. .... General Statutes.  
 Geo. .... King George (as 15 Geo. II.)  
 George .... George (Miss.)  
 Gil. .... Gillfillan (Minn.)  
 Gilbert, Tenures. .... Gilbert on Tenures.  
 Gill. .... Gill (Md.)  
 Gill & J. .... Gill & Johnson (Md.)  
 Gilman. .... Gilman (Ill.)  
 Gilmer. .... Gilmer (Va.)  
 Gilp. .... Gilpin (U. S.)  
 Gould, Pl. .... Gould on the Principles of Pleading in Civil Actions.  
 Gould's Dig. .... Gould's Digest of Laws (Ark.)  
 Grant, Cas. .... Grant's Cases (Pa.)  
 Grat. .... Grattan (Va.)  
 Gray. .... Gray (Mass.)  
 Green, C. E. .... C. E. Green (N. J.)  
 Green, Cr. Law R. .... Green's Criminal Law Reports (N. Y.)  
 Green, H. W. .... H. W. Green (N. J.)  
 Green, J. S. .... J. S. Green (N. J.)  
 Greene, G. .... G. Greene (Iowa)  
 Greenl. .... Greenleaf (Me.)  
 Greenl. Cruise, Real Prop. .... Greenleaf's Edition of Cruise's Digest of Real Property.  
 Greenl. Ev. .... Greenleaf on Evidence.  
 Gross, St. .... Gross' Illinois Compiled Laws (or Statutes).

## H

Hagg. .... Haggard's English Admiralty Reports.  
 Hagg. Cons. .... Haggard's English Consistory Reports.  
 Hagg. Ecc. .... Haggard's English Ecclesiastical Reports.  
 Hale, P. O. .... Hale's Pleas of the Crown.  
 Hall. .... Hall's Superior Court (N. Y.)  
 Halleck, Int. Law. .... Halleck's International Law.  
 Hall, Mex. Law. .... Hall's Mexican Law.  
 Halst. .... Halsted (N. J.)  
 Halst. Ch. .... Halsted's Chancery (N. J.)  
 Ham. .... Hammond (Ohio)  
 Hand. .... Hand (N. Y.)  
 Handy. .... Handy (Ohio)  
 Har. (Del.) .... Harrington (Del.)  
 Har. (Mich.) .... Harrington (Mich.)  
 Har. (N. J.) .... Harrison (N. J.)  
 Hardin. .... Hardin (Ky.)  
 Hare. .... Hare's English Vice Chancellors' Reports.  
 Harp. .... Harper (S. C.)  
 Harp. Eq. .... Harper's Equity (S. C.)  
 Harris. .... Harris (Pa.)  
 Hart Dig. .... Hartley's Digest of Laws, (Tex.)  
 Har. & G. .... Harris & Gill (Md.)

Har. & J. .... Harris & Johnson (Md.)  
 Har. & McH. .... Harris & McHenry (Md.)  
 Hasb. .... Hasbrouck's Reports (Idaho)  
 Hask. .... Haskell (U. S.)  
 Hata. .... Hatsell's Parliamentary Precedents.  
 Haw. .... Hawaiian Reports.  
 Hawk. .... Hawkins' Pleas of the Crown.  
 Hawk. P. O. .... Hawkins' Pleas of the Crown.  
 Hawks. .... Hawks (N. C.)  
 Hayes. .... Hayes' Irish Exchequer Reports.  
 Hayw. (N. C.) .... Haywood (N. C.)  
 Hayw. (Tenn.) .... Haywood (Tenn.)  
 Hayw. & H. .... Hayward & Hazelton (U. S.)  
 Has. Reg. .... Hazard's Register (Pa.)  
 H. Bl. .... Henry Blackstone's English Common Pleas Reports.  
 Head. .... Head (Tenn.)  
 Heisk. .... Heiskell (Tenn.)  
 Hemp. .... Hempstead (U. S.)  
 Hen. .... King Henry (as 8 Hen. VI.)  
 Hen. St. .... Henning's Statutes (Va.)  
 Hen. & M. .... Henning & Munford (Va.)  
 Herm. Chat. Mortg. .... Herman on Chattel Mortgages.  
 Hill. .... Hill (N. Y.)  
 Hill, Eq. .... Hill's Equity (S. C.)  
 Hill, Law. .... Hill's Law (S. C.)  
 Hill's Ann. Laws. .... Hill's Annotated Laws (Or.)  
 Hill & D. Supp. .... Hill & Denio, Lator's Supplement (N. Y.)  
 Hilt. .... Hilton (N. Y.)  
 Hil. Term 4, Will. IV. .... Hilary Term 4, William IV.  
 Hil. Torts. .... Hilliard on the Law of Torts.  
 H. L. Cas. .... House of Lords' Cases, English.  
 Hobart. .... Hobart's English King's Bench Reports.  
 Hodge, Presb. Law. .... Hodge on Presbyterian Law.  
 Hoff. Ch. .... Hoffman's Chancery (N. Y.)  
 Hoff. Land Cas. .... Hoffman's Land Cases (U. S.)  
 Holmes. .... Holmes (U. S.)  
 Holt, N. P. .... Holt's English Nisi Prius Reports.  
 Holt, Shipp. .... Holt on Shipping.  
 Hopk. Ch. .... Hopkins' Chancery (N. Y.)  
 Houst. .... Houston (Del.)  
 Houst. Cr. Cas. .... Houston's Criminal Cases (Del.)  
 How. (Miss.) .... Howard (Miss.)  
 How. .... Howard (U. S.)  
 How. Ann. St. .... Howell's Annotated Statutes (Mich.)  
 How. Prac. .... Howard's Practice (N. Y.)  
 How. Prac. (N. S.) .... Howard's Practice, New Series (N. Y.)  
 How. St. .... Howell's Annotated Statutes (Mich.)  
 How. & H. St. .... Howard and Hutchinson's Statutes (Miss.)  
 Howell, N. P. .... Howell's Nisi Prius Reports (Mich.)  
 Howell, St. Tr. .... Howell's English State Trials.  
 Hughes (Ky.) .... Hughes (Ky.)  
 Hughes. .... Hughes (U. S.)  
 Hume's Hist. Eng. .... Hume's History of England.  
 Humph. .... Humphrey (Tenn.)  
 Hun. .... Hun (N. Y.)  
 Hurd's Rev. St. .... Hurd's Revised Statutes (Ill.)  
 Hurl. Bonds. .... Hurlstone on Bonds.

Hurl. & C. .... Hurlstone & Coltman's English Exchequer Reports.  
 Hurl. & G. .... Hurlstone and Gordon's Reports (10, 11, English Exchequer Reports).  
 Hurl. & N. .... Hurlstone and Norman's English Exchequer Reports.  
 Hutch. Carr. .... Hutchinson on Carriers.  
 Hutch. Code. .... Hutchinson's Code (Miss.)

## I

Idaho ..... Idaho.  
 Ill. .... Illinois.  
 Ill. App. .... Illinois Appellate Court Reports.  
 Imp. Dict. .... Imperial Dictionary.  
 Ind. .... Indiana.  
 Ind. App. .... Indiana Appellate Court Reports.  
 Ind. T. .... Indian Territory.  
 Ins. Law J. .... Insurance Law Journal (Pa.)  
 Inst. .... Coke's Institutes.  
 Internat. Dict. .... Webster's International Dictionary.  
 Interst. Com. R. .... Interstate Commerce Reports.  
 Iowa ..... Iowa.  
 Ired. .... Iredell's Law (N. C.)  
 Ired. Eq. .... Iredell's Equity (N. C.)

## J

Jac. .... King James (as 21 Jac. I).  
 Jac. Law Dict. .... Jacob's Law Dictionary.  
 Jagg. Torts. .... Jaggard on Torts.  
 Jarm. Willa. .... Jarman on Wills.  
 Jeff. .... Jefferson (Va.)  
 J. J. Marsh. .... J. J. Marshall (Ky.)  
 Johns. .... Johnson (N. Y.)  
 Johns. Cas. .... Johnson's Cases (N. Y.)  
 Johns. Ch. .... Johnson's Chancery (N. Y.)  
 Johnson's Quarto Dict. .... Johnson's Quarto Dictionary.  
 Jones ..... Jones (Pa.)  
 Jones, Chat. Mortg. .... Jones on Chattel Mortgages.  
 Jones, Eq. .... Jones' Equity (N. C.)  
 Jones, Law. .... Jones' Law (N. C.)  
 Jones, Mortg. .... Jones on Mortgages.  
 Jones & S. .... Jones & Spencer (N. Y.)  
 Jour. Juris. .... Journal of Jurisprudence.  
 J. Scott (N. S.) .... English Common Bench Reports, New Series by John Scott.  
 Jud. Repos. .... Judicial Repository (N. Y.)

## K

Kan. .... Kansas.  
 Kan. App. .... Kansas Appeals.  
 Kay & J. .... Kay and Johnson's English Vice Chancellors' Reports.  
 Keen ..... Keen's English Rolls Court Reports.  
 Keener, Quasi Cont. .... Keener on Quasi Contracts.  
 Kel. .... Sir John Kelyng's English Crown Cases.  
 Kelly ..... Kelly (Ga.)  
 Kent, Comm. .... Kent's Commentaries on American Law.  
 Kern. .... Kernan (N. Y.)  
 Keyes ..... Keyes (N. Y.)  
 Kirby ..... Kirby (Conn.)  
 Kulp ..... Kulp (Pa.)  
 Ky. .... Kentucky.  
 Kyd, Corp. .... Kyd on Corporations.  
 Ky. Dec. .... Kentucky Decisions.  
 Ky. Law Rep. .... Kentucky Law Reporter.

K. & R. .... Kent and Radcliff's Law of New York (Revision of 1801).

## L

La. .... Louisiana.  
 La. Ann. .... Louisiana Annual.  
 Lack. Jur. .... Lackawanna Jurist (Pa.)  
 Lack. Leg. N. .... Lackawanna Legal News (Pa.)  
 Lalor, Supp. .... Lalor's Supplement to Hill & Denio's Reports (N. Y.)  
 Lanc. Bar .... Lancaster Bar.  
 Lanc. Law Rev. .... Lancaster Law Review.  
 Lana. .... Lansing (N. Y.)  
 Lans. Ch. .... Lansing's Chancery (N. Y.)  
 Law J. Ch. .... Law Journal, New Series, Chancery.  
 Law J. Q. B. .... Law Journal, New Series, Queen's Bench (English).  
 Law Rep. .... Law Reporter (Mass.)  
 Lawson, Rights, Rem. & Pr. .... Lawson on Rights, Remedies and Practice.  
 Law T. .... English Law Times Reports.  
 Law T. (N. S.) .... English Law Times Reports, New Series.  
 Ld. Raym. .... Lord Raymond's English King's Bench Reports.  
 Lea ..... Lea (Tenn.)  
 Leach, Cr. Cas. .... Leach's English Crown Cases.  
 Leach's C. L. .... Leach's Club Cases, London.  
 L. Ed. .... Lawyers' Edition Supreme Court Reports.  
 Lee ..... Lee (Cal.)  
 Leg. Chron. .... Legal Chronicle.  
 Leg. Gaz. .... Legal Gazette (Pa.)  
 Leg. Gaz. R. .... Legal Gazette Reports (Pa.)  
 Leg. Int. .... Legal Intelligencer (Pa.)  
 Leg. News. .... Legal News, Chicago.  
 Leg. Op. .... Legal Opinions.  
 Leg. Rec. Rep. .... Legal Record Reports.  
 Leg. Rep. .... Legal Reporter (Tenn.)  
 Leg. & Ins. Rep. .... Legal & Insurance Reporter.  
 Lehigh Val. Law Rep. .... Lehigh Valley Law Reporter.  
 Leigh ..... Leigh (Va.)  
 Leigh & C. .... Leigh and Cave's English Crown Cases.  
 Leon. .... Leonard's English King's Bench Reports.  
 Lill. Ab. .... Lilly's Abridgment, or Practical Register.  
 Litt. .... Coke on Littleton.  
 Litt. .... Littell (Ky.)  
 Litt. Comp. Laws. .... Littell's Statute Law (Ky.)  
 Litt. Sel. Cas. .... Littell's Select Cases (Ky.)  
 L. J. Ch. .... Law Journal, New Series, Chancery, English.  
 Loc. Acts. .... Local Acts.  
 Loc. Laws. .... Local Laws.  
 Long, Irr. .... Long on Irrigation.  
 Low. .... Lowell (U. S.)  
 Lower Ct. Dec. .... Lower Court Decisions (Ohio)  
 L. R. A. .... Lawyers' Reports Annotated.  
 L. R. App. Cas. .... English Law Reports, Appeal Cases, House of Lords.  
 L. R. C. P. .... English Law Reports, Common Pleas.  
 L. R. Eq. .... English Law Reports, Equity.  
 L. R. Ex. Cas. .... English Law Reports, Exchequer.  
 L. R. Exch. .... English Law Reports, Exchequer.

L. R. H. L. .... English Law Reports,  
English and Irish Appeal  
Cases.  
L. R. H. L. Sc. .... English Law Reports,  
Scotch and Divorce Ap-  
peal Cases.  
L. R. Prob. & Div. .... English Law Reports, Pro-  
bate and Divorce.  
L. R. Prov. & Div. .... See L. R. Prob. & Div.  
L. R. Q. B. .... English Law Reports,  
Queen's Bench.  
Luz. Law T. .... Luzerne Law Times (Pa.)  
Luz. Leg. Obs. .... Luzerne Legal Observer  
(Pa.)  
Luz. Leg. Reg. .... Luzerne Legal Register  
(Pa.)

## M

McAll. .... McAllister (U. S.)  
MacArthur .... MacArthur (D. C.)  
MacArthur, Pat. Cas. .... MacArthur's Patent Cases  
(U. S.)  
MacArthur & M. .. MacArthur & Mackey (D.  
C.)  
McCahon .... McCahon (Kan.)  
McCart. .... McCarter (N. J.)  
McCarty, Civ. Proc. .... McCarty's Civil Proce-  
dure Reports (N. Y.)  
McClain, Cr. Law. .... McClain's Criminal Law.  
McClell. Dig. .... McClellan's Digest of Laws  
(Fla.)  
McCord .... McCord's Law (S. C.)  
McCord, Eq. .... McCord's Equity (S. C.)  
McCrary .... McCrary (U. S.)  
McCul. Dict. .... McCulloch's Commercial  
Dictionary.  
McGloin .... McGloin (La.)  
McKelvey, Ev. .... McKelvey on Evidence.  
Mackey .... Mackey (D. C.)  
McLean .... McLean (U. S.)  
McMull. .... McMullan (S. C.)  
McMull. Eq. .... McMullan's Equity (S. C.)  
Man. .... Manning (Mich.)  
Mansf. Dig. .... Mansfield's Digest of Stat-  
utes (Ark.)  
Man., G. & S. .... Manning, Granger, and  
Scott's English Common  
Pleas Reports.  
Man. Unrep. Cas. .... Manning's Unreported Cas-  
es (La.)  
Man. & G. .... Manning & Granger's  
English Common Pleas  
Reports.  
Marsh. .... Marshall's English Com-  
mon Pleas Reports.  
Marsh., A. K. .... A. K. Marshall (Ky.)  
Marsh., J. J. .... J. J. Marshall (Ky.)  
Mart. (N. C.) .... Martin (N. C.)  
Mart. (N. S.) .... Martin's New Series (La.)  
Mart. (O. S.) .... Martin's Old Series (La.)  
Mart. & Y. .... Martin & Yerger (Tenn.)  
Marv. .... Marvel's Reports (Del.)  
Mason .... Mason (U. S.)  
Mass. .... Massachusetts.  
Maule & S. .... Maule and Selwyn's Eng-  
lish King's Bench Re-  
ports.  
Maxw. Adv. Gram. .... W. H. Maxwell's Advanced  
Lessons in English Gram-  
mar.  
Md. .... Maryland.  
Md. Ch. .... Maryland Chancery.  
Me. .... Maine.  
Meas. & W. .... Meason and Welsby's Eng-  
lish Exchequer Reports.  
Meigs .... Meigs (Tenn.)  
Mer. .... Merivale's English Chan-  
cery Reports.  
Metc. (Ky.) .... Metcalfe (Ky.)  
Metc. (Mass.) .... Metcalf (Mass.)  
Mich. .... Michigan.  
Mich. N. P. .... Michigan Nisi Prius.  
Miles .... Miles (Pa.)  
Mill, Const. .... Mill's Constitutional Re-  
ports (S. C.)

Miller, Const. .... Miller on the Constitution  
of the United States.  
Miller's Code. .... Miller's Revised and An-  
notated Code (Iowa)  
Mills' Ann. St. .... Mills' Annotated Statutes  
(Colo.)  
Mill. & V. Code. .... Milliken & Vertrees' Code  
(Tenn.)  
Minn. .... Minnesota.  
Minor .... Minor (Ala.)  
Minor, Inst. .... Minor's Institutes of Com-  
mon and Statute Law.  
Misc. Laws. .... Miscellaneous Laws (Or.)  
Misc. Rep. .... Miscellaneous Reports (N.  
Y.)  
Miss. .... Mississippi.  
Mitf. Eq. Pl. .... Mitford's Equity Pleading.  
Mo. .... Missouri.  
Moak, Eng. R. .... Moak's English Reports.  
Mo. App. .... Missouri Appeal Reports.  
Mo. App. Rep'r .... Missouri Appellate Report-  
er.  
Mod. .... Modern Reports, English  
King's Bench.  
Monag. .... Monaghan (Pa.)  
Mon., B. .... B. Monroe (Ky.)  
Mon., T. B. .... T. B. Monroe (Ky.)  
Mont. .... Montana.  
Mont. & B. .... Montagu & Bligh's Eng-  
lish Bankruptcy Reports.  
Month. Law Bul. .... Monthly Law Bulletin (N.  
Y.)  
Montg. Co. Law  
Rep'r .... Montgomery County Law  
Reporter (Pa.)  
Moody, Cr. Cas. .... Moody's Crown Cases,  
English Courts.  
Moody & M. .... Moody and Malkin's Eng-  
lish Nisi Prius Reports.  
Moore .... Moore (Ark.)  
Moore, Presb. Dig. .... Moore's Presbyterian Di-  
gest.  
Moreau & Carleton's  
Partidas .... Moreau and Carleton's  
Laws of Las Sièts Par-  
tidas in force in Louisi-  
ana.  
Mor. Priv. Corp. .... Morawets on Private Cor-  
porations.  
Morrell, Bankr. Cas. .... Morrell's English Bank-  
ruptcy Cases.  
Morris .... Morris (Iowa)  
Morse, Banks .... Morse on the Law of  
Banks and Banking.  
Mun. Code. .... Municipal Code.  
Munf. .... Munford (Va.)  
Murfree, Off. Bonds .... Murfree on Official Bonds.  
Murph. .... Murphey (N. C.)  
Murray's Eng. Dict. .... Murray's English Diction-  
ary.  
Myl. & C. .... Mylne & Craig's English  
Chancery Reports.  
Myl. & K. .... Mylne and Keen's English  
Chancery Reports.  
Myr. Prob. .... Myrick's Probate Court  
Reports (Cal.)

## N

Nat. Bankr. Law. .... National Bankruptcy Law.  
Nat. Bankr. R. .... National Bankruptcy Reg-  
ister (U. S.)  
N. B. R. .... National Bankruptcy Reg-  
ister (U. S.)  
N. C. .... North Carolina.  
N. C. Term R. .... North Carolina Term Re-  
ports.  
N. Chip. .... N. Chipman (Vt.)  
N. D. .... North Dakota.  
N. E. .... Northeastern Reporter.  
Neb. .... Nebraska.  
Nev. .... Nevada.  
Newb. Adm. .... Newberry's Admiralty (U.  
S.)  
Newell, Defam. .... Newell on Defamation,  
Slander and Libel.



N. H. ....	New Hampshire.	Pasch. Dig. ....	Paschal's Texas Digest of Decisions.
Nix. Dig. ....	Nixon's Digest of Laws (N. J.)	Pa. Super. Ct. ....	Pennsylvania Superior Court Reports.
N. J. Eq. ....	New Jersey Equity.	Pat. ....	Paterson's Laws.
N. J. Law ....	New Jersey Law.	Pat. & H. ....	Patton & Heath (Va.)
N. J. Law J. ....	New Jersey Law Journal.	Pears. ....	Pearson (Pa.)
N. M. ....	New Mexico.	Peck (Ill.) ....	Peck (Ill.)
Nisi Prius & Gen. T. Rep. ....	Nisi Prius & General Term Reports (Ohio)	Peck (Tenn.) ....	Peck (Tenn.)
Norris ....	Norris (Pa.)	Pen. Code. ....	Penal Code.
Northam. Law Rep. ....	Northampton County Law Reporter (Pa.)	Penning. ....	Pennington (N. J.)
Northumb. Co. Leg. N. ....	Northumberland County Legal News (Pa.)	Penny. ....	Pennypacker (Pa.)
Nott & McC. ....	Nott & McCord (S. O.)	Pen. & W. ....	Penrose & Watts (Pa.)
N. R. L. ....	Revised Laws 1813 (N. Y.)	Pepper & L. Dig. Laws ....	Pepper and Lewis' Digest of Laws (Pa.)
N. S. ....	New Series.	Perry, Trusts. ....	Perry on Trusts.
N. W. ....	Northwestern Reporter.	Pet. ....	Peters (U. S.)
N. Y. ....	New York.	Pet. Adm. ....	Peters' Admiralty (U. S.)
N. Y. Ann. Cas. ....	New York Annotated Cases.	Pet. C. C. ....	Peters' Circuit Court (U. S.)
N. Y. Cr. R. ....	New York Criminal Reports.	Peterad. Ab. ....	Petersdorff's Abridgment.
N. Y. Daily Reg. ....	New York Daily Register.	P. F. Smith ....	P. F. Smith (Pa.)
N. Y. Law J. ....	New York Law Journal.	Phila. ....	Philadelphia (Pa.)
N. Y. Leg. Obs. ....	New York Legal Observer.	Phil. ....	Phillips' Law (N. O.)
N. Y. St. Rep. ....	New York State Reporter.	Phil. Ch. ....	Phillips' English Chancery Reports.
N. Y. Super. Ct. ....	New York Superior Court.	Phil. Eq. ....	Phillips' Equity (N. C.)
N. Y. Supp. ....	New York Supplement.	Phil. Ev. ....	Phillips on Evidence.
		Phil. Ins. ....	Phillips' Law of Insurance.
		Pick. ....	Pickering (Mass.)
		Pickle ....	Pickle (Tenn.)
		Pike ....	Pike (Ark.)
		Pin. ....	Pinney (Wis.)
		Pittsb. Leg. J. ....	Pittsburgh Legal Journal (Pa.)
		Pittsb. R. ....	Pittsburgh Reports (Pa.)
		P. L. ....	Public Laws.
		Plow. ....	Plowden's English King's Bench Reports.
		Pol. Code ....	Political Code.
		Pom. Eq. Jur. ....	Pomeroy's Equity Jurisprudence.
		Pom. Rem. ....	Pomeroy on Civil Remedies.
		Pom. Rem. & Rem. Rights ....	Pomeroy on Civil Remedies & Remedial Rights.
		Pom. Spec. Perf. ....	Pomeroy on Specific Performance of Contracts.
		Port. (Ala.) ....	Porter (Ala.)
		Posey, Unrep. Cas. ....	Posey's Unreported Cases (Tex.)
		Pow. Cont. ....	Powell on Contracts.
		Prac. Act. ....	Practice Act.
		Pr. Ch. ....	Precedents in Chancery, by Finch.
		Priv. Laws. ....	Private Laws.
		Prob. Div. ....	Probate Division, English Law Reports.
		Prob. R. ....	Probate Reports (Ohio)
		Prov. St. ....	Statutes (Laws) of the Province of Massachusetts.
		Pub. Acts ....	Public Acts.
		Pub. Gen. Laws. ....	Public General Laws.
		Pub. Laws. ....	Public Laws.
		Pub. Loc. Laws. ....	Public Local Laws.
		Pub. St. ....	Public Statutes.
		Pub. & Loc. Laws. ....	Public and Local Laws.
		Purd. Dig. ....	Purdon's Digest of Laws (Pa.)
		P. Wms. ....	Peere Williams' English Chancery Reports.
		P. & L. Dig. Laws. ....	Pepper & Lewis' Digest of Laws (Pa.)

## O

O. C. D. ....	Ohio Circuit Decisions.
Ohio ....	Ohio.
Ohio Cir. Ct. R. ....	Ohio Circuit Court Reports.
Ohio Dec. ....	Ohio Decisions.
Ohio Law J. ....	Ohio Law Journal.
Ohio Leg. N. ....	Ohio Legal News.
O. L. D. ....	Ohio Lower Court Decisions.
Ohio N. P. ....	Ohio Nisi Prius.
Ohio St. ....	Ohio State.
Ohio S. & C. P. Dec. ....	Ohio Superior and Common Pleas Decisions.
Okl. ....	Oklahoma.
Olcott ....	Olcott (U. S.)
Op. Attys. Gen. ....	Opinions of the United States Attorneys General.
Or. ....	Oregon.
O. S. ....	Old Series.
Outerbridge ....	Outerbridge (Pa.)
Overt. ....	Overton (Tenn.)

## P

Pac. ....	Pacific Reporter.
Pa. Co. Ct. R. ....	Pennsylvania County Court Reports.
Pa. Dist. R. ....	Pennsylvania District Reports.
Pa. ....	Pennsylvania State.
Paige ....	Paige's Chancery (N. Y.)
Paine ....	Paine (U. S.)
Pa. Law J. ....	Pennsylvania Law Journal.
Paley, Ag. ....	Paley on Principal and Agent (or Agency).
Pamphl. Laws. ....	Pamphlet Laws.
Parker, Cr. R. ....	Parker's Criminal Reports (N. Y.)
Pars. Bills & N. ....	Parsons on Bills and Notes.
Pars. Cont. ....	Parsons on Contracts.
Pars. Eq. Cas. ....	Parsons' Select Equity Cases (Pa.)
Pars. Mar. Law. ....	Parsons on Maritime Law.
Partidas ....	Moreau and Carleton's Laws of Las Sièdes Partidas in force in Louisiana.

## Q

Q. B. ....	Queen's Bench Reports, Adolphus & Ellis, N. S. (English)
Q. B. Div. ....	Queen's Bench Division (English Law Reports)
Quincy ....	Quincy (Mass.)

## R

Rand. ....	Randolph (Va.)
Rand. Com. Paper..	Randolph on Commercial Paper.
Rap. Contempt ....	Rapalje on Contempt.
Rap. & L. Law Dict.	Rapalje and Lawrence Law Dictionary.
Rawle .....	Rawle (Pa.)
Rawle, Cov. ....	Rawle on Covenants for Title.
Raym. ....	Lord Raymond's English King's Bench Reports.
R. C. ....	Revised Statutes 1855 (Mo.)
Redf. Railways....	Redfield on Railways.
Redf. Sur. ....	Redfield's Surrogate (N. Y.)
Redf. Wills. ....	Redfield on the Law of Wills.
Rep. ....	Coke's English King's Bench Reports.
Rev. ....	Revision of the Statutes.
Rev. Civ. Code....	Revised Civil Code.
Rev. Civ. St. ....	Revised Civil Statutes.
Rev. Code. ....	Revised Code.
Rev. Laws. ....	Revised Laws.
Rev. St. ....	Revised Statutes.
R. I. ....	Rhode Island.
Rice .....	Rice's Law (S. C.)
Rice, Eq. ....	Rice's Equity (S. C.)
Rich. Eq. ....	Richardson's Equity (S. C.)
Rich. Eq. Cas. ....	Richardson's Equity Cases (S. C.)
Rich. Law. ....	Richardson's Law (S. C.)
Rich. (S. C.)....	Richardson (S. C.)
Riley .....	Riley's Law (S. C.)
Riley, Eq. ....	Riley's Equity (S. C.)
R. L. ....	Revised Laws.
R. M. Charit. ....	R. M. Charlton (Ga.)
Rob. ....	Charles Robinson's English Admiralty Reports.
Rob. (N. Y.)....	Robertson (N. Y.)
Pob. (La.) ....	Robinson (La.)
Rob. (Va.) ....	Robinson (Va.)
Robb, Pat. Cas. ....	Robb's Patent Cases (U. S.)
Rob. Pat. ....	Robinson on Patents.
Rolle .....	Rolle's English King's Bench Reports.
Rolle, Abr. ....	Rolle's Abridgment of the Common Law.
Roll. Rep. ....	Rolle's English King's Bench Reports.
Root .....	Root (Conn.)
Rorer, Jud. Sales..	Rorer on Void Judicial Sales.
Roscoe, Cr. Ev....	Roscoe on Criminal Evidence.
R. S. ....	Revised Statutes.
Russ. ....	Russell's English Chancery Reports.
Russ. Crimes. ....	Russell on Crimes and Misdemeanors.
Russ. Fact. ....	Russell on Factors and Brokers.
Russ. & R. ....	Russell and Ryan's English Crown Cases Reserved.
Ry. & Corp. Law J.	Railway and Corporation Law Journal.
R. & Ry. C. C. ....	Russell and Ryan's English Crown Cases.

## S

Salk. ....	Salkeld's English King's Bench Reports.
Sanb. & B. Ann. St.	Sanborn and Berryman's Annotated Statutes (Wis.)
Sandf. ....	Sandford (N. Y.)
Sandf. Ch. ....	Sandford's Chancery (N. Y.)
Sand. & H. Dig. ....	Sandels and Hill's Digest of Statutes (Ark.)
Saund. ....	Saunders' English King's Bench Reports.

Saund. Pl. & Ev....	Saunders' Pleading and Evidence.
Sawyer. ....	Sawyer (U. S.)
Sart. Ch. ....	Saxton's Chancery (N. J.)
Sayles' Ann. Civ. St. ....	Sayles' Annotated Civil Statutes (Tex.)
Sayles' Civ. St. ....	Sayles' Revised Civil Statutes (Tex.)
Sayles' St. ....	Sayles' Revised Civil Statutes (Tex.)
Sayles' Supp. ....	Supplement to Sayles' Annotated Civil Statutes (Tex.)
S. C. ....	South Carolina.
Scam. ....	Scammon (Ill.)
Schoales & L. ....	Schoales and Lefroy's Irish Chancery Reports.
Schouler, Pers. Prop. ....	Schouler on the Law of Personal Property.
S. D. ....	South Dakota.
S. E. ....	Southeastern Reporter.
Sedg. St. & Const. Law .....	Sedgwick on Statutory and Constitutional Law.
Sedg. & W. Tr. Title Land. ....	Sedgwick and Wait on the Trial of Title to Land.
Seld. ....	Selden (N. Y.)
Seld. Notes. ....	Selden's Notes (N. Y.)
Serg. & R. ....	Sergeant & Rawle (Pa.)
Sess. ....	Session.
Sess. Laws. ....	Session Laws.
Shars. Bl. Comm. ....	Sharswood's Edition of Blackstone's Commentaries.
Sheld. ....	Sheldon (N. Y.)
Shep. ....	Shepley (Me.)
Shep. Abr. ....	Sheppard's Abridgment.
Shep. Touch. ....	Sheppard's Touchstone of Common Assurances.
Silvernall .....	Silvernall (N. Y.)
Sim. ....	Simons' English Vice Chancery Reports.
Sim. (N. S.)....	Simon's English Vice Chancery Reports, New Series.
Sim. & S. ....	Simons & Stuart's English Vice Chancery Reports.
Smedes & M. ....	Smedes & Marshall (Miss.)
Smedes & M. Oh. ....	Smedes & Marshall's Chancery (Miss.)
Smith, E. D. ....	E. D. Smith (N. Y.)
Smith (Ind.)....	Smith (Ind.)
Smith (N. H.)....	Smith (N. H.)
Smith (N. Y.)....	Smith (N. Y.)
Smith, P. F. ....	P. F. Smith (Pa.)
Smith, Cont. ....	Smith on Contracts.
Smith, Man. Eq. Jur. ....	Smith's Manual of Equity Jurisprudence.
Smith's Laws. ....	Smith's Laws (Pa.)
Smith's Lead. Cas. ....	Smith's Leading Cases.
Sneed .....	Sneed (Tenn.)
Sol. J. ....	Solicitors' Journal, London.
South. ....	Southern Reporter.
Southard .....	Southard (N. J.)
Sp. Acts. ....	Special Acts.
Speers .....	Speers' Law (S. C.)
Speers, Eq. ....	Speers' Equity (S. C.)
Spencer .....	Spencer (N. J.)
Sp. Laws. ....	Special Laws.
Spr. ....	Sprague (U. S.)
Sp. Sess. ....	Special Session.
St. ....	Laws or Acts (in some states).
St. ....	State, Statutes.
Stand. Dict. ....	Standard Dictionary.
Starkie .....	Starkie's English Nisi Prius Reports.
Starkie, Ev. ....	Starkie on Evidence.
Starr & C. Ann. St. ....	Starr and Curtis' Annotated Statutes (Ill.)
Stat. ....	Statutes at Large (U. S.)
St. at Large. ....	Statutes at Large (S. C.)
Steph. Bailm. ....	Story on Bailment.

Steph. Comm. ....	Stephen's Commentaries on the Laws of England.	Tayl. Priv. Corp....	Taylor on Private Corporations.
Stephen, Ev.....	Stephen's Digest of the Law of Evidence.	Tayl. St.....	Taylor's Statutes (Wis.)
Steph. Pl. ....	Stephen on Pleading.	T. B. Mon.....	T. B. Monroe (Ky.)
Stew. (Ala.).....	Stewart (Ala.)	Tenn. ....	Tennessee.
Stew. (N. J.) ....	Stewart (N. J.)	Tenn. Cas. ....	Shannon's Tennessee Cases.
Stew. & P.....	Stewart & Porter (Ala.)	Tenn. Ch.....	Tennessee Chancery.
Stiles .....	Stiles (Iowa)	Term R. ....	Term Reports, English King's Bench (Durnford and East's Reports).
St. Law.....	Loughborough's Digest of Statute Law (Ky.)	Ter. Laws.....	Territorial Laws.
Stockt. ....	Stockton's Equity (N. J.)	Tex. ....	Texas.
Story .....	Story (U. S.)	Tex. App. ....	Texas Appeals Reports.
Story, Ag.....	Story on Agency.	Tex. Civ. App.....	Texas Civil Appeals Reports.
Story, Bailm. ....	Story on Bailment.	Tex. Cr. R.....	Texas Criminal Reports.
Story, Bills .....	Story on Bills.	Tex. Supp.....	Texas Supplement.
Story, Comm. Const.	Story's Commentaries on the Constitution of the United States.	Thacher, Cr. Cas....	Thacher's Criminal Cases (Mass.)
Story, Conf. Laws..	Story on the Conflict of Laws.	Thayer, Prelim. Treatise Ev.....	Thayer's Preliminary Treatise on Evidence.
Story, Const. ....	Story's Commentaries on the Constitution of the United States.	Thomp. Tenn. Cas..	Thompson's Unreported Tennessee Cases.
Story, Cont. ....	Story on Contracts.	Thomp. & C.....	Thompson & Cook (N. Y.)
Story, Eq. Jur. ....	Story on Equity Jurisprudence.	Thomp. & St. Code..	Thompson and Steger's Code (Tenn.)
Story, Eq. Pl.....	Story on Equity Pleading.	Tidd, Prac.....	Tidd's Practice.
Story, Partn.....	Story on Partnership.	Tiedman, Real Prop.	Tiedeman on Real Property.
Story, Prom. Notes.	Story on Promissory Notes.	Tiffany .....	Tiffany (N. Y.)
Story, Sales.....	Story on Sales of Personal Property.	Times L. Rep.....	Times Law Reports.
Story's Laws.....	Story's United States Laws.	Toller .....	Toller on Executors.
Strange .....	Strange's English King's Bench Reports.	Tom. Dict.....	Tomlins' Law Dictionary.
Strob. ....	Strobbart's Law (S. C.)	Tread. Const.....	Treadway's Constitutional Reports (S. C.)
Strob. Eq. ....	Strobbart's Equity (S. C.)	Troub. & H. Prac..	Troubat & Haly's Practice (Pa.)
Sumn. ....	Sumner (U. S.)	Tuck. ....	Tucker's Surrogate (N. Y.)
Sup. Ct. ....	Supreme Court Reporter.	Tucker's Blackstone.	Tucker's Blackstone's Commentaries.
Super. Ct. Rep....	Superior Court Reports (Pa.)	T. U. P. Charit....	T. U. P. Charlton (Ga.)
Supp. Rev. Code....	Supplement to the Revised Code.	Turn. ....	Turner (Ark.)
Supp. Rev. St.....	Supplement to the Revised Statutes.	Turn. & R.....	Turner and Russell's English Chancery Reports.
Supp. U. S. Comp.		Tyler .....	Tyler (Vt.)
St. 1903 .....	Supplement 1903 to the United States Compiled Statutes of 1901.	Tyler, Ej.....	Tyler on Ejectment and Adverse Enjoyment.
Sus. Leg. Chron....	Susquehanna Legal Chronicle (Pa.)		
Suth. Dam.....	Sutherland on Damages.		
S. W.....	Southwestern Reporter.		
Swab. ....	Swabey's English Admiralty Reports.		
Swab. & T.....	Swabey and Tristram's English Probate and Divorce Reports.		
Swan .....	Swan (Tenn.)		
Swan's St.....	Swan's Statutes (Ohio)		
Swan & C. St.....	Swan and Critchfield's Revised Statutes (Ohio)		
Swan & S. St.....	Swan and Saylor's Supplement to the Revised Statutes (Ohio)		
Sweeny .....	Sweeny (N. Y.)		
S. & C. Rev. St....	Swan and Critchfield's Revised Statutes (Ohio)		
S. & R. on Neg....	Shearman and Redfield on Negligence.		

## T

Taney .....	Taney (U. S.)
Tapp. ....	Tappan (Ohio)
Tariff Ind., New...	New's Tariff Index.
Taunt. ....	Taunton's English Common Pleas Reports.
Tayl. ....	Taylor (N. C.)
Tayl. Corp.....	Taylor on Private Corporations.
Tayl. Ev. ....	Taylor on the Law of Evidence.
Tayl. Landl. & T...	Taylor's Landlord and Tenant.
Tayl. Med. Jur.....	Taylor's Manual of Medical Jurisprudence.

## U

Unof. ....	Unofficial (Reports).
U. S. ....	United States.
U. S. App. ....	United States Appeals.
U. S. Comp. St. 1901.	United States Compiled Statutes 1901.
U. S. Comp. St.	
Supp. 1903.....	Supplement 1903 to the United States Compiled Statutes of 1901.
U. S. Law Mag....	United States Law Magazine (N. Y.)
U. S. Month. Law Mag. ....	United States Monthly Law Magazine.
Utah .....	Utah.

## V

Va. ....	Virginia.
Va. Cas. ....	Virginia Cases.
Va. Law J.....	Virginia Law Journal, Richmond.
Van Fleet, Coll. At-tack .....	Van Fleet on Collateral Attack.
Van Ness, Prize Cas.	Van Ness' Prize Cases (U. S.)
Vattel .....	Vattel's Law of Nations.
Vern. ....	Vernon's English Chancery Reports.
Ves. ....	Vesey, Junior, English Chancery Reports.
Ves. Jr.....	Vesey, Junior, English Chancery Reports.

Ves. Sr..... Vesey, Senior, English  
Chancery Reports.  
Vict. .... Queen Victoria (as 5 & 6  
Vict.)  
Vin. Abr..... Viner's Abridgment.  
Vroom ..... Vroom (N. J.)  
V. S..... Vermont Statutes.  
Vt. .... Vermont.

## W

Wag. St. .... Wagner's Statutes (Mo.)  
Wait, Act. & Def... Wait's Actions and De-  
fenses.  
Walk. .... Walker (Miss.)  
Walk. (Pa.) ..... Walker (Pa.)  
Walk. Ch..... Walker's Chancery (Mich.)  
Walk. Pat..... Walker on Patents.  
Wall. .... Wallace (U. S.)  
Wall. Jr..... Wallace, Junior (U. S.)  
Wall. Sr. .... Wallace, Senior (U. S.)  
Ware ..... Ware (U. S.)  
Warr. Abst..... Warvelle on Abstracts of  
Title.  
Wash. .... Washington.  
Wash. (Va.)..... Washington (Va.)  
Washb. Real Prop.. Washburn on Real Prop-  
erty.  
Wash. C. C..... Washington Circuit Court  
(U. S.)  
Wash. Law Rep... Washington Law Report-  
er (D. C.)  
Wash. T. .... Washington Territory.  
Watts ..... Watts (Pa.)  
Watts & S..... Watts & Sergeant (Pa.)  
W. Bl. .... Sir William Blackstone's  
English King's Bench  
Reports.  
Webst. Dict..... Webster's Dictionary.  
Webster in Sen.  
Doc. .... Webster in Senate Docu-  
ments.  
Webst. Int. Dict... Webster's International  
Dictionary.  
Wedgw. Dict. Eng.  
Etymology ..... Wedgwood's Dictionary of  
English Etymology.  
Wel., Hurl. & G.... Welsby, Hurlstone, and  
Gordon's Reports (1-9  
English Exchequer Re-  
ports).  
Wend. .... Wendell (N. Y.)  
West Coast Rep... West Coast Reporter.  
West. Law J..... Western Law Journal,  
Cincinnati (Ohio)  
West. Law Month.. Western Law Monthly  
(Ohio)  
West. L. M..... Western Law Monthly  
(Ohio)  
Whart. .... Wharton (Pa.)  
Whart. Ag..... Wharton on Agency.  
Whart. Cr. Ev.... Wharton on Criminal Evi-  
dence.  
Whart. Cr. Law.... Wharton's American Crimi-  
nal Law.  
Whart. Cr. Pl. &  
Prac. .... Wharton's Criminal Plead-  
ing & Practice.  
Whart. Law Dict... Wharton's Law Diction-  
ary (or Law Lexicon).  
Whart. Law Lexi-  
con ..... Wharton's Law Diction-  
ary (or Law Lexicon).  
Whart. Neg..... Wharton on Negligence.  
Whart. St. Tr.... Wharton's State Trials  
(U. S.)  
Wheat. .... Wheaton (U. S.)  
Wheat. Int. Law... Wheaton's International  
Law.  
Wheeler, Am. Cr.  
Law ..... Wheeler's Abridgment of  
American Common Law  
Cases.  
Wheeler, Cr. Cas... Wheeler's Criminal Cases  
(N. Y.)

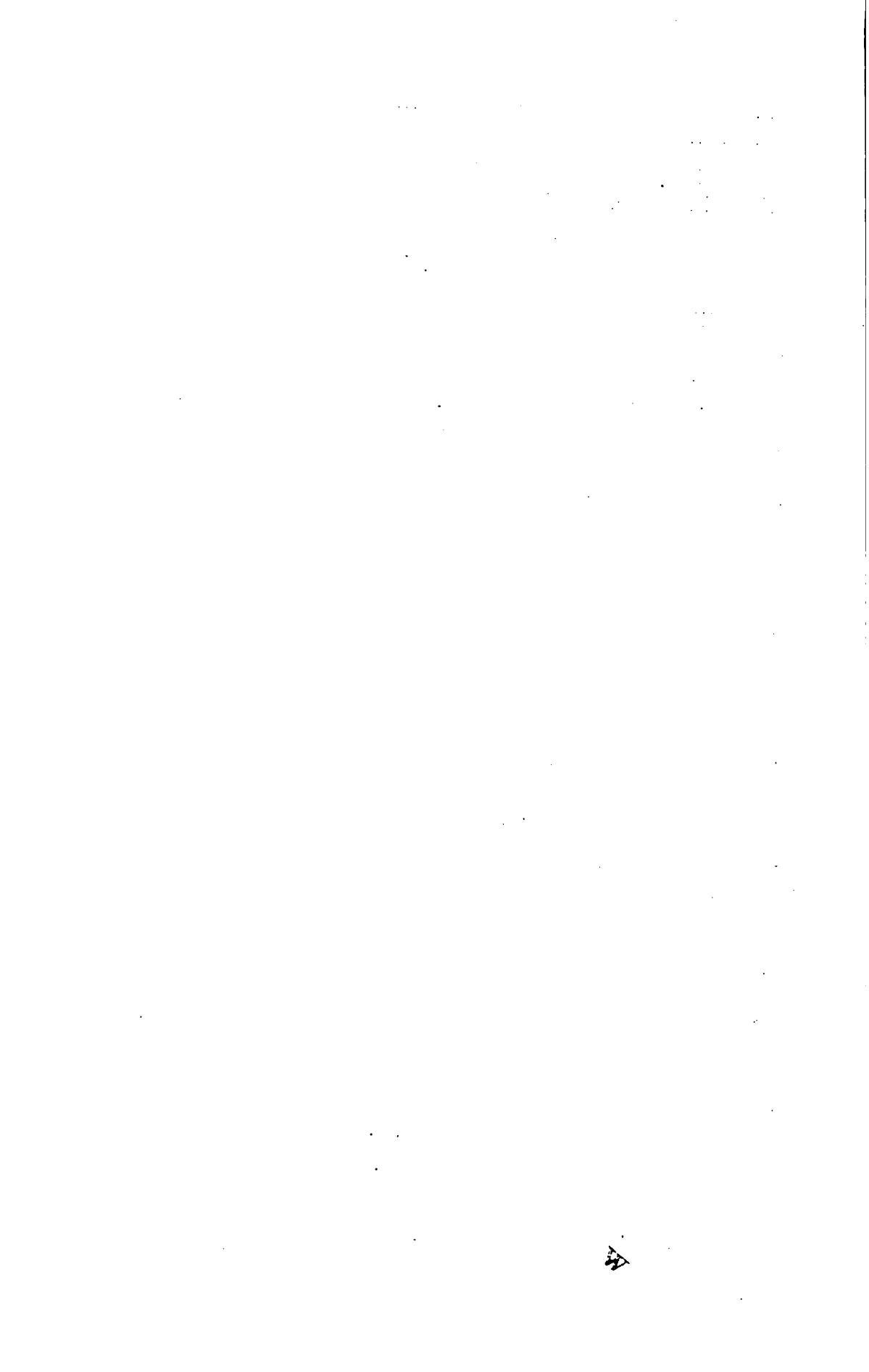
White ..... White's Recopilacion (Land  
Laws of Spain and Mex-  
ico).  
White & T. Lead.  
Cas. Eq..... White and Tudor's Lead-  
ing Cases in Equity.  
White & W. Civ.  
Cas. Ct. App.... White & Willson's Civil  
Cases Court of Appeals  
(Tex.)  
Wilcox ..... Wilcox (Pa.)  
Will. .... William (as 1 Will. IV).  
Willes ..... Willes' English Common  
Pleas Reports.  
Williams (Vt.) ..... Williams (Vt.)  
Williams, Ex'rs ... Williams on Executors.  
Willson, Civ. Cas.  
Ct. App. .... Willson's Civil Cases Court  
of Appeals (Tex.)  
Willson, Tex. Cr.  
Law ..... Willson's Revised Penal  
Code, Code of Criminal  
Procedure, and Penal  
Laws of Texas.  
Wils. .... Wilson (Ind.)  
Wils. .... Wilson's English Common  
Pleas Reports.  
Winch ..... Winch's English Common  
Pleas Reports.  
Winch ..... Winch's Entries.  
Winst. .... Winston (N. C.)  
Winst. Eq. .... Winston's Equity (N. C.)  
Wis. .... Wisconsin.  
Wkly. Dig..... Weekly Digest (N. Y.)  
Wkly. Law Bul... Weekly Law Bulletin  
(Ohio)  
Wkly. Law Gaz... Weekly Law Gazette  
(Ohio)  
Wkly. Notes Cas... Weekly Notes Cases (Pa.)  
Wkly. Rep..... Weekly Reporter, London  
(English).  
Wm. .... William (as 9 Wm. III).  
Wm. Bl..... Sir William Blackstone's  
English King's Bench Re-  
ports.  
Wm. Rob..... William Robinson's Eng-  
lish Admiralty Reports.  
Wms. Ex'rs ..... Williams on Executors.  
Wm. & Mary..... William and Mary (as 2  
Wm. & Mary, c. 1).  
Woodb. & M..... Woodbury & Minot (U. S.)  
Wood, Inst..... Wood's Institutes of Eng-  
lish Law.  
Wood, Landl. & Ten. Wood on Landlord and  
Tenant.  
Wood, Lim..... Wood on Limitation of Ac-  
tions.  
Woods ..... Woods (U. S.)  
Woodw. Dec..... Woodward's Decisions (Pa.)  
Woolw. .... Woolworth (U. S.)  
Worcest. Dict..... Worcester's Dictionary.  
Wor. Dict. .... Worcester's Dictionary.  
Works, Courts ... Works on Courts and Their  
Jurisdiction.  
Works, Pr..... Works' Practice, Pleading,  
and Forms.  
Wright ..... Wright (Ohio)  
Wright (Pa.) ..... Wright (Pa.)  
W. S. .... Wagner's Statutes (Mo.)  
W. Va. .... West Virginia.  
Wyo. .... Wyoming.  
Wythe ..... Wythe's Chancery (Va.)

## Y

Yeates ..... Yeates (Pa.)  
Yerg. .... Yerger (Tenn.)  
York. Leg. Rec.... York Legal Record (Pa.)  
Younge & C. Ch... Younge & Collyer's Eng-  
lish Chancery Reports.

## Z

Zab. .... Zabriskie (N. J.)



# JUDICIAL AND STATUTORY DEFINITIONS

## OF

# WORDS AND PHRASES.

### VOLUME 1.

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## A

### &

The character "&" means the same as the word "and," and may be used synonymously with "and" as an abbreviation of such word. *Brown v. State*, 16 Tex. App. 245, 248; *Stewart v. State*, 34 South. 818, 821, 137 Ala. 33; *Commonwealth v. Clark*, 58 Mass. (4 Cush.) 598, 597.

The sign "&" is held and used to mean "and" by thousands who do not recognize it as the Middle Ages manuscript contraction for the Latin "et." *Lorah v. Nissley*, 158 Pa. 329, 331, 27 Atl. 242.

The sign "&" as used in an indictment instead of the word "and" does not render the indictment defective. *Pickens v. State*, 58 Ala. 364.

An indictment is not defective in using the sign "&" instead of the word "and." In his appendix to his unabridged dictionary, under the title "Miscellaneous," Mr. Webster makes the sign or abbreviation "&" mean the same as the word "and," and Mr. Richardson in his dictionary gives many illustrations from the old English authors under the word "and" showing that the sign "&" was used synonymously with "and" as an abbreviation for the word "and." This sign of abbreviation has come down to us, sanctioned by age and common use for perhaps centuries, and is used even at this day in written instruments, in daily transactions, with such frequency that it may be said to be a part of our language when it is written. It is better that, in writing indictments, all words be written in full, but we see no sufficient reason for holding the indictment vicious be-

1 Wds. & P.—1

cause of this matter. *Molton v. State*, 16 S. W. 423, 29 Tex. App. 527.

### &c.

"&c." indicates "and so forth," and is English, although borrowed from the Latin. *Berry v. Osborn*, 28 N. H. (8 Fost.) 279, 288.

The character "&c." has received in use the same signification as was accorded the phrase "et cetera." That has been considered by lexicographers as its equivalent, and for that reason it has been stated by Worcester that these words, and also the contraction, "etc.," or "&c.," denote "and others of the like kind; and the rest; so forth; and so on." *Lathers v. Keogh* (N. Y.) 39 Hun, 576, 579.

"&c." implies some other necessary matter. *Coke*. As used in the resolutions of the directors of a certain railroad company authorizing a mortgage of the road, and its property, "&c.," it would apply to the franchises of the road. *Bardstown & L. R. Co. v. Metcalfe*, 61 Ky. (4 Metc.) 199, 211, 81 Am. Dec. 541.

In an entry on "The Old Purchase Blotter" of the commonwealth of Pennsylvania that "Ingersoll, &c., paid purchase money," on certain warrants for land, the sign "&c.," without explanation, means nothing, and may be disregarded. *Smith v. Walker*, 98 Pa. 133, 140.

### In decree.

The character "&c.," as used in a decree, reciting that the case was heard on the bill,

demurrer, answer, exhibit, "&c.," refers to the replication, as everything else in the record is specifically referred to in that connection. *Coles v. Hurt*, 75 Va. 380, 384.

#### In pleading.

"&c.," as used in a petition in an action for damages to furniture, "&c.," cannot be construed as a designation of coffee, sugar, and apples. *Whitmore v. Bowman*, 4 G. Greene, 148, 149.

As used in a plea of the general issue, "and of this he puts himself upon the country, &c.," according to Lord Mansfield, means every necessary matter which ought to be expressed, which is its utmost office. *Dickerson v. Stoll*, 24 N. J. Law (2 Zab.) 550, 553; *Everitt v. De Groff* (N. Y.) 1 Cow. 213, 214. And it will not be taken to mean "and the plaintiff or defendant doth likewise." *Dickerson v. Stoll*, 24 N. J. Law (2 Zab.) 550, 553.

#### In recognizance.

A recognizance conditioned for defendant's "appearance, &c., at my office at a certain day," construed to mean the usual phrase, "and not depart without leave." *Commonwealth v. Ross* (Pa.) 6 Serg. & R. 427, 428.

#### In will.

In a will by which the testatrix authorized a certain person to withdraw the contents of her bank book to be disposed of, part for her burial and funeral expenses and the residue for charitable purposes, masses, "&c.," "&c." is equivalent to "etc.," or "et cetera," and imports other purposes of a like character to those which have been named, and does not import that the trustee may apply the property to other purposes not charitable at his discretion, but he must apply it to charitable purposes. *In re Schouler*, 134 Mass. 426, 427.

#### & CO.

"& Co." is apt to mean nothing. The addition of "& Co." to a person's name raises no presumption of the existence of a partnership, in the absence of a statute prohibiting any individual from doing business under the name and style of a firm. *Schroeder v. Turner*, 13 Atl. 331, 332, 68 Md. 506.

"& Co.," in a state where there is no statute prohibiting the use of a name or an abbreviation to do business under other than that of the individual, does not create a necessary presumption, when used after a dealer's name, that he has a partner, or that such title includes more than one person. *Brennan v. Pardridge*, 35 N. W. 86, 87, 67 Mich. 449.

#### @

@, as used in a note reciting "Int. @ 6 % p. a.," "is known and recognized among commercial people and business men as standing for the word 'at.'" *Belford v. Beatty*, 34 N. E. 254, 255, 145 Ill. 414.

#### A.

The adjective "a" is commonly called the indefinite article, and so called because it does not define any particular person or thing. According to Webster the adjective means "one" or "any," but less "emphatically than either." He also says it is placed before nouns of the singular number denoting an individual object or quality individualized; and quality is defined as "(1) the condition of being of such a sort as distinguished from others; (2) special or temporary character; profession, occupation." *State v. Martin*, 30 S. W. 421, 422, 423, 60 Ark. 343, 28 L. R. A. 153.

#### As any.

The article "a" is not necessarily a singular term. It is often used in the sense of any, and when so used may be applied to more than one individual object. Thus in an assignment for the benefit of creditors, authorizing an extension of time for creditors to become parties as the trustees should allow by "a" writing, does not limit them to one writing or extension, but means any writing. *National Union Bank v. Copeland*, 4 N. E. 794, 795, 141 Mass. 257, 267.

Where a person contracted to lease for a certain purpose "a room that is improved and suitable," he does not bind himself to furnish a particular room, but fulfills his contract if he provides additional room, improved and suitable. *Thompson v. Stewart*, 14 N. W. 247, 248, 60 Iowa, 225.

In Agricultural Holdings (England) Act 1883 (46 & 47 Vict. c. 61, § 52), declaring that "no person shall act as bailiff to levy any distress or other holding to which the act applies unless authorized to act as a bailiff by a judge of 'a' county court," the word "a," as used in the phrase "a county court," was not intended to specify a particular, but should be construed as meaning any, county court. *In re Sanders*, 54 Law J. Q. B. 331, 333.

The term "a judge," in Gen. St. c. 47, art. 1, § 22, providing that "a judge" may cause any house or building to be searched for the protection of gambling tables, etc., is equivalent to "any judge," and comprehends an entire class, and cannot, without distorting its meaning, be restricted in its applications to judges of county, city, and police courts; and therefore the judge of the Louisville law and equity court has authority to issue a warrant for such a search.

*Commonwealth v. Wetzel*, 2 S. W. 123, 125, 84 Ky. 537.

Within the section of the constitution providing that when a person dies intestate his estate shall be divided among his children and widow, "a person" is a general term; it means "any person." It therefore equally includes persons who are sole tenants and persons who are tenants in connection with others, as tenants in common, tenants in coparceny, and joint tenants. *Lowe v. Brooks*, 24 Ga. 325, 327.

#### As my.

In a conveyance the description of the property as "a house and lot of land situated on Amity St., Lynn, Mass.," contained in a contract to convey, construed to relate to an estate owned by the party contracting to convey; and though there were several lots of land, with houses, on Amity street, the description might be applied to a particular house and lot so situated and so owned. If the party who enters into the agreement in fact owned a parcel answering the description, and only one such, that must be regarded as the one to which the description refers. With the aid of this presumption, the words "a house and lot" on a street, where a party who uses the language only owns one estate, are as definite and precise as the words "my house and lot" would be—a description the sufficiency of which has been placed beyond all doubt by very numerous authorities. *Hurley v. Brown*, 98 Mass. 545, 547, 96 Am. Dec. 671; *Scanlan v. Geddes*, 112 Mass. 15, 17; *Kitchen v. Herring*, 42 N. C. 190, 191; *Lente v. Clarke*, 1 South. 149, 152, 22 Fla. 515.

A contract for the sale of land in which the vendor agreed to sell "a tract" of nine acres and 66 poles near the junction does not specify any tract of land, the words "a tract" not being equivalent to "my tract," and is therefore indefinite, since the description might apply with equal exactness to any one of an indefinite number of tracts. *Dobson v. Litton*, 45 Tenn. (5 Cold.) 616, 619.

#### As one.

If used in an instruction that though plaintiff was negligent he was not precluded from a recovery, unless his negligence was "a" proximate cause of the injury, the "a" would have meant one, or one of the class, or one of the two contributing causes, and hence should have been used in place of the definite article "the." *Wastl v. Montana Union Ry. Co.*, 61 Pac. 9, 15, 24 Mont. 159.

A covenant not "to erect any building" except "a" private dwelling house will be construed not merely to limit the class of building accepted, but to authorize only one of that class. *Smith v. Standing*, 32 Sol. J. 734.

Under a deed of settlement of a joint-stock company providing that it might incur a debt not exceeding a certain sum, and might issue "a" note therefor, the company, having contracted a debt to that amount, was not precluded from giving security for it by several notes instead of a single note. *Thompson v. Wesleyan Newspaper Ass'n*, 8 C. B. 849, 861.

The phrase, "a chain cable of any size," in the specification for a patent which recites that it will raise "a chain cable of any size," is to be construed as meaning that the windlass will raise one cable of any size only. "A" applies to one only, and at all events the phrase is capable of that meaning. "I see nothing in the word that necessarily indicates the contrivance to be for fitting more than one cable." *Hastings v. Brown*, 1 El. & Bl. 450, 454.

Const. art. 7, § 13, provides that the state shall be divided into circuits, for each of which a judge shall be elected. It was held that such section did not prevent the legislature from providing for an additional judge for a circuit. *State v. Martin*, 80 S. W. 421, 423, 60 Ark. 343, 28 L. R. A. 153.

#### As the.

A verdict finding defendant guilty of writing and publishing "a bill" of scandal is insufficient to sustain a judgment, as the finding of him guilty of publishing "a bill" did not amount to a finding of publishing "the bill" charged in the indictment. *Sharff v. Commonwealth (Pa.)* 2 Bin. 514, 519.

In a statute containing a clause, "with a view to giving such creditor a preference over other creditors," "a" should be read as equivalent to "the." *Ex parte Hill*, 23 Ch. Div. 695, 701.

#### A SEA.

The term "a sea," as used in a policy of marine insurance insuring live cattle from dangers caused by "a sea," is susceptible of two meanings—one general, and the other restrictive and particular. A sea may mean a general disturbance of the surface of the water occasioned by storm, and breaking it up into the roll and lift of the waves, following or menacing each other. When a captain reports that on a particular day he encountered a heavy sea he uses a natural and appropriate expression, which we are not liable to misunderstand. If he says that a gale came from a particular direction, and raised a sea, which delayed his progress, he properly describes the general disturbance of the water. On the other hand, if he reports that in a gale a sea carried away his boats, and another swept a seaman overboard, we understand him in each instance to refer to some particular wave or surge,



separate from its fellows, which worked its own peculiar and special destruction. It is scarcely reasonable to believe that the words, "by a sea," as used in a policy, meant the blow of one or more particular waves upon the vessel, when loss was almost impossible thereby, where the cattle were carried between-decks and killed by the tossing of the ship. It is evident that it was not intended to limit the loss to one caused by the tossing of a ship by one single wave. *Snowden v. Gulon*, 5 N. E. 322, 323, 101 N. Y. 458 (reversing 50 N. Y. Super. Ct. [18 Jones & S.] 137, 143).

## A 1.

Words describing a ship as being "A 1" amount to a warranty. *Ollive v. Booker*, 1 Exch. 416, 423.

## A. D.

The capitals "A. D.," as part of a date, have been adjudged to be English language by use, though in fact being the initials of two Latin words. *State v. Hodgeden*, 3 Vt. 481, 485; *Clark v. Stoughton*, 18 Vt. 50, 51, 44 Am. Dec. 361.

"A. D." means the year of our Lord, and a complaint containing dates in numeral characters and the abbreviation "A. D." is sufficient in so far as the dates are concerned. *State v. Reed*, 35 Me. 489, 490, 58 Am. Dec. 727.

In a complaint for a criminal charge, the year of the alleged offense may be stated by means of the letters "A. D.," followed by words expressing the year, the letters "A. D." as so used having acquired an established use in the English language. *Commonwealth v. Clark*, 58 Mass. (4 Cush.) 596.

The fact that a date in a complaint, "this 14th day of Jan., A. D. 1864," is written in Arabic figures, with the initials "A. D." for the year, does not render it defective, although it would be better for criminal pleaders to adhere to the ancient practice in framing complaints exclusively in the English language. *Commonwealth v. Hagarman*, 92 Mass. (10 Allen) 401, 402.

The word "year" and the abbreviation "A. D.," when used in statutes, are equivalent to the expression, "year of our Lord." *Code Iowa* 1897, § 48, subd. 11; *Gen. St. Kan.* 1901, § 7342, subd. 11.

## A DATU.

A lease providing that it shall commence "a datu" includes the day of the date of a lease. *Haths v. Ash*, 2 Salk. 413; *Hatter v. Ash*, 1 Ld. Raym. 84.

## A DIE DATUS.

"From the day of the date," used in leases to determine the time or running of the estate, and when so used the time includes the day of the date. *Doe v. Watton*, 1 Cowp. 189, 191.

A lease providing that it should commence "a die datus" excludes the day of its date. *Haths v. Ash*, 2 Salk. 413.

## ABANDON—ABANDONMENT.

"To abandon is totally to withdraw ourselves from an object; to lay aside all care for it; to leave it altogether to itself." *Pidge v. Pidge*, 44 Mass. (3 Metc.) 257, 265 (quoting *Crabb on Synonyms*).

The word "abandon" means a giving up; a total desertion; an absolute relinquishment. *Sikes v. State* (Tex.) 23 S. W. 688, 689.

An "abandonment" is the relinquishment of a right. There can be no such thing as the abandonment of land in favor of a particular individual for a consideration. *Stephens v. Mansfield*, 11 Cal. 363, 366.

Abandonment is the giving up or relinquishing without consideration or without regard to any particular person. "To constitute an abandonment of a right secured there must be a clear, unequivocal, and decisive act of the party"—an act done that shows a determination not to have the benefit which is designated for him. *Breedlove v. Stump*, 11 Tenn. (3 Yerg.) 257, 276.

Abandonment is simply the evidentiary fact which proves the ultimate fact of the relinquishment of one's rights; in other words, the relinquishment of one's rights is the effect and result of one's abandonment of those rights; and hence the fact that a father had relinquished his right to the custody of his child may be shown by proving that he had abandoned it. *Nugent v. Powell*, 33 Pac. 23, 30, 4 Wyo. 173, 20 L. R. A. 199, 62 Am. St. Rep. 17.

Abandonment is the relinquishment of a right—the giving up of something to which one is entitled. *Dikes v. Miller*, 24 Tex. 417, 424; *Middle Creek Ditch Co. v. Henry*, 39 Pac. 1054, 1058, 15 Mont. 558. Abandonment must be by the owner without being pressed by any duty, necessity, or utility to himself, but simply because he desires no longer to possess the thing. *Middle Creek Ditch Co. v. Henry*, 39 Pac. 1054, 1058, 15 Mont. 558.

Abandonment can only take place where the occupant leaves the premises free to the occupation of the next comer, whoever he may be, without any intention to repossess or reclaim for himself, and regardless and indifferent as to what may become of them in the future. There can be no "abandon-

ment" except where the right entirely abates and ceases to exist. *Richardson v. McNulty*, 24 Cal. 339, 345; *Derry v. Ross*, 5 Colo. 295, 300.

Abandonment is a question of intention, to be decided as a matter of fact, as to whether or not all of the circumstances indicate an intent to abjure all further claim of right and title to the property; but it contains no element of estoppel in pais, and evidence sufficient to establish estoppel in pais is not evidence of an abandonment. *Marquart v. Bradford*, 43 Cal. 526, 529.

#### Intention.

Abandonment is a question of intent. Intent is ordinarily proved by acts. *Merchants' Nat. Bank v. Greenhood*, 41 Pac. 250, 266, 16 Mont. 395.

An "abandonment" is defined as a relinquishment or surrender of rights or property by one person to another; a giving up; a total desertion. It includes both the intention to abandon and the external act by which the intention is carried into effect. *Hough v. Brown*, 62 N. W. 143, 144, 104 Mich. 109; *Barnett v. Dickinson*, 48 Atl. 838, 840, 93 Md. 258; *Cassell v. Crothers*, 44 Atl. 446, 447, 193 Pa. 359; *Sioux City & St. P. Ry. Co. v. Davis*, 51 N. W. 907, 908, 49 Minn. 308; *Landes v. Perkins*, 12 Mo. 238, 256; *Hickman v. Link*, 22 S. W. 472, 473, 116 Mo. 123; *Siddeck v. Duran*, 67 Tex. 256, 262, 3 S. W. 264.

Abandonment includes both the intention to abandon and the external act by which the intention was carried into effect, and, as intention is the essence of abandonment, the facts of each particular case are for the jury. *Tennessee & C. R. Co. v. Taylor*, 14 South. 379, 380, 102 Ala. 224; *Bartley v. Phillips*, 30 Atl. 842, 165 Pa. 325.

Where plaintiff in ejectment relies on prior possession as his evidence of title, and it is claimed by defendant that he abandoned the land in controversy, and it is not shown that he voluntarily left the land, or without any express intention to resume the possession, the question of abandonment is one of intention, of which the jury is to judge exclusively, under all the facts of the case. *Keane v. Cannovan*, 21 Cal. 291, 303, 82 Am. Rep. 738.

A finding of fact is not sufficient to support a conclusion of the law that real property has been abandoned unless it is found that the premises were left vacant without any intention of reclaiming possession, and with an intention to leave them open for the occupation of any one who might choose to enter. *Smith v. Cushing*, 41 Cal. 97, 99.

The "abandonment" of an irrigation water right in a ditch is a relinquishment of possession thereof without any present intention to repossess. To constitute such aban-

donment, there must be a concurrence of act and intent; that is, the act of leaving the premises or property vacant so that it may be appropriated by the next comer, and the intention of not returning. *Judson v. Malloy*, 40 Cal. 299, 310; *Bell v. Bed Rock Tunnel & Mining Co.*, 36 Cal. 214, 217; *Moon v. Rollins*, Id. 333, 337; *St. John v. Kidd*, 26 Cal. 263, 272; *Richardson v. McNulty*, 24 Cal. 339, 345; *Willson v. Cleaveland*, 30 Cal. 192, 202; *Utt v. Frey*, 39 Pac. 807, 809, 106 Cal. 392; *Nichols v. Lantz*, 47 Pac. 70, 72, 9 Colo. App. 1; *Oviatt v. Big Four Min. Co.*, 65 Pac. 811, 812, 39 Or. 118.

The question of abandonment of a mining claim is one of intention, and that intention is to be gathered from all the evidences and inferences from it. This is peculiarly within the province of the jury, to be determined from all the facts and circumstances of the case. *Marshall v. Harney Peak Tin Min., Mill & Mfg. Co.*, 47 N. W. 290, 295, 1 S. D. 350; *Well v. Lucerne Min. Co.*, 11 Nev. 200, 212; *Lockhart v. Wills*, 50 Pac. 318, 320, 9 N. M. 263.

Abandonment includes both the intention to forsake or abandon and the act by which such intention is carried into effect. Property may be said to be abandoned when the owner throws it away, or when it is voluntarily left or lost, without any intent or expectation to regain it. Thus, two turbine water wheels left by their owner on a railway platform for one year, and then removed by him to a right of way, and left by him for nine years, cannot be said to have been abandoned. *Sikes v. State (Tex.)* 28 S. W. 688, 689.

In *Vogler v. Geiss*, 51 Md. 407, this court said, while a mere declaration of an intention to abandon will not alone be sufficient, the question whether the act of the party entitled to the easement amounts to an abandonment or not depends upon the intention with which it was done. *Barnett v. Dickinson*, 48 Atl. 838, 840, 93 Md. 258.

#### Lapse of time, evidence of.

While lapse of time is not an essential element of "abandonment," it may be a strong circumstance, in connection with others, to prove the intention to abandon. And where it appears that the locator of a mining claim, about a year after the location of the claim, left the mining district and territory, and has never since returned to the claim, there was an abandonment. *Harkrader v. Carroll (U. S.)* 76 Fed. 474, 475.

Abandonment is the leaving of property with the intention to abandon it, and if this intention to relinquish exists for never so short a time the abandonment is complete; but abandonment does not consist solely of an intention to abandon, it being necessary that there should be a concurrent act of leaving the premises vacant, so that they may be

appropriated by the next comer. The intention to abandon is not necessarily inferable from the fact that the premises have been left vacant, unimproved, and without attention for more than five years, though such fact may be taken into consideration in determining the question. *Judson v. Malloy*, 40 Cal. 299, 306.

Abandonment of land is the discontinuance of possession without any intention to repossess or reclaim in any event, or without regard to what may become of the land in the future. It is a question of intention, and not of lapse of time, which latter is only significant in connection with other circumstances for the purpose of ascertaining intention. *Moon v. Rollins*, 36 Cal. 333, 338; *Davis v. Perley*, 30 Cal. 630, 636.

#### **Nonuser.**

The abandonment of an easement necessarily implies nonuser. But nonuser does not create abandonment, no matter how long it continues. There must be found in the facts and circumstances connected with the nonuser an intention on the part of the owner of the easement to give it up; an intention existing coupled with nonuser will uphold the findings of abandonment. *Welsh v. Taylor*, 31 N. E. 896, 898, 134 N. Y. 450, 18 L. R. A. 535.

"Abandonment is a simple nonuser of an easement, and in order to make it an effectual answer to a claim upon that ground I find it perfectly well settled that the enjoyment, nay all acts of enjoyment, must have totally ceased for the same length of time that was necessary to create an original presumption." *Corning v. Gould* (N. Y.) 16 Wend. 531, 535.

Abandonment of water rights is a mixed question of intent and fact, and the mere nonuser, without intent to relinquish, does not constitute abandonment. *Tucker v. Jones*, 19 Pac. 571, 573, 8 Mont. 225.

Abandonment is a mixed question of intention and act. Mere lapse of time is not alone sufficient to establish abandonment. And where the owners of a ditch testified that they did not intend to abandon their right, and it appeared that one of them during the nonuser purchased the interest of one of his co-owners, there was no abandonment. *Gassert v. Noyes*, 44 Pac. 959, 960, 18 Mont. 216.

#### **Desert synonymous.**

See "Desert."

#### **Laches distinguished.**

Abandonment requires an intent, express or implied. It requires something more than mere passivity. It differs widely from laches in this: that in granting relief on the ground of abandonment, a court assumes to base

its action on the will of the party; in granting relief on the ground of laches, the action is *in invitum*. *William Wolff & Co. v. Canadian Pac. Ry. Co.*, 56 Pac. 453, 454, 123 Cal. 535.

#### **Sale or transfer distinguished.**

If the possession of the occupant be continued in another by the expression of a wish or desire of the occupant to another that he succeed to the possession, and he thereupon takes possession, a gift is the result, and not an abandonment. *Richardson v. McNulty*, 24 Cal. 339, 344.

Abandonment must be made without any desire that any other person shall acquire the same; for, if it were made for a consideration, it would be a sale or barter, and if without a consideration, but with an intention that some other person should become the possessor, it would be a gift. *Stephen v. Mansfield*, 11 Cal. 363, 366; *Middle Creek Ditch Co. v. Henry*, 39 Pac. 1054, 1058, 15 Mont. 558.

Abandonment is quite a different thing from a sale, and if for any reason a transaction fails as a sale it cannot be converted into an abandonment, since there is no such thing as an abandonment to a particular person or for a consideration. *Richardson v. McNulty*, 24 Cal. 339, 344; *McLeran v. Benton*, 43 Cal. 467; *Middle Creek Ditch Co. v. Henry*, 39 Pac. 1054, 1058, 15 Mont. 558.

The term "abandonment" in reference to the abandonment of a mining claim is not shown by the mere fact of the transfer of the claim by a qualified locator to an alien. *Manuel v. Wulff*, 14 Sup. Ct. 651, 652, 152 U. S. 505, 38 L. Ed. 532.

#### **Surrender distinguished.**

An allegation of abandonment of leased premises implies a surrender. *Burdick v. Cameron*, 42 N. Y. Supp. 78, 80, 10 App. Div. 589.

Where one gives up a right or thing to another by agreement, there is a "surrender"; but "abandon" imports the idea that the thing or right given up is of no value, and that it is not given up to any particular person. *Hagan v. Gaskill*, 6 Atl. 879, 880, 42 N. J. Eq. 215.

#### **Of child.**

"Abandon," in its ordinary sense, means to forsake entirely; to renounce and forsake; to leave with a view never to return. And when referring to the desertion of a wife by her husband it has been defined to mean the act of the husband in voluntarily leaving his wife with an intention to forsake her entirely, never to return to her, and never to resume his marital duties towards her, or to claim his marital rights. Such neglect as either leaves the wife destitute of the

common necessities of life, or would leave her destitute but for the charity of friends. As used in the statute, making a father guilty of a misdemeanor if he willfully and voluntarily abandon his child leaving it in a dependent and destitute condition, in order to constitute abandonment there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligation growing out of the same. That when the effect of this separation is to leave the child in a dependent and destitute condition the offense, under the statute, is complete. The act of desertion, and the attempt to throw off all parental obligation, are necessary component parts of the offense. The continued refusal to provide for the support of the child after the actual desertion takes place is necessary to complete the offense, but it alone is not an offense under the statute. *Gay v. State*, 31 S. E. 569, 570, 105 Ga. 599, 70 Am. St. Rep. 68.

The term "abandon," as used in Rev. St. 1846, c. 153, § 31, 2 Comp. Laws 1887, § 5741, providing that if a father or mother of any child under the age of six years, or any person to whom such child shall have been confided, shall expose such child in any street, field, house, or other place with an intention to abandon it, he or she shall be punished, etc., must be used in its ordinary sense of to forsake; to leave without an intention to return to; to renounce all care or protection of the child. It refers only to the intention of the party as connected with his own act, not the act of others, and has no reference to the probability or improbability of relief to the child from another; hence such intention is wholly independent of, and does not necessarily imply, an intention to injure. *Shannon v. People*, 5 Mich. 71, 89.

Wag. St. p. 497, § 4, making it a misdemeanor for any one to "abandon" his child or children, means a total desertion, and a leaving with a willful intention of bringing about perpetual separation, and does not apply to a mere temporary absence, or a temporary neglect of parental duty. *State v. Davis*, 70 Mo. 467, 468.

"Abandonment is simply the evidential fact which proves the ultimate fact of relinquishment. In other words, the relinquishment of one's rights is the effect and result of one's abandonment of those rights. As we have seen this relinquishment may be either by a deed or other instrument in writing, or it may be by parol, or by abandonment or by turning the child out of the house." *Nugent v. Powell*, 33 Pac. 23, 30, 4 Wyo. 173, 20 L. R. A. 199, 62 Am. St. Rep. 17.

In an action to foreclose mechanics' liens on a building it was contended that the owner was not liable because the contractor had

abandoned work on the building; and the court held that the allegation that the contractor had entirely ceased labor thereon without completion of said building was a fair definition of "abandonment." *McDonald v. Hayes*, 64 Pac. 850, 852, 132 Cal. 490.

In a mining lease providing that it shall be void if the enterprise shall be abandoned twelve months, the word "abandoned" should not be interpreted to mean that there could be no abandonment until after operations had once commenced, but should be construed to include a failure to commence mining operations within twelve months after the lease commences. *Woodward v. Mitchell*, 39 N. E. 437, 439, 140 Ind. 406.

#### Of condemnation proceedings.

The "abandonment" by a municipal corporation of condemnation proceedings authorized by Code, § 2111, is an abandonment in good faith of the entire proceeding and of the land for the purpose for which it was sought. In other words, it must be a complete surrender of the project so far as the land involved is concerned. *Robertson v. Hartenbower*, 94 N. W. 857, 858, 120 Iowa, 410.

#### Of corporate franchise.

The term "abandonment," as used in relation to a corporate franchise to construct and maintain a street railway, is a misnomer. A mere privilege or right may perhaps be properly said to be abandoned, although often in that case there must be something more than mere nonuser to constitute such abandonment. There must be also an act indicating an intention to abandon. But while a mere easement or right may be abandoned, the word is plainly inapplicable to a duty owing to the state. A public duty is not to be laid down at will. It has, however, been held that a total nonuser of the franchises of a corporation may exist for so long a period and under such circumstances that a surrender of its franchises by the corporation and acceptance of such surrender on the part of the state will be presumed. This doctrine, however, cannot be said to have been adopted by this court. *Wright v. Milwaukee Electric Ry. & Light Co.*, 69 N. W. 791, 794, 95 Wis. 29, 36 L. R. A. 47, 60 Am. St. Rep. 74.

#### Of highway.

Rev. St. § 1294, as amended by Laws 1892, c. 253 (1 Sandborn & B. Ann. St. § 1801), provides that any highway which shall be entirely "abandoned" as a route of travel, and on which no highway tax has been expended for five years, shall be considered legally discontinued, and the land shall revert to the owners. It was held that "abandon" means that the highway is not needed for travel, and therefore disused and aban-

doned as a highway. A highway, a small portion of which has been fenced by an abutting owner, and which the town authorities have neglected to make passable by the removal of such fence, the rest of the highway being used by the public and needed for travel, is not "abandoned," within the meaning of the statute. *Maire v. Kruse*, 55 N. W. 389, 390, 85 Wis. 302, 26 L. R. A. 449.

To rent or lease a piece of property is but to assert an ownership and control of it, and is never considered as an "abandonment." Improper use of a public street by the municipal authorities is not an abandonment of it. *Beebe v. City of Little Rock*, 58 S. W. 791, 801, 68 Ark. 39.

#### Of homestead or residence.

It is of the essence of an "abandonment" which will deprive a person of his homestead right that it should be made with the intention of giving up the place as a home. *Holmes v. Nichols*, 67 S. W. 722, 723, 93 Mo. App. 513.

Such a removal from a home as is sufficient to establish a new home is an "abandonment" of the first homestead. *Jarvais v. Moe*, 38 Wis. 440, 444, 446.

The term "abandonment," used in reference to the abandonment of one's abode or place of residence, cannot be predicated by a mere temporary absence or absences for business or pleasure. *Stafford v. Mills*, 31 Atl. 1023, 57 N. J. Law, 570.

Where the absence of one from a house in which she had lived was always temporary in character, and with an intention to return, and generally under medical advice in furtherance of her health, and her servants were in charge of the house in her absence, and her personal effects were kept there, a finding that she had not abandoned the premises, and ceased to reside thereon, was supported by the evidence. *Barnett v. Dickinson*, 48 Atl. 838, 840, 93 Md. 258.

To constitute "abandonment" of a residence in a mansion house, it is not enough that the person should at times absent himself from it or leave it out, if he intends at the time he so absents himself or makes such lease to return to such homestead, and make it his home, and that his absence shall be temporary. *King v. King*, 56 S. W. 534, 535, 155 Mo. 406.

Where the head of a family removes from the homestead with intent to abandon it, and leaves some of his children in possession, with the understanding that they are to follow him at a later date, the abandonment does not become complete, so as to deprive the land of the homestead protection, until the children have also removed. *Welborne v. Downing*, 11 S. W. 501, 502, 73 Tex. 527.

"Abandonment" of property actually a homestead cannot be accomplished by mere intention. There must be a discontinuance of the use, coupled with the intention not again to use it as a home, to constitute abandonment. The mere temporary lease of lots does not constitute an abandonment of a homestead right in the lots.—*Hines v. Nelson* (Tex.) 24 S. W. 541, 543.

A husband, with his wife, occupied premises in the state of Missouri as a homestead until forced to leave, about the close of the war, by the disturbed condition of the country, when they removed to Iowa, where the husband died. The wife then returned to the homestead, and resided thereon, keeping house with her brother. Held, that there was no "abandonment" of the homestead. *Leake v. King*, 85 Mo. 413, 416.

Where a husband and wife remove from a lot with the fixed intention to not return to it, the fact being clearly proved by their declarations or otherwise, this would constitute an "abandonment" of the homestead right. *O'Brien v. Woeltz*, 58 S. W. 943, 944, 94 Tex. 148, 86 Am. St. Rep. 829.

The "abandonment" of a homestead is a question of law and fact, and largely dependent on the intent of the parties. But if the owner of a homestead, while such owner, removes from the state, and acquires a domicile in another state, he forfeits such homestead estate. *Coile v. Hudgins*, 70 S. W. 56, 57, 109 Tenn. 217.

According to the preponderance of authority, an actual removal with no intention to return constitutes an "abandonment" of a homestead, even when a new homestead has not been acquired. *Galloway v. Rowlett* (Ky.) 74 S. W. 260, 261.

The mere return of a party to his native country does not operate as an "abandonment of the domicile" he has acquired in a foreign country, unless there be an intention to change his domicile; and it rests on the party relying on the abandonment to prove it, and the fact that the party died on his return with his family to his native country is not sufficient to create the presumption of abandonment. *Mills v. Alexander*, 21 Tex. 154, 161.

Where a man owning and occupying with his family an urban homestead, and carrying on the business of a merchant in the lower story of the same building, ceased to do business as a merchant, and removed his family to a new home in a different portion of the same town, and rented out the old home for mercantile purposes, such actions constituted an abandonment, though he used the rents to aid in supporting his family, and intended to again use it as a place to carry on his business as a merchant if he should recover from financial embarrassment. *Shryock v. Latimer*, 57 Tex. 674, 679.

**Of husband or wife.**

To constitute an abandonment as a ground for divorce, there must be a final departure with the intention not to return, without sufficient reason therefor, and without the consent of the other party. The test is the intent at the time of departure; for if the desertion be in itself complete a subsequent offer to return will not avail, as the deserted party has a legal right, of which he cannot be deprived without his concurrence. *Uhlmann v. Uhlmann* (N. Y.) 17 Abb. N. O. 236, 237 (quoted in *Simon v. Simon*, 37 N. Y. Supp. 1121, 1123, 15 Misc. Rep. 515).

"Abandonment," when used in referring to the act of one consort in leaving the other, is defined to mean the act of husband or wife who leaves his or her consort willfully, and with an intention of causing perpetual separation. It is the willful departure of the husband or wife from the society of the other and the common home, with an intention never to return or resume the marital relation. *Gay v. State*, 81 S. E. 569, 570, 105 Ga. 599, 70 Am. St. Rep. 68.

"Abandonment," as used in Act of March 7, 1857, providing for the relief and support of married women when deserted by their husbands, may be defined to be the act of willfully leaving the wife with the intention of causing a palpable separation between the parties, and implies an actual desertion of the wife by the husband. *Stanbrough v. Stanbrough*, 60 Ind. 275, 279.

Under Rev. St. 1880, § 5132, cl. 1, providing that a married woman may obtain provision for her support when the husband shall have deserted her, an allegation that a husband had "abandoned" his wife sufficiently conveyed the full idea of the act of desertion; that is, the act of willfully leaving the wife with the intention of causing a palpable separation; cessation from cohabitation. *Carr v. Carr*, 33 N. E. 805, 6 Ind. App. 377.

"Abandonment," as used in a statute authorizing a divorce for an "abandonment" which is continued for over a year, means "a neglect or omission of all marital duty." *Smith v. Smith*, 22 Kan. 699, 701.

If a man fails to supply his wife with such necessities and comforts of life as are within his reach, and by cruelty compels her to leave him and seek shelter and protection elsewhere, such conduct constitutes an abandonment of her by him, as much as if he had deserted her and gone away himself. *Levering v. Levering*, 16 Md. 213, 219.

"Abandonment," within a statute punishing a man for the abandonment of his wife, etc., means the actual and willful desertion by a husband of the wife. It is the willful act of actually leaving her or separating from her, and the withdrawal of all aid and protection implied in the marriage relations.

If the wife herself procures the separation or consents to it, the case does not come within the statute. It cannot be the result of an agreement or effected by the judgment of the court, but must be what is known to the criminal law as willful and voluntary desertion or abandonment. *Fitzgerald v. Fitzgerald*, L. R. 1 Prob. & Div. 694; *Pape v. Pape*, 20 Q. B. Div. 76; *Thompson v. Thompson*, 1 Swab. & T. 231. A husband cannot be convicted of abandoning his wife, and required to make provision for her support, when he is living apart from her, pursuant to a judgment of separation from bed and board, rendered by a court of competent jurisdiction, in an action for a limited divorce, although such judgment makes no provision for the payment of alimony, but gives leave to apply for a further judgment upon that subject. *People v. Cullen*, 47 N. E. 894, 896, 153 N. Y. 629, 44 L. R. A. 420 (quoted in *People v. Neyer*, 79 N. Y. Supp. 367).

To constitute abandonment, the cessation of cohabitation must be without the consent of the other party, and with the intention not to resume it. Where both parties consented to the original separation, and subsequently endeavor to make a reconciliation, there was no abandonment. *Dignan v. Dignan*, 40 N. Y. Supp. 320, 17 Misc. Rep. 268.

In *Williams v. Williams*, 130 N. Y. 197, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. Rep. 517, it is said that the term "abandonment," as used in the law of divorce, contemplates a voluntary separation of one party from the other without justification, and with the intention of not returning. Thus, where a wife left the home of her husband for sufficient reasons, and was willing to return providing that such conditions were done away with, she was not guilty of abandonment. *Simon v. Simon*, 37 N. Y. Supp. 1121, 1123, 15 Misc. Rep. 515.

"Abandonment," as used in the statute relative to divorce, has been construed by this court to mean the refusal by the spouse to recognize and contribute to the marital relation for a period of one year, although the parties lived beneath the same roof. *Evans v. Evans*, 93 Ky. 516, 20 S. W. 605. Thus, a wife may be said to voluntarily leave her husband and live in adultery where the husband is insane, and confined in an asylum, and the wife lives in adultery in the house owned by the husband. *McQuinn v. McQuinn*, 61 S. W. 358, 360, 110 Ky. 321.

As used in Conn. St. 1853, which provides that a married woman abandoned by her husband may transact business and sue and be sued as a feme sole, "abandoned" means an abandonment which is voluntary on the part of the husband, with an intention never to resume his marital duties toward his wife or to claim his marital rights. It is of no consequence that such abandonment

has been caused by the wife's misconduct. *Moore v. Stevenson*, 27 Conn. 14, 25.

The adultery of a husband is not of itself sufficient to constitute an "abandonment," within the statute making one who abandons his wife or children without means of support a disorderly person. *People v. Neyer*, 79 N. Y. Supp. 367.

The word "abandon," in *Burns' Ann. St. 1901*, § 7298a, providing that any male person who, being at the time under or liable to a prosecution for seduction or bastardy, fraudulently enters into a marriage with the female who has been seduced, or who is the mother of the bastard child, with the intention of thereby avoiding such prosecution, and who, within two years after such marriage, shall abandon his wife, or cruelly or inhumanly mistreat his wife, or fail and neglect to reasonably provide for her support, shall be liable to a penalty, means a physical abandonment, and does not include a constructive abandonment. *Milbourne v. State (Ind.)* 68 N. E. 684.

#### Of insured property.

Title "Du Délaissement" in the Code de Commerce (Code Napoleon), art. 372, provides that abandonment shall extend to nothing but those effects which are the objects of the assurance and of the risk. This code removes the apparent inconsistency in the law of France under the Code of Louis XIV, established in 1681. Emerigon in his *Treatise des Assurances*, c. 17, § 1, remarks that abandonment presents to the mind the idea of a thing existing in whole or part, or at least the idea of a doubtful existence, for it appears absurd to renounce to the assurers a thing of which the absolute loss is already established. "Nevertheless," he says, "according to our maritime laws one may abandon to the underwriters a thing which is entirely lost, and, however singular it may appear, the law requires the form of an abandonment in the process of an action de délaissement, though it be stated that the goods have absolutely ceased to exist." *Roux v. Salvador*, 3 Bing. N. C. 266, 284.

An insurance policy provided that in case of abandonment the assured should assign, set over, and transfer to the insurance company all their interest in and to the said property, and every part thereof, free from all claims and charges whatsoever. Held, that the word "abandonment" was there used in its technical legal sense, and as so used was to be interpreted as not intending to change the legal effect of abandonment, but merely to prescribe the form in which the transfer should be made to the underwriters of the interest insured, which was derived by the law of subrogation from the abandonment, and to point out the mode in which the intention to be abandoned should be unequivocally expressed. An abandonment

operates as a transfer to the underwriter the legal title to and right of disposal of what remains of the thing insured. The former assignment provided for in the clause under consideration may reasonably have been intended simply to facilitate the sale of the right by the insurance companies without discharging them from their legal liability to account to the party insured for his proportion of the proceeds. *Cincinnati Ins. Co. v. Duffield*, 6 Ohio St. 200, 205, 67 Am. Dec. 339.

The abandonment cannot transfer the interest of the assured any further than such interest is covered by the policy, and when properly made an abandonment operates as the transfer of the property to the underwriter, and gives him a title to it, or what remains of it, so far as it was covered by the policy. *Cincinnati Ins. Co. v. Duffield*, 6 Ohio St. 200, 203, 67 Am. Dec. 339; *Merchants' & Manufacturers' Ins. Co. v. Duffield (Ohio)* 2 Handy, 122, 127; *Papasco Ins. Co. v. Southgate*, 30 U. S. (5 Pet.) 604, 623, 8 L. Ed. 243; *Cincinnati Ins. Co. v. Bakewell*, 43 Ky. (4 B. Mon.) 541, 543.

"By the word 'abandonment' is understood a yielding, ceding, or giving up." As used in the law of insurance, it means surrender after loss of "whatever is left of the property insured to the underwriters." A clause in a policy requiring an abandonment after loss is of no effect when the entire property is destroyed and there is nothing to abandon. *Camberling v. McCall (Pa.)* 2 Dall. 280, 283, 1 L. Ed. 381, 1 Am. Dec. 341.

Abandonment to underwriters is not necessary when there is in fact an average or total loss. *Mellish v. Andrews*, 15 East, 18, 15; *Mullet v. Shedden*, 13 East, 304, 310; *Green v. Royal Exch. Assur. Co.*, 6 Taunt. 68, 70; *Idle v. Royal Exch. Assur. Co.*, 8 Taunt. 755; *Robertson v. Clarke*, 1 Bing. 445; *Cambridge v. Anderson*, 2 Barn. & C. 691, 692.

Abandonment proper, as used in relation to abandonment of vessels to an insurer of a transfer of some remnants of the subject of the insurance, whether ship, cargo, or freight. Abandonment, therefore, is not necessary when the loss is actually total, nor can the abandonment be made unless the loss is constructively total. Abandonment is never obligatory upon the injured, but operates only as a voluntary transfer of title. The collection from an insurance company of the full amount at which a vessel was valued in the policy on account of injury by collision does not import an abandonment of the vessel by the owner to the insurer, where she was undervalued in the policy, and the owner refuses to abandon. *The St. Johns (U. S.)* 101 Fed. 469, 472.

Abandonment is the act by which, after a constructive total loss, a person insured by

a contract of marine insurance, declares to the insurer that he relinquishes to him his interest in the thing insured. Civ. Code S. D. 1903, § 1922.

#### Of invention or patent.

Abandonment, as applied to inventions, is the giving up of his rights by the inventor, evidenced either by conduct or by declarations on his part, such as an acquiescence in full knowledge of the use of his invention by others, or he may forfeit his rights so as to constitute an abandonment by willful or negligent postponement of his claims. *Woodbury Patent Planing Machine Co. v. Keith*, 101 U. S. 479, 485, 25 L. Ed. 939.

A person is sometimes said to have abandoned his invention when he gives up the idea; surrenders it in the popular sense; relinquishes the intention of perfecting his invention, so that another person may take up the same thing and become the original and first inventor. Abandonment also applies where a party having made an invention allows the public to use it with his knowledge and consent; allows it to be incorporated into other machines with his knowledge and consent, and to be used by any person without objection. *American Hide & Leather Splitting & Dressing Mach. Co. v. American Tool & Mach. Co. (U. S.)* 1 Fed. Cas. 647, 652.

If an inventor, after perfecting his invention, places it upon the market in large or considerable numbers, and sells to all who desire to purchase, and continues so to do for months without applying for a patent, no other conclusion can be drawn than that he does not intend to apply for a patent; and he cannot be permitted, after having made public the knowledge and induced many persons to purchase, to conclude that the invention may be worth patenting, and that he will debar the public from using the knowledge they have acquired from him by procuring the issuance of the patent. And, where no caveat has been filed, an "abandonment" of the invention to the public is constituted. *Mast, Foos & Co. v. Demster Mill Mfg. Co. (U. S.)* 71 Fed. 701, 703.

The mere sale of a patent right, not made within two years before the application for the patent, does not constitute an abandonment thereof. "Where the act is accompanied by a declaration to that effect there can be no doubt; but if the sale be not an abandonment, a mere acquiescence in the use of the invention would seem not to be. Within two years, to constitute an abandonment, the intention to do so must be expressed or necessarily implied from the facts and circumstances of the case. It is a question of intention." *Bartlette v. Crittenden (U. S.)* 2 Fed. Cas. 961, 982; *Pitts v. Hall (U. S.)* 19 Fed. Cas. 754, 757; *Bevin v. East Hamilton Bell Co. (U. S.)* 8 Fed. Cas. 321, 328.

The word "abandon," when used in reference to the abandonment of a patent, means that the inventor dedicated it to the public use; and the failure of the inventor to assert his claims by suit or otherwise, and the omission to sell licenses to use the invention, and his neglect to make any efforts to realize any personal advantage from his patent, and similar circumstances, may be considered in connection with other evidence on the question whether the inventor had abandoned his patent. *Ransom v. New York (U. S.)* 20 Fed. Cas. 286, 291.

#### Of land.

A person "abandons land when he leaves the same free to the occupation of the next owner, whoever he may be, without any intention to repossess it, and regardless and indifferent as to what may become of it in the future." *Mitchell v. Carder*, 21 W. Va. 277, 285.

"If a man be dissatisfied with his immovable estate, and abandons it, immediately he departs from it corporally with the intention that it shall no longer be his, it will become the property of him who first enters thereafter." *Moreau & Carleton's Partidas*, 8, tit. 4, Law 50.

Where a single man has an actual settlement, improvement, and residence on a tract of land, his residing off the land for a reasonable time, in the house of his father-in-law, until he can arrange for accommodations more suitable to his changed conditions, does not constitute an abandonment. *Heath v. Biddle*, 9 Pa. (9 Barr) 273, 274.

#### Of legal title.

Precisely what is meant by an "abandoned legal title" is hard to define. If it is the valid legal title, it is inconceivable how it can be abandoned. The disappearance and long neglect to assert the title by the owner did not operate to extinguish or toll it. Nothing but a possession adverse to him for the statutory period would have such a consequence. If there has not been a devolution of title by operation of adverse possession, their title is perfect, and their right to recover would not be affected by a theoretical abandonment, predicated alone upon a neglect of their estate. *East Tennessee Iron & Coal Co. v. Wiggin (U. S.)* 68 Fed. 446, 449, 15 C. C. A. 510.

Abandonment can only properly refer to inchoate rights; but a perfect title cannot be abandoned. If the owner of a perfect title fails or neglects to pay taxes, the law, instead of presuming his title abandoned, regards it as still remaining a species of valuable property, which is seized and sold to the highest bidder. *City of Philadelphia v. Biddle*, 25 Pa. (1 Casey) 259, 263.



**Of mining claim.**

"Abandonment" is a word which has acquired technical meaning, and there can be no reason why a different signification should be given it when applied to the loss of a right to a mining claim than that which it has received in the books. It is defined to be the relinquishment of a right; the giving up of something to which we are entitled. *Mallett v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204, 90 Am. Dec. 484.

"Abandonment," as applied to mining claims held by location merely, takes place only when the locator voluntarily leaves his claim to be appropriated by the next comer, without any intention to retake or claim it again, and regardless of what may become of it in the future. *McKay v. McDougall*, 64 Pac. 669, 870, 25 Mont. 258; *St. John v. Kidd*, 26 Cal. 263, 272.

Abandonment does not depend on any rules or regulations or customs of mining, but solely on the question of the intention of the locator in leaving his claim. *St. John v. Kidd*, 26 Cal. 263, 272.

The term "abandonment," when applied to a mining claim, correctly characterizes the act of one holding the claim, in giving up his claim, and stopping the payment of assessments in pursuance of the intention to give up the claim. Whether there has been an abandonment is a mixed question of fact. *Oreamuno v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 215, 217.

An abandonment, within the meaning of the rule that a mining claim may be lost by abandonment, includes the voluntary yielding of the possession of the claim to another. *Murley v. Ennis*, 2 Colo. 300, 306.

"Abandonment" is a question of act as well as intent; and it is also said that it is a question of mixed law and fact. *Lockhart v. Wills*, 50 Pac. 318, 320, 9 N. M. 263.

"Abandonment" is a matter of intention, and operates instantaneously. Where a miner gives up his claim, and goes away from it without any intention of repossessing it, and regardless as to what becomes of it or who takes possession of it, an abandonment takes place, and the property reverts to its original status as a part of the unoccupied public domain. *Derry v. Ross*, 5 Colo. 295, 300.

**Of railroad station.**

Under Pub. St. c. 112, § 156, prohibiting a railroad company from abandoning an established station, the removal of the station to another place in the same town and neighborhood, with the design of furnishing better accommodations does not constitute an abandonment, since such change is a relocation, and not an abandonment of the station. *Attorney General v. Eastern R. Co.*, 137 Mass. 45, 48.

**Of right of way.**

"Abandonment," as used in relation to the abandonment of a right of way by a railroad company, means simply a permanent cessation of the use of the right of way for railroad purposes; that is, a cessation to use with an intent not to resume the use. *McClain v. Chicago, R. I. & P. Ry. Co.*, 57 N. W. 594, 595, 90 Iowa, 646.

**Of trade-name.**

To establish the defense of "abandonment" of a trade-name, it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon. Acts which, unexplained, would be sufficient to establish an abandonment, may be answered by showing that there was never an intention to give up or relinquish the right claimed. *Saxlehner v. Eisner & Mendelson Co.*, 21 Sup. Ct. 7, 11, 179 U. S. 19, 45 L. Ed. 60.

"Abandonment" in industrial property is an act by which the public domain originally enters or re-enters into the possession of the thing (commercial name, mark, or sign) by the will of the legitimate owner. The essential condition to constitute abandonment is that the one having a right should consent to the dispossession. Outside of this, there can be no dedication of the right, because there cannot be abandonment in the juridical sense of the word. *Singer Mfg. Co. v. June Mfg. Co.*, 16 Sup. Ct. 1002, 1009, 163 U. S. 169, 41 L. Ed. 118.

**Of water right.**

"Abandonment," as applied to the doctrine of appropriation of water to a beneficial use, may be defined to be an intentional relinquishment of a known right. Thus, where the owners of mining premises allowed them to be sold for taxes, and no claim was made of the water right for eighteen years, intention to abandon such right was established. *Oviatt v. Big Four Min. Co.*, 65 Pac. 811, 812, 39 Or. 118.

"Abandonment" is a question of fact, to be determined by the jury or court sitting as such. Evidence that the owner of an irrigation water right had for several years used but little water for irrigating, though using it continuously for domestic purposes, and had allowed the ditch to become so obstructed that it would convey but little water, does not show an abandonment. *Utt v. Frey*, 39 Pac. 807, 809, 106 Cal. 392.

The "abandonment" of water rights occurs when the party in possession deserts the property without an intention to reclaim it, and such intention is not shown by mere non-user or failure to maintain. *Butterfield v. O'Neill*, 72 Pac. 807, 808 (citing *Putnam v. Curtis*, 7 Colo. App. 457, 43 Pac. 1056).

The right is not abandoned to the use of a ditch to convey water for purposes of

irrigation merely because water does not flow in it every day in the year. *Hesperia Land & Water Co. v. Rogers*, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209.

Where a person who owned a water right quitclaimed his possessory right to the land without reservation of a water right, and left the state for three years, claims no interest in the water until after his return, he will be held to have abandoned it. *Nichols v. Lantz*, 47 Pac. 70, 72, 9 Colo. App. 1.

### ABANDONED PROPERTY.

Abandoned property is property which has been thrown away or the possession of which is voluntarily forsaken by the owner, in which case it becomes the property of the first occupant. *Eads v. Brazleton*, 22 Ark. 499, 509, 79 Am. Dec. 95.

### ABATE—ABATEMENT.

#### Of action.

To "abate," as applied to an action, is to cease, terminate, or come to an end prematurely. *Bouv. Law Dict.* When, upon the return day of a summons issued from the district court in the city of New York, the plaintiff fails to appear or pay the trial fee, and the defendant makes no motion for a dismissal, the action abates, or is in effect discontinued, and its pendency cannot therefore be pleaded in bar of a new action for the same cause between the same parties. *Goldstein v. Loeb*, 21 Misc. Rep. 72, 73, 46 N. Y. Supp. 838.

The entry "Action abated" is simply a statement of the legal effect of overruling a demurrer and sustaining a bill in abatement. It is an appropriate entry to inform the clerk of the legal status of the case in the event no exceptions are taken, or the exceptions taken are overruled and no amendment allowed. *Fleming v. Courtenay*, 49 Atl. 611, 614, 95 Me. 128.

"Abatement," in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended, but in the sense of courts of equity an abatement signifies only a suspension of all proceedings in the suit for the want of parties capable of proceeding therein. At common law when a suit is abated it is absolutely dead, but in equity a suit when abated was merely in a state of suspended animation and might be revived. *Witt v. Ellis*, 42 Tenn. (2 Cold.) 38, 39, 40 (citing *Story, Eq. Pl.* 354).

St. Conn. p. 35, provided that if any writ, etc., shall be directed to an indifferent person, except in certain cases, it shall "abate." It was held that the word "abate" was not synonymous with "plea of abate-

ment," the two expressions having very different meanings. "Abate" is a generic term, derived from the French word "abattre," and signifies to quash, to beat down, or destroy. The modes of abatement are various, but the thing is simple and uniform; a plea of abatement is only one mode of quashing a writ, while there are others, such as in some cases it is the duty of the court to abate a writ ex officio, and in case the writ is a nullity, so that the judgment thereon would be incurably erroneous, it is de facto abated. When it was declared that a writ should "abate" the term was used in its most comprehensive sense, not prescribing a mode, but commanding a thing. Hence the statute did not require a plea of abatement. *Case v. Humphrey*, 6 Conn. 130, 140 (citing *Earl of Clanrickard's Case*, Hobart, 288; *Case on Fines*, 3 Rep. 85; *Hughson v. Webb*, Cro. Eliz. 121; *Cooke v. Gibbs*, 3 Mass. 198; *Wood v. Ross*, 11 Mass. 271).

#### Of freehold.

"Abatement" is a figurative expression, used to denote that the rightful possession of the freehold by the heir or devisee has been overthrown by the intervention of a stranger, and is always consequent on the descent or devise of an estate in fee simple. *Brown v. Burdick*, 25 Ohio St. 260, 268 (citing 3 Bl. Comm. 167, 169).

#### Of legacy.

An "abatement of a legacy" is a pro rata diminution of general legacies made necessary in order to pay debts and specific legacies. *Brown v. Brown*, 79 Va. 648, 650.

"The reduction of a legacy, general or specific, on account of the insufficiency of the estate of the testator to pay his debts and legacies. When the estate of a testator is insufficient to pay both debts and legacies it is the rule that the general legacies must abate proportionately to an amount sufficient to pay the debts. If the general legacies are exhausted before the debts are paid, then, and not till then, the specific legacies abate, and proportionably." *Bouv. Law Dict.* (citing 2 Shars. Bl. Comm. 513, and note; approved *Neistrath's Estate*, 5 Pac. 507, 508, 66 Cal. 330).

Where a bequest is made in the form of a general legacy, and of pure bounty, and there are no expressions in the will or inferences to be derived therefrom manifesting an intention to give any of them priority, in the event of a deficiency of assets they will all abate pro rata. *Titus' Adm'r v. Titus*, 28 N. J. Eq. (11 O. E. Green) 111, 114, 117, 119.

#### Of nuisance.

In Rev. Code, § 4027, providing that a public nuisance may be abated on the ap-

plication of any citizen of the district, and a private nuisance on the application of the party injured, "abated" is a technical term, meaning to destroy the nuisance, and does not mean the prevention of a nuisance by injunction, nor a verdict for damages against the one maintaining it as by way of punishment. *Ruff v. Phillips*, 50 Ga. 130.

The words "abate" and "suppress" in a statute giving a city power to abate nuisances and suppress gambling houses are practically synonymous. *Town of Nevada v. Hutchins*, 13 N. W. 634, 635, 59 Iowa, 506.

#### Of taxes.

The terms "exemption" and "abatement," in their literal sense, have different shades of meaning, and this is so to a certain extent in the meaning of these terms as employed in the constitution and statutes; for an exemption prevents any assessment or levying of taxes in the first instance, and in that way relieves the property from the burden of taxation, while in the case of an abatement the property is relieved of its share of the burden of taxation after the assessment has been made and the tax levied. The difference in the sense of these terms, therefore, relates to the method rather than to the effect; for the ultimate result, whether by exemption or abatement, is precisely the same. In either case, the property is relieved from the burden of taxation. Hence a statute providing that the board of county commissioners may abate the taxes of certain persons is in conflict with the constitution forbidding exemptions of property except such as are of the laws of the United States and under this constitution. *State v. Armstrong*, 53 Pac. 981, 982, 17 Utah, 166.

An abatement of taxes supposes the assessment not duly made. If the tax be wholly abated it is as if no assessment had been made, and if the tax be partially abated, and the residue paid, all that was duly assessed has been paid. *Inhabitants of Billerica v. Inhabitants of Chelmsford*, 10 Mass. 394, 396.

#### Of wages.

The requirement of Act March 25, 1889, that corporations, companies, and persons engaged in the business of operating or constructing railroads and railroad bridges, and contractors and subcontractors engaged in the construction of any such road or bridge, to pay their employes on the day of discharge the unpaid wages then earned by them at the contract rate, "without abatement or deduction," means without discount for paying in advance of the time fixed by the contract, and does not prevent the corporation from offsetting the damages sustained by the employe's failure to perform his contract. *Leep v. St. Louis, I. M. & S. Ry. Co.*, 25 S. W. 75, 84, 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109.

#### ABATOR.

The term "abator" is synonymous with an occupier without color of title, and signifies a stranger who has taken possession of a freehold on the death of a person seized of an inheritance, thereby preventing the entry of the heir or devisee. *Brown v. Burdick*, 25 Ohio St. 260, 268.

#### ABDUCTION.

"The term 'abduction' means in law the taking and carrying away of a child, a ward, a wife, etc., either by fraud, persuasion, or open violence. Webster's Dict." *State v. George*, 93 N. C. 567, 570; *State v. Chisenhall*, 11 S. E. 518, 519, 106 N. C. 676; *Humphrey v. Pope*, 54 Pac. 847, 848, 122 Cal. 253; *Carpenter v. People* (N. Y.) 8 Barb. 603, 606.

The word "abduction" is from the Latin "abduco," to lead away. In private or civil law it is the act of taking away a man's wife by violence or by persuasion. Our criminal statutes as to the crime of abduction for the purposes of prostitution use the words "take away" for the word "abduct." It has been held that a physical carrying away is not required to constitute the taking, but that inducements are sufficient. In the decisions of courts generally the word "abduction" and the words "take away" are used as equivalents of each other, as we think in fact they are, and such is its meaning as used in the statute relating to the abduction of a husband from his wife or of a parent from his child. *Humphrey v. Pope*, 54 Pac. 847, 848, 122 Cal. 253.

It is not necessary, in order to constitute "abduction," that the taking should be by force; it being sufficient "if such moral force was used as to create a willingness on the girl's part to leave her father's home." *Wightman, J. Reg. v. Handley*, 1 Fost. & F. 648.

In order to constitute "abduction" the law does not require that the taking away of a female for unlawful purposes shall be by force. "If the child was induced by defendant to go away from the custody and care of her mother it is a sufficient 'abduction' or taking away"; the gist of the offense being the taking away of the child against the will of the person having lawful charge of her, for the purpose of prostitution. *People v. Demousset*, 12 Pac. 788, 71 Cal. 611.

It is not necessary to the commission of the crime of abduction that the accused should in any case use any force or practice any fraud or deception. The offense may be committed without actual manual capture of the female, and it is not necessary that she be taken against her will. *People v. Seeley* (N. Y.) 37 Hun, 190, 192, 193.

Pen. Code, § 282, provides: "A person who \* \* \* (subdivision 2) inveigles or

entices an unmarried female of previous chaste character into a house of ill fame, or of assignation, or elsewhere, for the purpose of prostitution or sexual intercourse, \* \* \* is guilty of abduction, and punishable by imprisonment," etc. *People v. Crotty*, 9 N. Y. Supp. 987, 938, 55 Hun, 611.

## ABET.

See, also, "Aid and Abet."

To abet is to countenance, assist; to give aid. *State v. Walker*, 9 S. W. 646, 652, 98 Mo. 95.

Abetting the commission of an offense involves the idea of the use of force, physical or moral, joined with that of the actual perpetrator in producing it. *State v. Teahan*, 50 Conn. 92, 101.

The word "abet" includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime. *People v. Dole*, 55 Pac. 581, 584, 122 Cal. 486, 68 Am. St. Rep. 50 (quoted and approved in *State v. Corcoran*, 61 Pac. 1034, 1042, 7 Idaho, 220).

In Act Cong. April 20, 1818, § 3, prohibiting the slave trade, and declaring that whosoever shall in anywise be "aiding or abetting" in the fitting out of a slaver shall severally forfeit, etc., the terms "aid and abet" are not used as technical phrases belonging to the common law, the offense not being made a felony, and therefore the words require no such interpretation. "The statute punishes them as substantive offenses, and not as accessorial, and the words are therefore to be understood as in the common parlance, and import 'assistance, co-operation, and encouragement.'" *United States v. Gooding*, 25 U. S. (12 Wheat.) 460, 470, 6 L. Ed. 693.

In *True v. Commonwealth*, 14 S. W. 684, 90 Ky. 651, the words "encourage, aid or abet, counsel, advise, or assist," were said to be words in appropriate use to describe the offense of a person who, not actually doing the felonious act, by his will contributes to or procures it to be done, and thereby becomes a principal or accessory. *Omer v. Commonwealth (Tex.)* 25 S. W. 994, 996.

### Aid distinguished.

The word "aid" does not imply guilty knowledge or felonious intent, whereas the definition of the word "abet" includes knowledge of the wrongful purpose of a person, and counsel and encouragement in the crime. *People v. Morine*, 72 Pac. 166, 168, 138 Cal. 626 (citing *People v. Warren*, 130 Cal. 682, 53 Pac. 87).

The words "aid" and "abet" are not synonymous. To abet is to encourage, counsel, incite, or instigate the commission of a crime. The word indicates an act of an accessory before the fact. To aid is to support. *State v. Empey*, 44 N. W. 707, 79 Iowa, 460.

The words "aid" and "abet," as used in Code 1876, § 4802, providing that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid or abet in its commission, though not present, must be indicted, tried, and punished as principals, "are nearly synonymous, and comprehend all assistance given by acts, words of encouragement, or by presence, actual or constructive." *Raiford v. State*, 59 Ala. 106, 108.

### Consent distinguished.

See "Consent."

## ABETTOR.

See, also, "Aider and Abettor."

In criminal law an abettor is one who is present at the time the offense was committed, and aids in its commission, although he is not the actual perpetrator, or who, while not present, is in such a situation as to be able readily to come to the assistance of the perpetrator. *Green v. State*, 13 Mo. 382, 392.

To abet is to countenance, assist, to give aid; and hence an instruction that if defendant was near enough to and did give immediate assistance in the killing of deceased, or intentionally aided, countenanced, or encouraged it, or waited upon or stood watch for those who did it, acting in one common purpose with them, he was guilty as an abettor, was correct. *State v. Walker*, 9 S. W. 646, 652, 98 Mo. 95.

Abetting the commission of an offense involves the idea of the use of force, physical or moral, joined with that of the actual perpetrator in producing it. The abettor must stand in the same relation to the crime as the criminal, approach it at the same direction, and touch it at the same point. *State v. Teahan*, 50 Conn. 92, 101.

A person may be guilty of crime as an abettor even though he cannot be a principal. *Bishop v. State*, 45 S. E. 614, 118 Ga. 799.

## ABEYANCE.

"Sometimes the fee may be in abeyance—that is, in expectation or contemplation of law—there being no person in esse in whom it can vest and abide at the time, though the law considers it as always potentially existent and ready to vest whenever a property owner appears. Thus, in a grant to J. for

life, and afterwards to the heirs of R., the inheritance is plainly neither granted to J. nor R., nor can it vest in the heirs of R. till his death. *Nam nemo est hæres viventis.* It remains therefore in waiting or 'abeyance' during R.'s life." 2 Bl. Comm. 107. In the civil law the legal conception is slightly different. Pothier says: "The dominion of property, the same as all other rights, as well in re as ad rem, necessarily supposes a person in whom the right subsists and to whom it belongs. \* \* \* When an owner dies, and no one will accept the succession, this dormant succession is considered as being a civil person, and as the continuation of that of the deceased, and in this fictitious person subsists the dominion or ownership of whatever belongs to the deceased, the same as all other passive and active rights of the deceased. *Hæreditas jacens personæ defuncti locum obtinet.*" Illinois Cent. R. Co. v. Bosworth, 10 Sup. Ct. 231, 233, 133 U. S. 92, 33 L. Ed. 550 (quoting *Droit de Domaine de Propriete*, cc. 1, 15).

## ABIDE.

In an indictment charging that defendants "did lewdly and lasciviously abide and cohabit" together, the term "abide" was synonymous with the word "associated," as used in Pub. St. c. 214, § 27, prohibiting persons from lewdly and lasciviously associating and cohabiting together. Commonwealth v. Dill, 34 N. E. 84, 159 Mass. 61.

A recognizance to await the action of the court of appeals is not equivalent to a condition to abide the judgment of such court. Wilson v. State, 7 Tex. App. 38, 39.

### As be governed by.

A docket entry under an action at law to "abide" the decision in a certain equity suit means not that the action at law should be dependent on the final determination of the suit in equity, but that so much of the issue as was common to both should be decided in the former the same as in the latter. Hodges v. Pingree, 108 Mass. 585, 587.

A stipulation that certain cases shall "abide" the event of another case, both in the trial court and on appeal, means the final outcome and the end of the litigation, and that the side finally successful in the first case should be successful in all. Commercial Union Assur. Co. v. Scammon, 35 Ill. App. 659, 660.

### As conform to, execute, or perform.

"Abide," as used in a recognizance binding the defendant to appear and "abide" the order of the court, meant obedience, compliance, to perform, to execute, to conform to such order. Jackson v. State, 30 Kan. 88, 1 Pac. 317, 318.

As used in Rev. St. c. 49, providing that the accused in bastardy proceedings shall appear and abide the order of the court, "abide" means that the accused shall perform, execute, and conform to such order. Hodge v. Hodgdon, 62 Mass. (8 Cush.) 294, 297.

The condition of a bond given in a prosecution for bastardy, conditioned that the principal defendant should appear at the next court, and "abide" the order of the court, extends to performance of the order of court consequent on the adjudication of the accused as the father. Taylor v. Hughes, 3 Me. (3 Greenl.) 433, 434.

In Weeks v. Trask, 16 Atl. 413, 415, 81 Me. 127, it was held that defendant's entry on land in dispute, and the erection of a fence after the land had been awarded to plaintiff under an arbitration by agreement "binding both parties to abide the award," did not constitute a breach of the award. In discussing the meaning of the words "to abide by" the court adopts the language of Richardson, C. J., in Shaw v. Hatch, 6 N. H. 162: "The words 'abide by' do not mean to acquiesce in, but simply to await the award without revoking the submission. The award is conclusive between the parties, and the defendant may be liable in trespass for what he has done." A like view was adopted in Marshall v. Reed, 48 N. H. 36. Doubtless a revocation of the authority of the arbitrators before the award is made is a breach of such a stipulation. King v. Joseph, 5 Taunt. 452; Brown v. Leavitt, 26 Me. 251. So is putting it beyond the power of the arbitrators to make an award, as the marriage of the female party. Charnley v. Winstanley, 5 East, 266. Or preventing one of the arbitrators from taking part in the award as to costs. Quimby v. Melvin, 35 N. H. 198. So is refusing to pay money in accordance with the award. Thompson v. Mitchell, 35 Me. 281; Plummer v. Morrill, 48 Me. 184. Also refusing to do any act other than the payment of money required by the award, such as transferring a piece of a vessel, and, when the submission is not under seal, assumpsit will lie. Gerry v. Eppes, 62 Me. 49, 51, 52. The debtor's stipulation in his bail bonds to abide the judgment means, said Peters, J., "to stand to," "to submit to," or "to abide." Hewins v. Currier, 62 Me. 236, 239. "While these illustrations show that these words take some shade of meaning from the subject-matter with which they are connected, our opinion is that in cases of this sort they mean, in substance, that the parties will not in any wise revoke or prevent the making and publication of the award, and when made and published it shall be final, and that they will perform any act required by the award which is within the scope of the authority conferred on the arbitrators by the submission."

**As pay or satisfy.**

"Abide and satisfy," within the meaning of Gen. St. 1878, c. 86, § 10, providing that an appeal bond shall be conditioned to pay the costs of said appeal and damages sustained by the respondent in consequence thereof, if said order or any part thereof is affirmed, or said appeal is dismissed, and abide and satisfy the judgment or order which the appellate court may give therein, must be construed, not only to require payment of the costs and damages, but also the judgment which may be rendered on appeal, with interest, as, if the term be construed to apply only to the costs and damages incident to the appeal, that part of the provision requiring the payment of costs of said appeal and the damages sustained would be without meaning. *Erickson v. Elder*, 25 N. W. 804, 34 Minn. 370.

Comp. Laws Kan. 1879, c. 47, § 5, relating to illegitimate children, requires that the defendant charged with being the father of such child shall appear at the district court, and give a recognizance not to depart without leave, and to abide the judgment and orders of the court. Held, that the word "abide" in such act does not mean that the person charged shall pay or satisfy the final judgment rendered in the action, but that he will attend court so long as the action is pending, and when final judgment is rendered surrender himself or give bond to perform such judgment, or be committed to prison; citing *Shaw v. Hatch*, 6 N. H. 162; *Marshall v. Reed*, 48 N. H. 86. The court says: "It is believed that the word 'abide' never means 'pay' or 'satisfy,' while it does sometimes mean 'endure' or 'suffer'; and to construe the word to mean 'to pay or satisfy' is to give the statute in which it is found a harsh and needlessly severe construction. The Supreme Court of Maine seems to hold \* \* \* that the word 'abide' in a statute similar to ours means 'pay,' and that when the final judgment is rendered the defendant and his sureties commit a breach of their bond unless they pay or satisfy the judgment." *Taylor v. Hughes* (Me.) 3 Greenl. 433, 434; *Corson v. Tuttle*, 19 Me. 409. These cases were decided prior to the case of *Towns v. Hale* (Mass.) 2 Gray, 199, 201, in which they were cited and disapproved, the court holding in that case that the word "abide" cannot mean more than a willingness and readiness to have the judgment of the court enforced against the defendant, and not that the defendant or his sureties shall perform the final judgment or order of the court, but only that defendant will attend the court so long as the action is pending, and when final judgment is rendered that he will surrender himself to the court to give bond or be committed. *McGarry v. State*, 14 Pac. 492, 493, 37 Kan. 9.

**ABIDE AND PERFORM.**

A bond conditioned that the maker would "abide and perform the orders and decrees of the court" in a cause in which a writ of ne exeat had been issued cannot be construed as equivalent to "abide the event of the suit," for to do so would be to wholly ignore the word "perform," and hence the maker cannot be discharged from the bond on his principal's placing himself within the jurisdiction of the court and subject to its orders and decrees. *Hazard v. Durant*, 13 R. I. 125.

**ABIDE BY.**

A stipulation in a condition in an arbitration bond that the parties consent to and "abide by" such a line as the arbitrator should establish is the same in legal effect as if the language of the parties had been "to abide by and perform the award of the arbitrator," which means only that the parties shall await the award of the arbitrators before revoking the submission, and not that they shall acquiesce in the award when made, and cannot be construed to mean that the party shall not be at liberty to dispute the validity of any award when made, but such award will stand as conclusive on the parties until impeached for good cause. *Marshall v. Reed*, 48 N. H. 36, 41; *Shaw v. Hatch*, 6 N. H. 162, 163.

A condition in an arbitration agreement to abide by the award is broken where a party took measures to prevent the attendance of a witness. *Quimby v. Melvin*, 35 N. H. 198, 204.

The obligation in a bond to "abide by" a money judgment cannot in reason mean that the obligors stipulated to acquiesce in a condition of things which was beyond their power to change; that they would not complain of a judgment after its affirmance in the appellate court, when, after its affirmance, they could have no other alternative but acquiescence. Every judgment debtor must abide by a final money judgment without contracting to do so. It is stripped of all signification unless it requires payment of the judgment. *Harris v. Kansas Elevator Co.*, 71 Pac. 804, 805, 66 Kan. 372.

**As perform.**

"These words have a settled fixed meaning. Webster's International Dictionary says: 'Abide,' when followed by 'by,' as 'abide by,' means to stand to, to conform to, as 'to abide by a decision or an award.' Soule's Synonyms gives as synonymous for 'abide by' the words 'act up to'; 'fulfill'; 'discharge.' Roget's Thesaurus, in like manner gives synonymous of 'abide by,' meet; fulfill, carry out; carry into execution; execute; perform; discharge; satisfy." Hence, where an arbitration bond was conditioned that the

parties should abide by the award, the obligor and sureties were liable for the payment of the award to the extent of the penalty of the bond. *Pass v. Critcher*, 17 S. E. 9, 10, 112 N. C. 405.

In an arbitration agreement of a boundary dispute binding the parties to "abide by" such lines as the arbitrators might decide on, the words "abide by" were construed to require the parties to perform the award, and in order to enforce the same the court decreed specific performance by the execution of deeds of release up to such lines. *Thompson v. Deans*, 59 N. C. 22.

A condition in an arbitration bond, that the party shall well and truly "submit, stand to, and abide by" the decision and award of the arbitrators, is construed to extend to the performance by the principal of the award after it is made, the court remarking, in the course of discussion, that to speak of submitting to and abiding by a law, an order, a decision, means in common parlance to obey it, to comply with it, to act in accordance with it and perform its requirements. *Washburne v. Lufkin*, 4 Minn. 466, 471 (Gil. 362, 364).

A condition of a bond, on obtaining certiorari, that the obligor would "abide by" and stand to the judgments of the court, is equivalent to a condition that he would perform the judgment of the court. *Molton v. Hooks*, 10 N. C. 342, 350.

#### ABIDE, DO, AND PERFORM.

A bail bond was conditioned that the person charged should appear and answer the writ and should "abide, do and perform" the judgment of the court, or the judgment of any other court before whom such process in due course of law shall be finally determined. Held, that the words "abide, do and perform" mean "to stand to," "to submit to," or "to abide." They are evidently a useless reiteration, and at most an inaccuracy of language employed to add force and expression to the idea conveyed by the words "to abide," and the phrase "to abide, do and perform and not avoid" is no more than "to abide and not avoid." The contract or bail is in effect that the debtor shall pay the judgment or surrender his body to be taken, or that the bail shall pay the debt. If the debtor gives the creditor the means of taking his body in execution, he does "abide, do and perform the judgment and not avoid it," in the meaning of those words in the condition of the bond. *Hewins v. Currier*, 62 Me. 236, 239.

#### ABIDE THE EVENT.

See "Cost to Abide Event"; "Event."

#### ABIDING CONVICTION.

An abiding conviction of guilt is not the equivalent of belief beyond a reasonable doubt. *Williams v. State*, 19 South. 826, 73 Miss. 820.

A verdict, wherein the jury returned that they had "an abiding conviction of defendant's guilt," signified settled and fixed conviction which follows a careful examination and comparison of the whole evidence, and was equivalent to a finding that they had no reasonable doubt of defendant's guilt; and hence such verdict was sufficient to support a judgment of conviction. *Griffith v. State*, 8 South. 812, 814, 90 Ala. 588; *Battles v. Tallman*, 11 South. 247, 249, 96 Ala. 403.

An instruction in a criminal case on the doctrine of reasonable doubt stated that if, after an impartial comparison and consideration of the evidence, the jury could truthfully have an "abiding conviction" of the defendant's guilt such as they would act on in the weightier affairs of their own life, they then had no reasonable doubt. Held, that the word "abiding" as there used meant "settled and fixed"—a conviction which may follow a careful examination and comparison of the whole evidence. *Hopt v. People*, 120 U. S. 430, 439, 7 Sup. Ct. 614, 618, 30 L. Ed. 708.

#### ABIDING FAITH.

"Abiding faith" would be a belief or confidence in the guilt of the accused which remains or continues in the minds of the jury. It is certainly true that before a jury can convict a person charged with a crime they must have an abiding faith of the truth of the charge of his guilt, but what degree of faith, how strong must that faith be before it crosses the line which separates the realm of doubt from that of moral certainty, is a question which should be explained to the jury in connection with the instruction that in order to be convinced beyond a reasonable doubt the jury must be able to feel that they have an abiding faith of the truth of the charge of the guilt of the accused. *Patzwald v. United States*, 54 Pac. 458, 460, 7 Okl. 232.

#### ABIDING PLACE.

See, also, "Place of Abode."

The expression "abiding place," as used in an opinion of a court reciting that the engines and cars of a railroad company have no "abiding place" or permanent location in the state, is an equivalent term for "permanent location." *Hopkins v. Baker*, 28 Atl. 284, 285, 78 Md. 363, 22 L. R. A. 477.

## ABILITY.

See "Best of Ability"; "Pecuniary Ability"; "Present Ability"; "Sufficient Ability."

In Or. Code, § 475, declaring "that the use of any unlawful violence on the person of another with intent to injure him is an assault and battery," and any attempt to commit a battery, or any threatening gesture "coupled with an ability to commit" a battery, is an assault, "ability" means (1) that the person committing the assault must be in such a position that if not prevented he may inflict a battery on the person assaulted, and (2) that he must be at such a distance from the person assailed as to be able to commit a battery by the use of the means with which he attempts it. *Jarnigan v. State*, 6 Tex. App. 465, 467; *Farrar v. State*, 15 S. W. 719, 720, 29 Tex. App. 250.

Laws 1885, c. 422, § 2, makes it a misdemeanor for a husband, "being of sufficient ability," to neglect to support his wife. *Held*, that the words include as well the capacity or skill to earn or acquire money as to property actually owned, the court saying: "A husband may and often does gain a fortune, or receive a large salary in consequence of his skill in some direction, and thus becomes able to support his wife and family. Ability and refusal to support constitute one act of delinquency, and where a man has physical and mental power to acquire means he comes within the intent of the law." *State v. Witham* (Wis.) 35 N. W. 934, 935.

"Ability," as used in the divorce act authorizing the granting of a divorce for the willful neglect of the husband to provide the wife with the common necessities of life, he having the "ability" to provide the same, means "the possession by the husband of the means and property to provide such necessities," not to his capacity of acquiring such means by labor. *Washburn v. Washburn*, 9 Cal. 475, 476.

St. 9 Geo. IV, c. 14, § 6, providing that no action shall be brought to charge any person on or by any representation or assurance made or given concerning or relating to the conduct, credit, "ability," trade, or dealings of any other person to enable such person to obtain credit, means the party's ability according to the extent of his property, and the amount of the charges to which that property has been subjected. *Lyde v. Barnard*, 1 Mees. & W. 101, 103.

## ABJURATION.

"Abjuration, which was connected with the law of sanctuary, was a method by which a criminal escaped punishment by taking an oath of abjuration and leaving the realm forever." "Both sanctuary and

abjuration were abolished by St. Jac. I, c. 25, and 20 Jac. I, c. 18." *Avery v. Everett*, 18 N. E. 148, 152, 110 N. Y. 317, 1 L. R. A. 264, 6 Am. St. Rep. 368.

## ABJURE.

To "abjure the state" implies a total abandonment of the state, a departure without the intention of returning, but does not mean a renunciation of one's country on an oath of perpetual banishment, as the term originally implied. *Meade v. Hughes' Adm'r*, 15 Ala. 141, 148, 50 Am. Dec. 123.

## ABLE.

See "When able."

Feel able, see "Feel—Felt."

A promise to pay a debt "when able" must be construed as relating to financial ability. *Richardson v. Bricker*, 1 Pac. 433, 434, 7 Colo. 58, 49 Am. Rep. 344.

Where, in negotiations for the settlement of an action, the defendant informed plaintiff of his financial condition and his inability to pay any part of plaintiff's claim out of his salary so long as certain obligations continued, and a settlement was effected wherein defendant promised to pay when he should "be able to do so," the expression "able to do so" will be deemed to mean that the defendant should be required to pay only when his circumstances were changed for the better either by an accession of fortune or a decrease of obligation. *Work v. Beach*, 12 N. Y. Supp. 12, 17.

Rev. St. c. 14, § 1, providing that nurses and necessities to an infected person be furnished at his charge "if able," otherwise that of the town to which he belongs, means on his ability to pay the expenses, although they may be a large portion of his means. *Inhabitants of Hampden v. Inhabitants of Newburgh*, 67 Me. 370, 371.

The words "if able" in the statute providing that any town which has paid for the commitment and support of an insane person may recover the amount paid of the insane person, if able, means if able to pay the entire amount, and cannot be construed to authorize the town to recover a portion of the expense from such person if he is not financially able to pay the entire sum. *Inhabitants of Cape Elizabeth v. Lombard*, 72 Me. 492, 493.

"Able," when used in a promise to pay when "able," is to be reasonably interpreted. On the one hand, "it does not imply ability to pay without embarrassment, or even without crippling the debtor's resources or business; while, on the other hand, ability to pay cannot be fairly implied while the debtor,



although he may be in possession of property sufficient to pay the particular debt, is insolvent, or, when payment if enforced, would strip him of his means of support." *Tebo v. Robinson*, 100 N. Y. 27, 29, 2 N. E. 383.

"Able to pay," within the meaning of a statute that a sick person may be provided with nurses and necessities at his charge if he is able to pay therefor, or to the town to which he belongs, is to be construed as limited to his ability to pay the entire expenses, and if he is not able to pay all of such expenses he is not chargeable with any part thereof. *Inhabitants of Orono v. Peavey*, 66 Me. 60, 61.

#### ABLE-BODIED.

The act relating to the militia required the enrolling officer to enroll all "able-bodied citizens" of a certain age, but authorized a citizen to disenroll on a certificate of a surgeon to the acceptance of the officer. *Held*, that the term "able-bodied" in this connection was of difficult definition; that it did not imply absolute freedom from all physical ailment, but imported merely the absence of those palpable and visible defects which incapacitate a person from performing ordinary duties of a soldier. *Darling v. Bowen*, 10 Vt. 148, 152.

St. Vt. 1797, vol. 1, p. 383, providing that every "able-bodied" person should be deemed legally settled in the town in which he should have first resided for the space of one year, does not refer to ability or inability during the time mentioned to perform ordinary labor and thereby support himself and family, but that a person is to be deemed not to have been able-bodied during the year he received an injury which afterward resulted in permanent disability, although not incapacitating him during the year for ordinary labor. *Town of Marlborough v. Sisson*, 28 Conn. 57, 59.

Act 1797, § 1, relating to legal settlements, and providing that the applicant should be "an able-bodied and healthy" person and of quiet and peaceable behavior, does not require that the person should invariably continue in good health throughout the year, or that he should remain wholly exempt from those accidents which for a time would impair his physical energies, but means that the person should be in ordinary health and strength in his usual and habitual condition. *Town of Starksboro v. Town of Hinesburgh*, 15 Vt. 200, 209.

#### ABODE.

See "Actual Place of Abode"; "Permanent Abode"; "Place of Abode"; "Usual Place of Abode."

An "abode" is the place where a person dwells. *Dorsey v. Brigham*, 52 N. E. 303,

307, 177 Ill. 250, 42 L. R. A. 809, 69 Am. St. Rep. 228.

#### ABOMINATION.

Webster defines the word "abomination" to mean anything wicked. A charge that another committed an abomination in the sight of the Lord is not libelous *per se*. *People v. Isaacs*, 1 N. Y. Cr. R. 148, 153.

#### ABORTION.

Abortion is, technically speaking, the expulsion of the ovum or embryo from a female at any time between 6 weeks and 6 months after conception. *Smith v. State*, 33 Me. 48, 59, 54 Am. Dec. 607.

Abortion is the act of giving premature birth, particularly the expulsion of the human foetus prematurely or before it is capable of sustaining life; miscarriage. "Procuring an abortion," in common language, means substantially the same as procuring a miscarriage, and by our statute is meant the criminal act of destroying the foetus any time before birth. *State v. Crook*, 51 Pac. 1091, 1093, 16 Utah, 212.

The term "abortion" does not itself import a crime. It simply means, according to Webster, the act of miscarrying; the expulsion of an immature product of conception; miscarriage; the immature product of an untimely birth. And an eminent law-writer defines it to be the act of bringing forth what is yet imperfect, and particularly the delivery or expulsion of the human foetus prematurely, or before it is yet capable of sustaining life; also, the thing prematurely brought forth, or produced of an untimely process. *Belt v. Spaulding*, 20 Pac. 827, 830, 17 Or. 130 (citing 1 Abb. Law Dict. 8).

The word "abortion" is synonymous and equivalent to "miscarriage" in its primary meaning, which means the bringing forth the foetus before it is perfectly formed and capable of living, and is rightly predicated of the woman instead of the child. "Abortion" has a secondary meaning, in which it is used to denote the offspring, but it is not used in that sense here. It is a flagrant crime at common law to attempt to procure the miscarriage or "abortion" of the woman, because it interferes with and violates the mysteries of nature in that process by which the human race is propagated and continued. It is a crime against nature which obstructs the fountain of life. It is not necessary that the woman had become quick. It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated. *Mills v. Commonwealth*, 13 Pa. (1 Harris) 631, 632; *Wells v. New England*

Mut. Life Ins. Co., 43 Atl. 126, 127, 191 Pa. 207.

A mere suggestion or advice to go to a physician and get some medicine to procure an abortion, without evidence of its being acted upon, does not constitute the crime. *People v. Phelps*, 18 N. Y. Supp. 699, 700, 63 Hun, 632; *Id.*, 15 N. Y. Supp. 440, 441, 61 Hun, 115.

"A person who, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve the life of the woman, or of the child with which she is pregnant, either, first, prescribes, supplies, or administers to a woman, whether pregnant or not, or advises or causes a woman to take any medicine, drug, or substance, or second, uses, or causes to be used, any instrument or other means, is guilty of abortion, and is punishable by imprisonment in a state prison for not more than four years, or in a county jail for not more than one year." Pen. Code, § 294. *People v. Van Zile*, 26 N. Y. Supp. 390, 391, 73 Hun, 534.

#### Attempt included.

The term "abortion" in Pen. Code, § 294, providing that any one who advises or causes a woman to use drugs, etc., with intent to produce a miscarriage, shall be guilty of "abortion," is not to be understood in its ordinary meaning of producing young before the natural time, but also includes the attempt to produce such result. *People v. Phelps*, 15 N. Y. Supp. 440, 441, 61 Hun, 115.

#### Consent as affecting.

Rev. St. c. 164, § 11, provided that any one who shall administer to a woman pregnant with a child any drug, or use any instrument on her or other means, with intent thereby to destroy the child, unless the same shall be necessary to preserve the life of the mother, shall be guilty of manslaughter. It was held that the use of violence on a woman with an intent to procure her miscarriage constituted an abortion notwithstanding she consented to the act, and that she was not quick with child at the time of the attempted abortion. *State v. Dickinson*, 41 Wis. 299, 309.

#### Death of foetus as affecting.

"Abortion," as used in St. 1845, c. 27, relating to procuring or attempting to procure an "abortion," cannot be construed to mean that the mother on whom it is attempted must be quick with child, but it would not be an abortion if the foetus with which the woman was pregnant had lost its vitality so that it could never mature into a living child. *Commonwealth v. Wood*, 77 Mass. (11 Gray) 85, 92.

Under Comp. St. c. 108, § 8, punishing any one who maliciously, "with intent to cause and procure the miscarriage of a woman then pregnant with a child," shall ad-

minister to her or advise her to take or swallow any drug, or shall use any instrument with like intent, it is not essential to the commission of the offense that the foetus should be alive at the time the attempt is made. *State v. Howard*, 32 Vt. 380, 399, 78 Am. Dec. 609.

#### ABORTIVE CHILD.

An "abortive" child is one which by an untimely birth is either born dead or is incapable of living, and it is not necessary that the child should live 24 hours, as required by the Spanish law, in order that the child should be considered as naturally born and not abortive. *Cottin v. Cottin* (La.) 9 Mart. (O. S.) 93, 95.

#### ABOUT.

See "At or About."

See, also, "In and About"; "On or About."

"About," used to describe the location of land in an entry or grant, signifies "at," unless something can be shown to evidence a contrary intention. *Simms' Lessee v. Dickson* (U. S.) 3 Tenn. (Cooke) 137, 140, 22 Fed. Cas. 158, 159.

A conveyance of all of a woman's stock in trade, materials, and other articles "in and about her said business" included a horse and gig which were kept for trade and not for pleasure. *Dean v. Brown*, 5 Barn. & C. 386, 388.

#### Disregarded in courses and distances.

In ascertaining a place to be found by its distance from another place, the vague words, "about," "nearly," or the like, are to be discarded, if there are no other words rendering it necessary to retain them, and the distance is to be taken positively. *Kincaid v. Blythe's Heirs*, 5 Ky. (2 Bibb) 479, 480; *Grubbs v. Rice*, 5 Ky. (2 Bibb) 107, 109; *Sanders' Heirs v. Morrison's Ex'r*, 18 Ky. (2 T. B. Mon.) 109, 110, 15 Amer. Dec. 140; *Wise v. Burton*, 14 Pac. 678, 681, 73 Cal. 166; *Purinton v. Sedgley*, 4 Me. (4 Greenl.) 283, 291; *Johnson v. Pannel*, 15 U. S. (2 Wheat.) 206, 211, 4 L. Ed. 221; *Bodley v. Taylor*, 9 U. S. (5 Cranch) 191, 210, 3 L. Ed. 75; *Simms v. Dickson*, 3 Tenn. (Cooke) 137, 140.

The calls of a grant, beginning "on D. river about three-quarters of a mile below" the mouth of a creek, "at a beech," will, if no beech can be found at the place indicated, locate the place of beginning at the end of three-quarters of a mile, meandering the river from the mouth of the creek. *Simms' Lessee v. Dickson* (U. S.) 3 Tenn. (Cooke) 137, 140, 22 Fed. Cas. 158, 159.

A description of land as extending "about 30 feet from a road where an old dwelling house now stands" will be con-

strued to mean that exact precision of the length of the line was not intended, and that, if the place where the house stood could not be determined, the distance must be limited to the number of feet given. *Cutts v. King*, 5 Me. (5 Greenl.) 482, 486.

"About" has no effect upon the question of boundaries, nor will it control monuments, courses, and distances where the language is clear and obvious. *Wheeler v. Randall*, 47 Mass. (6 Metc.) 529, 533; *Whitaker v. Hall*, 4 Ky. (1 Bibb) 72; *Stephens v. Hedden*, 7 Ky. (4 Bibb) 107, 108.

In a land entry one of the courses was given as "about" a north course. It was held that "about" should be rejected and the course run due north. *Shipp v. Miller*, 15 U. S. (2 Wheat.) 316, 323, 4 L. Ed. 248.

#### As estimate of distance.

"About," as used in a grant to a railroad company of a strip of land "about" 50 perches in length, shows that the length was estimated instead of measured. *Mt. Pleasant Coal Co. v. Delaware, L. & W. R. Co.*, 50 Atl. 251, 253, 200 Pa. 434.

Where the description in a deed described a line as extending "about" a certain number of feet to a monument, the term "about" will be understood to imply that exact precision in the length of the line was not intended, and the grantee will take to the monument; but if the place where the monument stood cannot be established, the grantee must be limited to the number of feet given. *Cutts v. King*, 5 Me. (5 Greenl.) 482, 486.

The use of the word "about," in a reservation in a deed of a gate or passageway "about" five feet wide, was held to indicate that the width of the gate was not intended to be definitely fixed by the instrument, and that the reservation was only of the right of a suitable and convenient passage for the purposes indicated. *Atkins v. Bordman*, 43 Mass. (2 Metc.) 457, 466, 37 Am. Dec. 100.

A call in a description for "at or about" the head of a certain stream was sufficiently accurate, though it might extend a few rods either way from the place originally intended. *State v. Coleman*, 13 N. J. Law (1 J. S. Green) 98, 103.

A deed describing a boundary line as running at a right angle with another line to connect with a third line "about" 50 feet long should be construed to render the measurement approximate, so that where the third line would be 53½ feet long the measurement was controlled by the angle. *Iverson v. Swan*, 48 N. H. 282, 283, 169 Mass. 582.

"About," in a description describing the distance of a boundary as "about 216 poles more or less to the A. river aforesaid," con-

strued not to restrict the distance to 216 poles, but that the line would extend to the river. *Purinton v. Sedgley*, 4 Me. (4 Greenl.) 283, 291.

A deed describing a lot as "about five chains and 25 links in depth," where the entire description is intelligible and the intention manifest, will include the entire lot, though it be a few lengths greater in depth. *White v. Woodruff*, 24 N. J. Law (4 Zab.) 753, 755.

In a contract for the sale of "about" 45 feet in a certain property, the use of "about" indicates that the parties only contracted for a number of feet that would be a near approximation to those mentioned, and negatives the conclusion that entire precision was intended. *Maryland Const. Co. v. Kuper*, 45 Atl. 197, 201, 90 Md. 529.

A deed of land being "about" 80 feet wide does not fix the dimensions with sufficient certainty to convey the property. *Fine-lite v. Sinnott*, 5 N. Y. Supp. 439, 440, 57 N. Y. Super. Ct. (25 Jones & S.) 57.

#### As estimate of quantity.

"About so much," as used in a contract, while not precise, nevertheless indicates an approximation in quantity. *Sample v. Upton*, 42 N. W. 54, 56, 74 Mich. 416.

In a contract of sale of lumber estimated to be "about" a certain number of feet, more or less, obtained from "about" a certain number of feet of white pine saw logs banked and being banked at a certain place, the word "about" makes the naming of the quantity but an estimate of the probable amount, and that the amount sold is fixed by the amount at the place named. *Rib River Lumber Co. v. Ogilvie*, 89 N. W. 483, 485, 113 Wis. 482.

In sales of merchandise, especially in large quantities, where it is impossible to ascertain with precise accuracy the number or weight of the articles before concluding a contract for their purchase, it is necessary and usual to insert the words "more or less" or "about" in connection with the specific amount which forms the subject of the contract, in order to cover any variations from the estimate which are likely to arise from differences in weight, errors in counting, diminutions by shrinkage, or other similar causes. But in such cases parol evidence is not admitted to show that the parties intended to buy and sell a different quantity or amount from that stated in the written agreement. On the contrary, it is held to be a contract for the sale of the quantity or amount specified, and the effect of the words is only to permit the vendor to fulfill his contract by a delivery of so much as may reasonably and fairly be held to be a compliance with the contract, after making due allowances for the excess or short delivery.

arising from the usual and ordinary causes which prevent an accurate estimate of the weight or number of the articles sold; or, as it is sometimes briefly expressed, it is an absolute contract for a specific quantity within a reasonable limit. *Cabot v. Winsor*, 83 Mass. (1 Allen) 546, 450.

Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about," or words of like import, the contract applies to the specific lot, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it, a slight deviation being allowable according to the circumstances of the case or nature of the articles. In such cases the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity. *Brawley v. United States*, 96 U. S. (6 Otto) 168, 171, 24 L. Ed. 622; *Norrington v. Wright*, 6 Sup. Ct. 12, 15, 115 U. S. 188, 29 L. Ed. 366.

"About," as used in a contract for the shipment of about so many tons of goods of a certain quantity, means a margin for a moderate excess or diminution of such quantity. *Salmon v. Boykin*, 7 Atl. 701, 703, 66 Md. 541.

The term "about," in a finding that one-half a car load of lumber is about so many feet, means "not far from." *Indianapolis Cabinet Co. v. Herrman*, 34 N. E. 579, 581, 7 Ind. App. 462.

"About," as used in a letter in which the writer stated that a certain person had been advised that he was in need of "about" a certain number of dollars worth of red rock stock, and saying that the writer would attend to the payment of such orders as the person might give, shows that entire accuracy as to the amount was not intended. *Maine Red Granite Co. v. York*, 35 Atl. 1014, 1015, 89 Me. 54.

#### Same—Variations allowed.

A contract for the sale of "about" 300 quarters of foreign rye did not authorize the seller to deliver, nor require the buyer to accept, so large an excess as 50 over the 300 quarters, but the excess should bear a very small proportion to the amount named; a smaller proportion than that of 45 to 300. *Cross v. Eglin*, 2 Barn. & Adol. 106.

A contract of sale described the property as "all iron contained in the seller's

yard, about 150 tons." Held, that the phrase "about 150 tons" could be construed as words of expectation and estimate only, as the contract was not for the delivery of 150 tons, but for all the iron in the yard, and therefore a delivery of 144 tons only was not a breach of the contract. *McLay v. Perry*, 44 Law T. (N. S.) 152.

In an agreement to sell a cargo of railroad iron, to be delivered at a ship, "about 300 or 350 tons" expresses an estimate only, and where a party delivered a full cargo he performed his contract, though the total amount which the vessel was able to carry was only 227 tons. *Pembroke Iron Co. v. Parsons*, 71 Mass. (5 Gray) 589, 590.

An agreement to transport stores supposed to amount to "about" 3,700 barrels should be construed to mean only that the probable amount was 3,700 barrels, but that the amount stated did not amount to a warranty; and hence the delivery of 3,105 barrels constituted a fulfillment of the contract, good faith only being required. *Robinson v. Noble*, 33 U. S. (8 Pet.) 181, 196, 8 L. Ed. 910.

In a charter party, agreeing that the ship should load as may be required by the master, "about" 5,000 barrels, the word "about" meant any amount between 4,500 and 5,500. *Alcock v. Leeuw*, 1 Cab. & El. 98, 99.

A charter party, providing that a ship should load a complete cargo of iron ore, not exceeding what she could reasonably stow, etc., "say about 1,100 tons," was construed to mean that the shipowner would be content with a cargo of "about 1,100 tons." If the ship should hold more, and if she could only carry less the undertaking of the charterer would be fulfilled by loading a complete cargo. The court said: "The reasonable meaning seems to be that the shipowner undertakes, if the ship is of much greater capacity than 1,100 tons, to accept a cargo of about 1,100 tons as equivalent to a full cargo, and thus effect is given to the words 'say about,' etc., as words of contract. When the word 'about' is used, it always implies that the deviation must not be very large." And therefore a stowage of only 1,080 tons was not a fulfillment of the charterer's contract to load about 1,100 tons. *Morris v. Levison*, 1 C. P. Div. 155, 158.

A chattel mortgage on "about 6,000 hides," then laden or to be laden on a certain vessel on the coast of Africa, construed to render the exact number of hides intended to be covered by the mortgage indeterminate, and therefore it covered the whole lot belonging to the grantor, though numbering 7,040. *Pollard v. Saltonstall* (U. S.) 56 Fed. 861, 864.

The words "about," or "more or less," when used in a contract, are used as estimate of an otherwise designated quantity,

and the object of the party is the purchase or sale of a particular lot, and is susceptible of a broad construction. A contract designating the amount of timber to be cut and delivered as about 2,750,000 feet, more or less, cannot be glossed over by the words "about," or "more or less," so as to cover 17,000,000 feet. *Pine River Logging & Imp. Co. v. United States*, 22 Sup. Ct. 920, 924, 186 U. S. 279, 46 L. Ed. 1164.

#### As estimate of quantity of land.

In stating the number of acres conveyed in a conveyance, it is usual to represent it as "about" so many. Yet the word "about," although it negatives the conclusion that entire precision is intended, is without any legal operation whatever. *Purinton v. Sedgley*, 4 Me. (4 Greenl.) 283, 286.

A contract containing the words "about 65 acres" construed to mean 65 acres, with a slight variation of actual measurement, and that the qualifying word "about" imported the actual quantity mentioned, or perhaps a slight discrepancy of perhaps 1 or 2 acres, and that therefore the conveyance of 36 acres did not satisfy the contract. *Baltimore Permanent Building & Land Soc. v. Smith*, 54 Md. 187, 204, 39 Am. Rep. 374.

Where a deed purported to convey all the real estate owned by the grantor in certain counties, and described "to be about 2,600, more or less," the latter clause is to be construed as a warranty of the quantity of land, and will entitle the grantees to relief in equity if there is a material difference between the real and represented quantity of land, as 1,000 acres. *Thomas v. Perry* (U. S.) 23 Fed. Cas. 964, 965 (cited in *Solinger v. Jewett*, 25 Ind. 481).

A contract describing the land conveyed as containing "about" 140 acres means that the actual quantity is a near approximation to that mentioned in the contract; and where the amount of the land was 134.74 acres, valued at \$55 per acre, the variation was too great. *Stevens v. McKnight*, 40 Ohio St. 341.

It is well settled that a vendee of land, when it is sold in gross or with the description "more or less," or "about," does not thereby ipso facto take all risk of quantity in the tract. The use of the words "more or less," or "about," or similar words, in designating quantity, although they show a sale in gross and not by the acre, covers only a reasonable excess or deficiency. *Bigham v. Madison*, 52 S. W. 1074, 1075, 103 Tenn. 358, 47 L. R. A. 267 (citing *Belknap v. Sealey*, 14 N. Y. [4 Kern.] 143, 67 Am. Dec. 120; *Harrell v. Hill*, 19 Ark. 102, 68 Am. Dec. 212; *Drake v. Eubanks*, 32 S. W. 492, 61 Ark. 120; *Stebbins v. Eddy* [U. S.] 22 Fed. Cas. 1192; *Couse v. Boyles*, 4 N. J. Eq. [3 H. W. Green] 212, 38 Am. Dec. 514; *Pratt v. Bowman*, 17 S. E. 210, 37 W. Va. 715; *Wheeler v. Boyd*, 6 S.

W. 614, 69 Tex. 293; *Newton v. Tolles*, 19 Atl. 1092, 66 N. H. 136, 9 L. R. A. 50, 49 Am. St. Rep. 593).

Where a vendor agrees to convey a farm in gross, amounting to about 115 acres of land, and the deed executed describes the land by boundaries, and adds, "containing about 115 acres of land," a deficiency of 6½ acres will not entitle the purchaser to an abatement of the purchase price. *Weart v. Rose*, 16 N. J. Eq. (1 C. E. Green) 290, 297.

#### As estimate as to time.

A charter of a steamer, providing that the vessel should be delivered for the charterer's use at a certain port "about" a certain day, gave the owner only such additional time as might be necessary by accidents of navigation arising on the voyage after a seasonable start. *The Alert* (U. S.) 61 Fed. 504, 505.

A steamship was chartered at New York through brokers for use in the fruit trade, and the brokers understood that the charterer insisted on a delivery at Santa Marta by April 15th, and by the charter party, executed by them as agents for both parties, the owner agreed to let and the charterer to hire the steamer "from the time of delivery at Santa Marta, 'about' April 10th, for a period of four months." Held, that the use of the word "about" in the clause relating to the time of delivery did not make the time immaterial, but that the word was inserted to allow for contingencies of navigation which might protract the voyage, and that the steamer was nevertheless required to leave New York in time to reach Santa Marta by April 10th under ordinary conditions. *Sanders v. Munson* (U. S.) 74 Fed. 649, 651, 20 C. C. A. 581.

Defendant agreed to ship cattle by a vessel "sailing about the middle of September." The vessel then was at sea. On September 14th defendant inquired the steamer's probable sailing day, and was told about September 27th, to which he made no objection. On September 22d the defendant, being notified that the steamer would sail on the 29th, declined to ship on the ground that his contract did not require him to ship at so late a day. Held, that the ship having construed the indefinite phrase, "about the middle of September," to mean as late as the 27th of the month, and defendant having acquiesced therein, his refusal to ship was a breach of the contract. *Bennett v. Lingham* (U. S.) 31 Fed. 85.

#### As estimate of value.

Where an assignment was made in trust to pay the grantor's debts, set out in a schedule, one of which was put "about" \$1,100, when in fact the debt was upwards of \$1,300, such excess was not so great that the creditor would not be entitled to a dividend

on the whole amount due. *Browne v. Weir* (Pa.) 5 Serg. & R. 401, 402.

Where a contract was for the payment of a claim of "about \$150," the intention being that relief should be had from the entire claim, whatever the amount should be, the contractor was liable to pay the claim, though it amounted to \$196. *Turner v. Whidden*, 22 Me. (9 Shep.) 121, 124.

The amount of a mortgage on assured's property was stated in the policy to be "about \$3,000," and, though the statement had been made in good faith, the mortgage actually amounted to \$4,425. Held to constitute a material misrepresentation, which would avoid the policy; the discrepancy being too large to be covered by the latitude inferred from the use of the word "about." *Glade v. Germania Fire Ins. Co.*, 9 N. W. 320, 321, 56 Iowa, 400.

An application for an insurance policy contained a statement that the premises were mortgaged for "about" \$4,000. Held that, where the mortgage in fact amounted to a little less than \$4,700, it amounted to a misrepresentation which avoided the policy. *Brown v. People's Mut. Ins. Co.*, 65 Mass. (11 Cush.) 280, 282.

The word "about," in a deed in trust made for the purpose of securing or satisfying a number of debts, each of which is described to be for about a certain sum, shows that the exact amount of the deed was not known at the time the deed was executed; and, the debts being otherwise sufficiently described by the description of the debtor and creditors, the deed operates as security for a debt of \$1,481, though it was described in the deed of trust as "about \$1,000." *Canaday v. Paschall*, 38 N. C. 178, 180.

Where a resolution of a county board recited that the county indebtedness was "about" \$100,000, and that an additional tax should be levied until a sufficient amount was raised to meet the indebtedness, the power conferred by a vote under such resolution was exhausted by levies for three years producing \$115,000, and a further levy could not be had, though it appeared that the indebtedness was \$132,000; that amount not being "about" \$100,000. *Peoria & P. U. Ry. Co. v. People*, 64 N. E. 969, 971, 198 Ill. 818.

#### As exact quantity of personality.

Where defendant sold plaintiff "about" 500 tons of nitrate of soda, "to form the full and complete cargo of the John Phillips, 345 tons' register, and, in the event of her being unable to prosecute her voyage from any casualty, then the seller agreed to deliver another cargo or cargoes of about equal quantity," meant that the defendant was to deliver 500 tons, and that the John Phillips, which was supposed to be large enough to carry that quantity, should be employed for

that purpose, and the defendant's contract was not performed by the delivery of 400 tons, though that amount was all that the John Phillips could carry. *Bourne v. Seymour*, 16 C. B. 337, 353.

A contract to furnish 5,000 tons of iron rails provided that they were to be shipped at the rate of "about" 1,000 tons per month, beginning February, 1880, but the whole contract to be shipped before August 1, 1880. Held, that the contract required a shipment of 1,000 tons in each month from February to June, and that a shipment of 400 tons in February and 885 tons in March justified a rescission of the contract. *Norrington v. Smith*, 6 Sup. Ct. 12, 15, 115 U. S. 188, 29 L. Ed. 366.

#### As not exceeding.

Act March 13, 1883, declares that a city of the sixth class must be one "not exceeding" 3,000 inhabitants. Held, that a notice by county supervisors of an election to decide on the incorporation of the city, stating that the number of inhabitants therein was "about 3,000," was a sufficient notice to enable the voters to classify the city as one of the sixth class under the act, since, if it contained "about 3,000," it could not exceed 3,000, prohibited by the statute. *People v. City of Riverside*, 11 Pac. 759, 70 Cal. 461.

"About" means "nearly," "approximately," "almost," and where plaintiff, in an action for the loss of baggage, alleged the value of the articles as being "about" a certain sum, he is limited to such sum in his recovery. *Simpson v. New York, N. H. & H. R. R. Co.*, 38 N. Y. Supp. 341, 342, 16 Misc. Rep. 613.

In the settlement of an estate of an assigning debtor, who had described the claim of A. as "about \$4,500," when it was in fact \$5,867, the other creditors claimed that the claim of A. was limited by the schedule to the amount inserted thereon, or at most to a small amount thereafter, and that such other creditors, who had become parties to the assignment after A., had a good right to rely on the accuracy of the schedule. It was held, however, that A. was entitled to prove his entire claim, as it was expressly declared in the assignment that it might not be practical to make a schedule entirely full and accurate, and the provision was made therein for corrections by the parties. *Dedham Bank v. Richards*, 43 Mass. (2 Metc.) 106, 112.

#### As immediately or soon.

In a statute allowing an attachment when a debtor is "about" to remove his stock, "about" must be taken in its common acceptance as defined by lexicographers—"near to in action, or near to in the performance of some act." *Wrompelmair v. Moses*, 62 Tenn. (3 Baxt.) 467, 474; *Jackson v. Burke*, 51 Tenn. (4 Heisk.) 610, 614.

To authorize an attachment on the ground that defendant is "about" fraudulently to dispose of his property, the charge in the affidavit must import that defendant is on the eve of such fraudulent disposition, and the charge that defendant will dispose of his property to defraud his creditors is insufficient. *Jackson v. Burke*, 51 Tenn. (4 Helsk.) 610, 614.

"About," as used in the attachment law, is not meaningless. It indicates the time the contemplated breach will be perpetrated. A creditor may not be able to swear that his debtor is about to leave the state permanently, while he could safely state that he will leave the state permanently. If the debtor contemplates leaving in six or ten months, the latter statement could not well be considered false, but not so with the former; and "about," in the statute, as connected with an averment that a fraudulent assignment will be made, gives a further indication of the time of making it, that it is about to be made, or that it will immediately be made. *Frere v. Perret*, 25 La. Ann. 500.

The phrase, "about to remove," in a statute giving a right of attachment against a debtor about to remove from the state, means a debtor who is engaged in the act, or is near to the performance of the act, of removing. *Myers v. Farrell*, 47 Miss. 281, 283.

Within an act requiring the Governor to fill by appointment, with the consent of the Senate, all officers when the term is "about to expire," requires the Governor to make his nominations to the Senate at a session immediately preceding the expiration of the term. That satisfies the intent of the words. The idea is that, if a term of a judicial officer will come to an end before the next regular session of the Senate, then the nomination shall be made to the body in session just before or preceding such ending of the term. *Brady v. Howe*, 50 Miss. 607, 617.

#### **As too indefinite in petitions for roads and ditches.**

"About" signifies "nearly," "approximately," "in the neighborhood of," so that a petition for a road, stating that the place of beginning is "about" 150 yards from the dwelling, is equivalent to saying it is approximately 150 yards, and hence is not sufficiently definite to comply with Hill's Ann. Laws Or. § 4062, requiring a petition to specify the place of beginning. *Sime v. Spencer*, 47 Pac. 919, 920, 30 Or. 340.

In an application for a road, qualifying the courses which would otherwise be specified, as running north "about" 63 degrees west, etc., renders the description indefinite. *Adams v. Rulon*, 14 Atl. 881, 882, 50 N. J. Law, 526.

The word "about," in a case in which the court was construing a petition for the

establishment of a highway, which described a portion of the highway as running in a certain direction, about 69 rods, around a certain marsh, said that the word "about," where the context limits and restrains its meaning, does not materially impair the certainty of a description. Technical accuracy is not necessary in a description of a proposed line of road. It is enough that the general description shall be such that a surveyor can, with the assistance of the points definitely named, trace and designate the proposed route. *Adams v. Harrington*, 14 N. E. 603, 606, 114 Ind. 66.

In a petition for a ditch, wherein the description is as follows: "Said ditch to commence at a certain point 'about' 30 rods south of the north line of the southeast quarter of said section"—"about," taken in connection with the words restraining and limiting its meaning, does not materially impair the certainty of the description, and is a compliance with a provision requiring the petition to set forth "a general description" of the starting point. *Corey v. Swagger*, 74 Ind. 211, 212.

#### **Same—In pleading and proof.**

The word "about," used in connection with an allegation of time when a traversable fact occurred, takes all certainty from the allegation, and practically leaves the declaration without any allegation as to the time. *Platt v. Jones*, 59 Me. 232, 241; *State v. Baker*, 34 Me. 52, 53; *Cole v. Babcock*, 2 Atl. 545, 78 Me. 41.

A demand in trespass on the case set forth that "about the month of September" defendant took away, etc. Held that, while not indefinite as to time, it was "carrying the matter too far," as the day was not material. *Lippencott v. Smith*, 4 N. J. Law (1 Southard) 95.

An answer, alleging the making of an agreement "about two weeks prior" to the time when a note became due, is as much indicative of a little less as of a little greater period, and, in connection with an allegation of payment "in about ten days thereafter," falls to show with sufficient certainty payment before maturity. *Colter v. Greenhagen*, 3 Minn. 126, 130 (Gil. 74, 76).

An abstract on appeal, stating that one count in a declaration alleged "about" the same facts as several preceding counts, is too indefinite in its meaning to afford a satisfactory understanding of what the paragraph contained, and insufficient to review a ruling on such paragraph. *City of Birmingham v. Coleman*, 20 South. 383, 384, 111 Ala. 407.

In a complaint, alleging that plaintiff was injured while attempting to descend the steps when the train was "about arriving," means "nearly," "not far from," the arrival of the train, and does not imply that the time

had come when it was reasonably or apparently necessary that plaintiff should descend from the platform and place himself in readiness to enter a car without undue haste, and did not sufficiently aver that the time had arrived when it became the duty of the railroad company to have the depot lighted, failure to do which was the negligence complained of in the action. *Alabama & G. S. R. Co. v. Arnold*, 4 South. 359, 864, 84 Ala. 159, 5 Am. St. Rep. 354.

"About" is a very comprehensive term, and, when used with regard to time, may cover a considerable extent thereof, so that, under the rule permitting evidence of a contemporaneous theft to prove one alleged, evidence of the theft "about" the time of the theft charged is admissible. *James v. State*, 49 S. W. 401, 40 Tex. Cr. R. 190.

Proof as to a debtor prisoner being without the limits "about eight weeks before" a given date held to be very indefinite, but, in view of a construction given to the phrase by the trial court on certiorari, the court refused to say that the trial court erred. *Tunison v. Cramer*, 5 N. J. Law (2 Southard) 498, 499.

An allegation in an indictment that an offense was committed "on or about" a certain day is too indefinite to sustain the indictment; the exact time in such cases being an essential element, and the expression "on or about" a day would not sufficiently advise the defendant which offense he was required to answer, in the event that he might have been engaged in an altercation with the same person on two different, or even more, successive days, but under very different circumstances. *Territory v. Armijo*, 87 Pac. 1117, 1118, 7 N. M. 571.

An allegation in an answer, denying that a certain person, on and prior to the 25th day of April, 1898, was the owner of the land in controversy, and that she died on or "about" said day, is entirely consistent with ownership after April 25th and before she died, and also with ownership before and at said date, subject to a right of possession in some one else as tenant and licensee. *Knight v. Denman*, 90 N. W. 863, 864, 64 Neb. 814.

The use of the words "on or about," in a statement filed by the claimant of a mechanic's lien with the clerk of a district court in order to preserve his lien, that the contract under which he claims was made on or about a certain day, does not preclude the claim in a contest with a mortgagee of the property on which the lien is claimed from introducing evidence showing the exact date of the contract. *Mitchell v. Penfield*, 8 Kan. 186, 188.

The petition in an action stated that since the cause of action accrued defendant had been absent from the state at different

times, amounting in all to a period of "about two years." The court held the word "about," as here used, to be equivalent to the words "more or less," and therefore deprived the other words of the clause of any binding effect which rendered the petition insufficient to take the notes out of the statute of limitation. *Hedges v. Roach*, 21 N. W. 404, 406, 18 Neb. 673.

#### Same—In verdicts and awards.

The finding of a jury for "wood and timber to the amount of about 40 cords" meant any quantity between 30 and 50 cords, and hence rendered the verdict too indefinite to enable execution of process founded thereon. *Baird v. Johnson*, 14 N. J. Law (2 J. S. Green) 120, 123.

"About," as used in arbitration and award, allowing "on about 88 tons country damaged wheat, 15 per 500 lb.," denotes an approximation merely, and is therefore insufficient to furnish data by which the amount to be allowed could be ascertained to a certainty. *Alexander v. McNear* (U. S.) 28 Fed. 403, 405.

A special verdict recited that "about the time" defendant received certain money, etc., plaintiff demanded an accounting. Held that, although the word "about" had an uncertain meaning, it would not control the definite meaning as to the time of the demand. *Woodward v. Davis*, 26 N. E. 687, 127 Ind. 172.

#### As intended for.

"About," as used in a will devising to testator's sons all the corn and other articles which should be "in or about" his mill, or "in or about" his dwelling house, did not include a cargo of wheat consigned to testator, which was in transitu at the time of his death, since such cargo could not be considered "in or about," or in the vicinity of, the mill. *Lane v. Sewell*, 43 Law J. Ch. 378.

In a will in which testator left all the furniture, household effects, etc., "in, upon, or about" the premises, such term included articles which had been upon the property and had been temporarily sent away for repairs, but did not include articles which had been intended for, but which were never in, the house. *Brooke v. Warwick*, 12 Jur. 912, 913, 12 Law T. 41.

#### Intent or purpose indicated.

In the codicil to a will, stating in effect that the testator is "about to convey" certain real estate, the grant not to be charged as an advancement, the clause "about to convey" is a mere expression of an intent to convey, and not a devise. *Hurlbut v. Hutton*, 6 Atl. 286, 295, 42 N. J. Eq. 15.

Code 1873, § 2019, relating to party walls, and providing that he who is "about" to build



contiguous to the land of his neighbor, etc., does not mean merely intends to build, since "about" is defined as "nearly," "approximately," "almost," so that an allegation that plaintiff intends to build the wall does not bring the pleading within the statute. *Switzer v. Davis*, 66 N. W. 174, 175, 97 Iowa, 266.

"About," as used in Rev. St. 1879, § 398, subdiv. 6, providing that an attachment will issue where the defendant is "about" to remove out of the state with intent to change his domicile, means substantially that if a purpose exists to remove, a scheme may be carried out in one, two, three, or several weeks or months, and, if contemplated with a view to evade or delay creditors, a writ may be taken out. *Elliott v. Keith*, 32 Mo. App. 579, 585 (citing *Drake*, *Attachm.* [6th Ed.] § 108).

The meaning of the phrase "about to abscond," as distinguished from "absconded," is that the former is complete without action, while the latter requires action without animus. *Bennett v. Avant*, 84 Tenn. (2 Sneed) 152, 153 (cited in *Elliott v. Keith*, 32 Mo. App. 579).

"About," as used in statute authorizing attachment where the debtor is "about" to remove, is where the debtor entertains a purpose to remove and is making preparations to carry out such purpose. *Myers v. Farrell*, 47 Miss. 281, 284.

The word "about" means "in contiguity or proximity to; not far from; in connection with; nigh or near; in concern with; engaged in; dealing with; occupied upon;" and hence a debtor cannot be regarded as "about" to dispose of his property, so as to authorize an attachment, unless he had formed a purpose or design to do so. *Dueber Watch Case Mfg. Co. v. Young*, 40 N. E. 582, 583, 155 Ill. 226.

About to convert property for the purpose of disposing of it to defraud creditors, within attachment statutes, constitutes the making preparation on the part of the debtor to transfer his property or convert the same into cash with the intent to defraud. *Williams v. McDonald*, 42 N. J. Eq. (15 Stew.) 392, 395, 7 Atl. 866.

"About," in Swan's St. p. 646, authorizing the arrest of a debtor who is "about to dispose of his property with intent to defraud his creditors," means actually about to dispose of property, and not merely circumstances leading the creditor to suppose or believe it. *Hockspringer v. Ballenburg*, 18 Ohio, 804, 812.

#### As more or less.

A petition stated that since the cause of action had accrued the defendant had been absent from the state at different times, amounting in all to "about" two years. It

was held that the word "about" was equivalent to "more or less," and hence too indefinite. *Hedges v. Roach*, 21 N. W. 404, 406, 16 Neb. 673, 675.

#### As near to.

The words "in and about," in an agreement by a street railway company to pave the street in and about the rails in a permanent manner and keep them in repair, must be regarded as if written "within and about the rails," and requires the company to keep in repair, not only that portion of the streets immediately adjoining its rails, but so much as is included between them, and, where it has laid double tracks, the space between such tracks. In *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231, where the words in question were under consideration, the court said, "Clearly, all the space within the defendant's rails fell within its agreement," although it was subsequently said, "But we need not put so wide a construction as that upon the agreement. In or about the rails means at least within the two rails of each track and some space outside of each rail. Beyond doubt it means so far outside as the street surface was disturbed in the act of laying the track." *City of New York v. Second Ave. R. Co.*, 81 Hun, 241, 245.

#### ABOUT THE PERSON.

Code, § 1005, prohibits the carrying of a concealed weapon "about" one's person while off his own premises. Held, that where a person carried a pistol in a basket, which he held in his lap, he was carrying a concealed weapon "about his person," within the statute. *State v. McManus*, 89 N. C. 555, 558.

One who carries a pistol, concealed in a satchel supported and carried by a strap over his shoulder, is guilty under an act making it unlawful to carry a weapon concealed about the person. The weapon was being carried about the person in the sense of moving with the person, and this is the distinct principle which that act has determined. *Warren v. State*, 10 South. 838, 839, 94 Ala. 79.

"About the person," as used in a statute prohibiting the carrying of concealed weapons "about the person," includes the carrying of a pistol concealed in a hand basket, which defendant carried in his hand or on his arm from his residence to a street railway station, and that when he entered the car he placed the basket on the seat beside him. *Diffey v. State*, 5 South. 576, 86 Ala. 66.

Code, § 4109 (Sess. Acts 1880-81, p. 38), provides that any person who carries concealed "about his person" a pistol, etc., on conviction, shall be fined. Held, that proof that defendant carried a pistol in his saddle

bags while riding horseback along a road did not constitute "carrying about the person," within the statute, since, in order to have been carried about the person, the weapon must have been so connected with the person that the locomotion of the accused would carry the pistol with him. *Cunningham v. State*, 76 Ala. 88.

"About their person," as used in Dig. Fla. 498, § 5, declaring that it shall be unlawful for any person to carry arms secretly on or about their person, construed to include a case where defendant carried a pistol in his trousers' pocket so that at the time it was concealed by his coat. *Sutton v. State*, 12 Fla. 135, 136.

Where the evidence shows defendant had a pistol in his hand, it sufficiently shows that he had it about his person. *Woodward v. State*, 5 Tex. App. 296, 297.

A conviction under a statute providing a penalty for carrying a pistol on or about the person may be sustained on evidence that the defendant had a pistol on a wagon seat on which he sat. *Garrett v. State (Tex.)* 25 S. W. 285.

#### ABOUT THE PREMISES.

Liquor purchased from a storekeeper and drank in a public road within five or six steps of his store, and in full view thereof, is drunk about the storekeeper's premises, within Code 1886, prohibiting the sale without license of liquor to be drunk on or about the seller's premises. *Whaley v. State*, 6 South. 380, 381, 87 Ala. 83.

An indictment charged that defendant, not having procured a license as a retail liquor dealer, did sell liquor, which was drunk on or "about" his premises. Held, that the defendant was properly convicted, though the liquor was sold from a jug which defendant had about a mile from his house and about a mile from another. *Powell v. State*, 63 Ala. 177.

A statute prohibiting the sale of liquor to be drunk on or "about the premises" includes a place in a public highway within 15 or 20 steps of the seller's store, in front and in full view of it. *Brown v. State*, 31 Ala. 353, 356.

Defendant's buggy, in which he carried liquor for sale at a public administrator's sale in the country, constituted his premises within the meaning of the statute forbidding the sale of liquors "about the premises." *Pearce v. State*, 40 Ala. 720, 724.

A condition of an insurance policy required the insured to employ a watchman, to be "in or about the premises" by day or night during the time that they are idle. Held, that the terms of the statute are not complied with, where the insured premises were

idle for two months, by employing one watchman, who habitually slept in a building 300 feet away, and "it is too much to say that he was a watchman employed 'to be in or about the premises' during the nighttime." *Rankin v. Amazon Ins. Co. (Cal.)* 25 Pac. 260, 262.

The words "on or about," in a lease of a mill privilege, consisting of land, water power, etc., and giving the lessee the privilege of laying logs, boards, and other lumber on or about said privilege, does not operate as a permission for the lessee to occupy lands of the lessor lying outside the mill privilege. Though the word "about" may frequently have the meaning of "around; on the outside of; without the limitations," etc., yet it as frequently in common conversation means through or over, in various directions or in various parts of the whole, promiscuously. To travel about the country means to go from place to place in the country and not out of town. A man about town is not a man out of town. *Thompson v. Banks*, 43 N. H. 540.

#### ABOUT TO SAIL.

The statement in a charter party, stipulating that a vessel is "about to sail," with cargo, is equivalent to a statement that she has her cargo on board and is ready to sail. *The Wickham*, 5 Sup. Ct. 346, 350, 113 U. S. 40, 28 L. Ed. 835.

The phrase "about to sail," used in a charter party, implies that the vessel is loaded, and hence warranty to that effect is not fulfilled where the vessel was not more than three-elevenths loaded and the time for finishing was subject to all the contingencies of wind, weather, labor, and boats incident to the trade on the north coast of Africa. *Von Lingen v. Davidson (U. S.)* 4 Fed. 346, 350, reversing s. c. (U. S.) 1 Fed. 178, construing the words to mean "to sail as soon as a cargo could be got on board with reasonable diligence."

#### ABOVE.

The natural meaning of the term, in a statute forbidding the erection of a bridge or the keeping of a ferry within a certain distance "above or below" another bridge, would seem to be above or below in the course of the river. The ordinary meaning of these words, in such connection, is not that of location, but that of course or direction, and would mean that such distance should be measured on such course. *McLeod v. Burroughs*, 9 Ga. 213.

"Above" as used in a charter of a bank, providing that it should invest no money in bonds and mortgages, except on real estate worth at least double the amount of the sum invested "above" incumbrances, means "in

excess of," so that such real estate should be worth at least double the investment and double the incumbrances. *Williams v. McKay*, 18 Atl. 824, 828, 46 N. J. Eq. 25; *Williams v. McDonald*, 7 Atl. 866, 868, 24 N. J. Eq. 392.

"Above agreement," as used in the condition of a bond given to secure the performance of a contract, and reciting that the bond shall be void if goods are delivered under the "above agreement," construed to mean the agreement previously set out in the bond. *Booske v. Gulf Ice Co.*, 5 South. 247, 250, 24 Fla. 550.

A stipulation for value was given on the discharge of a vessel from custody in libel proceedings, which fixed her value at \$1,750 and contained an agreement that, in case of default on the part of the claimant, execution might issue for the "above amount." The stipulation bore a heading that it was entered into pursuant to the rules of the court, and by a rule thereof interest on the stipulated value was payable in case of default. Held, that the phrase "above amount" meant, not only the stipulated value, but interest, pursuant to the rule. *The Belle* (U. S.) 3 Fed. Cas. 128, 129.

The phrase, "the above named" A., appearing in the affidavit to a petition, construed to mean the person of the same name mentioned in the body of the petition. *Clement v. Bullens*, 34 N. E. 173, 159 Mass. 193.

## ABRASION.

An "abrasion" is the breaking of the skin. *People v. De Garmo*, 76 N. Y. Supp. 477, 480, 73 App. Div. 46.

## ABRIDGMENT.

See "Fair Abridgment."

### Compilation distinguished.

To abridge means to epitomize, to reduce, to contract, and, to constitute a true and proper abridgment of the work, the whole of it must be preserved in its sense, and therefore the act of abridgment is an act of understanding employed in carrying a larger work into a smaller compass. The mere selection or different arrangement of the part of an original work, so as to bring it into a smaller compass, is not a fair and bona fide abridgment, but there must be a real and substantial condensation of the materials, and the bestowal of labor and judgment thereon, not merely the facile use of the scissors or extracts of the essential parts of the original work. A fair abridgment of any work is considered a new work, since to write it requires labor and the exercise of judgment; but it is only new in the sense

that the views of the author are given in a condensed form, and an abridgment must not only contain the arrangement of the original work, but the ideas must be taken from its pages, and it must be in good faith an abridgment, and not a treatise interlarded with citations. *Story v. Holcombe* (U. S.) 23 Fed. Cas. 171, 173; per *Story, J.*, in *Folsom v. Marsh* (U. S.) 9 Fed. Cas. 342, 345; *Lawrence v. Dana* (U. S.) 15 Fed. Cas. 26, 59.

A compilation consists of selected extracts from different authors, while an abridgment is a condensation of the views of the author. A compilation cannot be extended, so as to convey the same knowledge as the original work, while an abridgment contains an epitome of the work abridged, and consequently conveys substantially the same knowledge. A compiler cannot adopt the arrangement of the work cited, while in an abridgment the arrangement of the original work must be used. A compilation infringes the copyright, if the matter transcribed, when published, shall impair the value of the original book; but a fair abridgment, though it may injure the original, is lawful. The work of the abridger is therefore different from that of a mere compiler, and his labor is of a different kind and of a higher order. *Story v. Holcombe* (U. S.) 23 Fed. Cas. 171, 173.

## ABSCOND—ABSCONDING DEBTOR.

A party may "abscond," and subject himself to the operation of the attachment laws against absconding debtors, and still not depart from the limits of the state. *Field v. Adreon*, 7 Md. 209, 213.

To "abscond" means to go in a clandestine manner out of the jurisdiction of the courts, or to be concealed in order to avoid their process; to hide, conceal, or absent one's self clandestinely, with intent to avoid legal process. *Smith v. Johnson*, 62 N. W. 217, 218, 43 Neb. 754 (citing *Hoggett v. Emerson*, 8 Kan. 262; *Ware v. Todd*, 1 Ala. 200; *Fitch v. Waite*, 5 Conn. 121; *Field v. Adreon*, 7 Md. 209); *Malvin v. Christoph*, 7 N. W. 6, 54 Iowa, 562 (quoting *Bour. Law Dict.*); *Bennett v. Avant*, 34 Tenn. (2 Sneed) 152, 153; *Gandy v. Jolly*, 52 N. W. 376, 377, 34 Neb. 536; *McMorran v. Moore*, 71 N. W. 505, 506, 113 Mich. 101; *Thompson v. Newton*, 2 La. 411, 413; *Norman v. Zieber*, 8 Or. 197, 205.

"Absconding" is withdrawal or absenting one's self privately. *Kingsland v. Worsham*, 15 Mo. 657, 660.

An "absconding debtor," within Const. art. 1, § 17, providing that there shall be no imprisonment for debt except in cases of absconding debtors, is one who leaves or is about to leave the jurisdiction, or who conceals himself within the jurisdiction, for the purpose of avoiding the process of the

courts. *Burrichter v. Cline*, 28 Pac. 367, 868, 3 Wash. St. 135.

An absconding debtor, within an act allowing attachment of goods of an absconding debtor, includes a debtor who was shut up in his own house. *Ives v. Curtis*, 2 Root (Conn.) 133.

An absconding debtor is one who, with intent to defeat or delay the demands of his creditors, conceals or withdraws himself from his usual place of residence beyond the reach of process. It is not necessary that he depart from the limits of the state in which he has resided. If one eludes his creditors, he intends to defraud or delay them. If one eludes his creditors, then he can be held to the intent of evading process, and all the law requires in order to constitute an "absconding debtor" is that he shall put himself in such a position that he can and does successfully evade the service of process. In one case it may be by concealment in his own house. It may consist in going from place to place so quickly as to evade meeting with the service of process anywhere. *Stafford v. Mills*, 32 Atl. 7, 8, 57 N. J. Law, 574.

A man may be absent or absent himself without absconding or intending to elude his creditors. *Conard v. Conard*, 17 N. J. Law (2 Har.) 154, 156.

#### Concealment.

The term "abscond," in a statute requiring a creditor in attachment to make complaint on oath that he is his or her debtor, hath removed or is removing out of the state, or so absconds, etc., that the ordinary process of law cannot be served on him, has been considered as equivalent to the term "conceal," which is used in connection with it. *Wallis v. Wallace*, 7 Miss. (6 How.) 254, 255.

The term "absconding," as used in reference to concealment or absconding of the debtor as ground for attachment, is not strictly synonymous with "concealment"; but concealment for the purpose of defrauding creditors or avoiding service of summons is always "absconding," and both of the terms are used separately and conjunctively. The one refers to the absconding within the state, and the other without the state; so that an affidavit, using the term "absconds or conceals himself," states but one real ground for attachment, the terms being for that purpose equivalent. *Garson v. Brumberg*, 26 N. Y. Supp. 1008, 1005, 75 Hun, 336.

#### Departure from state.

Rev. St. 1879, § 2348, declaring that, when a married man shall have "absconded" or absented himself from his place of abode at the time of levy, his wife may claim exempt articles, should be construed to mean

a fleeing from his place of abode; and hence where a man became apprehensive of arrest, and fled from the state, and it did not appear that he went for the purpose of changing his domicile, he had absconded, within the meaning of the statute, and the wife was entitled to claim his exemption. *Griffith v. Bailey*, 79 Mo. 472, 475.

"An absconding debtor is one who is about to leave the state, either openly or secretly, with intent to delay, hinder, or defraud his creditors of their just debts." A debtor who is about to leave his state of residence without any definite motive to return will be presumed to have such intent. The term grammatically includes debtors who have actually absconded, as well as those who intend to do so. *Norman v. Manciette* (U. S.) 18 Fed. Cas. 807.

Where a statute authorized an attachment against the goods of one about to abscond, an affidavit stating that defendant was about to leave the state was insufficient, inasmuch as an open and undisguised departure does not fall within the meaning of the word "abscond." *Aiken v. Richardson*, 15 Vt. 500, 502.

An affidavit for an attachment which avers that defendant is about to abscond himself and his property out of the state is equivalent to averring that defendant is about to remove himself and his property out of the state privately, and therefore is substantially within the statute authorizing an attachment where defendant is about to remove himself from the state. *Ware v. Todd*, 1 Ala. 199, 200.

#### Remaining in state.

He who lives without the state, or he who has intentionally concealed himself from his creditors or withdrawn himself from the reach of their suits, with intent to frustrate their just demands; but where there has been no imagination of fraud, and the debtor has only removed from his permanent home to another town in the state in an honest pursuit after property, he cannot be held to be an absconding debtor. *Fitch v. Waite*, 5 Conn. 117, 121.

One who has departed secretly or clandestinely, and therefore, when used in an attachment statute, is not fulfilled by an affidavit that the debtor has absconded, where it is proved that he did not leave the state, but merely went to another town on business. *Branson v. Shinn*, 13 N. J. Law (1 J. S. Green) 250, 258.

The term "absconding debtor," in a statute authorizing attachments against "absconding debtors," means a debtor who has actually run away to avoid his creditors, but does not require that he should have left the state. *Field v. Adreon*, 7 Md. 209, 213.

## ABSENCE—ABSENT.

See "Necessary Absence"; "Voluntary Absence."

Where plaintiff contracted to furnish defendant with board and lodging at a stipulated price, "with no deduction in case of absence," the phrase "with no deduction in case of absence" should not be construed to mean that there should be no deductions so long as defendant kept his agreement, but so that under the contract the plaintiff may recover for losses suffered by defendant's leaving before the expiration of the time agreed upon without notice to plaintiff. *Wilkinson v. Davies*, 40 N. E. 501, 146 N. Y. 25.

Rev. St. c. 24, § 1, cl. 4, providing that, on the division of a town, a person having a settlement therein and "absent at the time" shall have his settlement in that part of the town which includes his last dwelling place, does not apply to a person who had gone to sea, and had not been heard from for 16 years before the division of the town, since the law presumes, after an absence of 9 years, that the absentee was dead, and, being dead, he could not be considered absent. *City of Rockland v. Inhabitants of Morrill*, 71 Me. 455, 456.

As used in a statute of limitations, which provides that if, after the cause of action shall have accrued, the defendant shall depart from and reside out of the state, the time of his absence shall not be included in the period of limitation, the expressions "reside out of the state" and "the time of his absence" have the same meaning. They are correlative expressions, so that while the defendant resided out of the state he was absent from the state, and accordingly until he again became a resident of the state the suspension of the operation of the statute continued. *Penfield v. Chesapeake, O. & S. W. R. Co.*, 10 Sup. Ct. 566, 569, 134 U. S. 351, 33 L. Ed. 940; *Burroughs v. Bloomer*, 5 Denio, 532, 535.

In section 1019 of the Revised Statutes, providing that service on corporations may be made on any business agent in the county, in the absence of any of the other representatives named, does not mean absence from the state, but merely from the county. *Florida Cent. & P. R. Co. v. Luffman* (Fla.) 33 South. 710.

Where a resident of a state against whom a cause of action has accrued removes his residence to another state, but continues his business in the state where he formerly resided, coming into the state openly, notoriously, and regularly each business day, and remaining there during working hours, he is not absent from the state within the meaning of a statute suspending the running of the statute of limitations as against

parties absent from the state. *Webster v. Citizens' Bank of Omaha* (Neb.) 96 N. W. 118, 119.

### Concealment.

Where a debtor was arrested, but escaped and fled to another house, denying himself to callers and remaining there until dark, intending to delay his creditors, and then, returning to his own house, remained in his room for nearly a month, he was guilty of "absenting" himself to defraud his creditors, within an attachment statute. *Bayly v. Schofield*, 1 Maule & S. 338, 349.

Within the statutes authorizing process of foreign attachment, an "absent and absconding debtor" is a person who lives without the state, or who has intentionally concealed himself from his creditors, or withdrawn himself from the reach of their suits, with intent to frustrate their just demands. Thus, if a person depart from his usual residence, or remain absent therefrom, or conceal himself in his house, so that he cannot be served with process, with intent to unlawfully delay or defraud his creditors, he is an absconding debtor; but if he depart from the state, or from his usual abode, with the intention of again returning, and without any fraudulent design, he has not absconded, nor absented himself, within the intendment of the law. *Fitch v. Waite*, 5 Conn. 117, 121.

### Intention.

The "absence from the state," within the meaning of the attachment law, making absence from the state for four months a ground of attachment, includes the case of a debtor who leaves his home with the intention of going out of the state, who consummates such purpose, and is absent from his home pursuant to such intention, for the period of four months, notwithstanding some unlooked-for casualty may have delayed him a few days from passing beyond the territorial boundary of the state. *Spalding v. Simms*, 61 Ky. (4 Metc.) 285, 289.

### Nonresidence.

"Absence" and "nonresidence" are not convertible terms, within the attachment act. *Camman v. Bridgewater Copper Min. Co.*, 12 N. J. Law (7 Halst.) 84.

St. 1838, p. 287, authorizing an attachment of debts due from any person to an "absent debtor," will be construed to include nonresident debtors, as well as resident debtors temporarily absent. *Cochran v. Fitch* (N. Y.) 1 Sandf. Ch. 142, 144.

The word "absence," as used in Laws Wash. 1888, pp. 26, 27, § 5, providing for service by publication when other service cannot be had by reason of the "absence" of defendant, does not mean simply being away from a usual place of residence within the juris-

diction of the court, nor a simple absence from the county where the action is pending, but is intended as the equivalent of nonresidence, and only intended to authorize service by publication in cases where the defendant resides out of, and is therefore absent from, the state. *State v. Superior Court of Pierce County*, 33 Pac. 827, 828, 6 Wash. 352.

"Absent," as used in Rev. St. c. 120, § 6, providing that all actions of assumpsit or on the case must be brought within six years, unless the plaintiff is absent from the United States, extends to foreigners, who never were within the United States. *Von Hemert v. Porter*, 52 Mass. (11 Metc.) 210, 215.

"Absent," as used in Comp. St. c. 192, §§ 4, 9, declaring that if the defendant, at the time the cause of action accrued or afterwards, was "absent" from and residing out of the state, the time of such absence shall be excluded in the computation of the several times limited for the commencement of personal actions, refers only to the condition or situation of the person, without allusion to any prior condition or situation, and hence the statute applies to a person who has never been in the state. *Paine v. Drew*, 44 N. H. 306, 317.

Where a statute of limitation provides that the time of defendant's absence should not be a part of the time limited for the commencement of an action, such absence includes two different conditions, physical absence in the case of a resident, and residence without the state in the case of a nonresident. It was held in *Fowler v. Hunt*, 10 Johns. 464, that successive absences could be cumulated, and the aggregate deducted from the statutory period. *Burroughs v. Bloomer*, 5 Denio, 532, went further, and held that the expressions, "and reside out of the state" and "the time of his absence," have the same meaning, so that, while the defendant in this case resided out of it, he was absent from the state, and accordingly, until he again became a resident of the state, the suspension of the operation of the statute continued, and where a defendant was a resident of another state, doing business in New York and attending there on secular days, it was held that the statute did not run in his favor. *Connecticut Trust & Safe Deposit Co. v. Wead*, 65 N. E. 261, 262, 172 N. Y. 497, 92 Am. St. Rep. 756.

#### **Presumption of death created.**

"Absence," as used in reference to the absence of a person from his domicile unheard of for seven years creating a presumption of death, means that the person is not at the place of his domicile and that his actual residence is unknown. Removal alone is not enough. *Francis v. Francis*, 37 Atl. 120, 180 Pa. 644.

1 Wds. & P.—8

"Absents," as used in Comp. Laws S. D. § 5312, providing that, if any person on whose life any estate in real property depends "absents" himself, in the state or elsewhere, for seven years together, he shall be accounted naturally dead, means to take or withdraw one's self to such a distance as to prevent intercourse. *Burnett v. Costello*, 87 N. W. 575, 577, 15 S. D. 89.

In 2 Rev. St. p. 139, § 6, authorizing a widow to recover dower in real estate belonging to her husband in case he has absented himself for a space of five successive years, etc., "absented himself" means a withdrawal of the husband's whereabouts from the wife and his relations, and from the ordinary and usual opportunities of identification, which would naturally and ordinarily give rise to the presumption of death after the lapse of five successive years. *Jones v. Zoller*, 19 Wkly. Dig. 287.

#### **Prior residence required.**

As the term "absence" is used in statute of limitations, requiring that the time within which a debtor shall be "absent" from the state will not be considered as part of the time limited within which suit may be brought on the debt, it means and applies only to a person who has been a resident of the state and is temporarily absent, since a person not a resident and never having a domicile within the state cannot be considered to be absent within the meaning of the statute; such person not being entitled to the defense of the statute at all. *White v. Hight*, 2 Ill. (1 Scam.) 204, 205; *Milton v. Babson*, 88 Mass. (6 Allen) 322, 325; *Snoddy v. Cage*, 5 Tex. 106, 107.

In Rev. St. c. 748, § 7, allowing wills to be contested by suit in chancery for three years after probate, and not afterwards, save to persons absent from the state, the words "absent from the state" do not apply to nonresidents. *Wheeler v. Wheeler*, 25 N. E. 588, 589, 124 Ill. 522, 10 L. R. A. 613.

In Act 1796 (1 Dig. 58), providing that a chose in action may be subjected by a chancery proceeding to the payment of a debt in the proceeding against "absent defendants" and their debtors residing within the state, "absent defendants" means persons who had been resident within the state, but were temporarily absent therefrom. The difference in meaning between "absent defendants" and "nonresidents" is as striking as that between nonresidents and citizens. A man may be a citizen of the state and yet nonresident, and he may be a resident and yet an absent defendant; and as it is the duty of men who owe debts to pay them before leaving the state, or make arrangements for meeting them if the debts should become due in their absence, if they fail to do so, they may be proceeded against under

the act. *Curd v. Letcher*, 26 Ky. (3 J. J. Marsh.) 443, 445.

Acts 1777, c. 2, giving the right to attach property of an "absent debtor," had no other meaning than that of a debtor who had removed himself from his home to avoid process, and did not confer jurisdiction to render a judgment on an attachment against the inhabitant of another state. *Den v. Deaderick's Ex'rs*, 9 Tenn. (1 Yerg.) 125, 135.

In a statute providing that, if a defendant cannot be found and is not "absent from the island," it shall be deemed good service by leaving the summons at his usual place of abode, the words "absent from the island" meant only persons who had been present there and subject to jurisdiction of the court out of which the process issued. *Buchanan v. Rucker*, 9 East, 192, 194.

Hutch. Code, p. 764, authorizing notice by publication against any "absent" defendant, is to be construed as meaning defendants having their residence in the state, who are absent from the state or cannot be found at their usual place of residence. *Wash v. Heard*, 27 Miss. (5 Cushm.) 400, 405.

#### Temporary absence.

To an ordinary mind the term "absence," when applied to the occupant of a dwelling house, does not convey the same but a widely different meaning than "removal," and according to the common understanding persons leaving their houses on visits, excursions, or other temporary occasions do not remove from or cease to occupy them. *Stone v. Granite State Fire Ins. Co.*, 45 Atl. 235, 236, 69 N. H. 438.

Absence from the state, within the meaning of the statute of limitations, must be not merely temporary and occasional, but of such a character and with such intent as to constitute a change of domicile. *Hallet v. Bassett*, 100 Mass. 167, 170; *Barney v. Oelrichs*, 11 Sup. Ct. 414, 415, 138 U. S. 529, 34 L. Ed. 1037.

With reference to a person in a statute other than that of limitation, absence means one who has been present, not a nonresident. The word conveys the idea of a temporary condition, a cessation of, and the probability or possibility of returning, presence. *Wheeler v. Wheeler*, 35 Ill. App. 123, 124.

While every casual or temporary absence of a debtor from his place of abode for a brief period may prevent the service of a summons, yet it is not ground of attachment. It may be asserted that, where the absence is such that, if a summons issue on the day the attachment is sued out, it will be served on the defendant in sufficient time before the return day to give the plaintiff all the rights which he can have at the return

term, defendant has not so absented himself within the attachment statute as that ordinary process of law cannot be served upon him. *Kingsland v. Worsham*, 15 Mo. 657, 661. This rule was followed in *Charlton County v. Moberly*, 59 Mo. 238, 239, where it was held that, where defendant has merely left the state with his family temporarily for business, health, or relaxation, he has not absented himself within the meaning of the statute.

The absence of a debtor which is ground for domestic attachment does not apply to the absence in the regular course of his business of a theatrical manager, whose business takes him away from the state. *Loesh v. Rivers*, 5 Phila. 83.

Within the meaning of an attachment law, authorizing an attachment if the debtor is absent or absconding, the word "absent" will not be taken or understood in its literal sense; but what is understood by the word is that the debtor should not only be absent, but that he has absconded or is a nonresident. Mere absence from the state temporarily on business or pleasure certainly would not fall within the mischief of the act, and consequently could not be intended as having been meant by the Legislature. *Mandel v. Peet*, 18 Ark. 236, 243.

Under the provisions of the by-laws of a beneficial society that no sick benefits shall be granted to resident brothers for more than a week prior to application therefor, and an "absent" brother claiming benefits must send a statement of the case, attested by the sachem of a tribe near the place where he may be, one out of the jurisdiction of the tribe or lodge to which he belongs is an absent brother, without regard to the place of his residence, since the term "resident" does not have reference to the legal residence of a party, but designates one who at the time of claiming benefits is within the jurisdiction of the tribe, while an absent brother is one who happens at the time to be permanently or temporarily without the jurisdiction. *Walsh v. Cosumnes Tribe*, No. 14, Improved Order of Red Men, 41 Pac. 418, 103 Cal. 496.

#### Executor.

As used in Code Civ. Proc. Cal. § 1354, providing that, where a person "absent from the state" is named executor, if there is another executor who accepts the trust and qualifies, the latter may have letters testamentary and administer the estate until the return of the absentee, who may then be admitted as a joint executor, "absent" means a person both actively and constructively absent; that is, a person who is out of the state and has made no application for letters. In *re Brown's Estate*, 22 Pac. 233, 234, 80 Cal. 381.

**Foreign corporation.**

Shannon's Code, § 4455, provides that, if the person against whom an action accrues be absent from the state, the time of such absence shall not be taken as part of the time limited for the commencement of the action. It was held that absence from the state meant such absence as renders it impracticable at all times to obtain the service of process, so that while a corporation may reside beyond the state, and be out of the state, still it may, through its officers and agents, subject itself to the jurisdiction of the courts of the state, and not be absent, within the sense of this provision of the statute. *Turcott v. Yazoo & M. V. R. Co.*, 45 S. W. 1067, 1069, 101 Tenn. 102, 40 L. R. A. 768, 70 Am. St. Rep. 661.

The term "absent from the state," as used in a statute authorizing the verification of an answer to be made by the agent or attorney of defendant if he is absent from the state, does not describe a foreign insurance company which has appointed an agent in the state upon whom process may be served for it, as provided in Foreign Corporation Act, §§ 7, 8. *West v. Home Ins. Co. (U. S.)* 18 Fed. 622.

**Husband or wife.**

Civ. Code, § 61, declares that a subsequent marriage contracted with any person during the life of a former husband or wife is illegal, unless such former husband or wife was "absent" and not known to such person to be living for the space of five successive years immediately preceding such present marriage, etc. Held, that an absent spouse, within the meaning of the statute, is one who has left his or her residence, home, or domicile; and hence a wife, who had been living with her husband in Australia, and who left him and went to live with her parents, who subsequently moved to California, was an absent spouse after the expiration of the five years, entitling the husband to remarriage. *Jackson v. Jackson*, 29 Pac. 957, 94 Cal. 446.

"Absented himself," as used in Rev. St. p. 139, § 6 (volume 3, § 2332), providing that if any person, whose husband or wife shall have "absented himself," or herself, for the space of five years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time, etc., means a withdrawal of his or her whereabouts from the husband or wife and relatives, and from the ordinary and usual opportunities of identification. It means that withdrawal from the family which would, after the lapse of five successive years, lead naturally to the inference that death had ensued. The fact that a husband so absenting himself still remained in the general locality in which he lived did not prevent his departure being an "absenting himself," within the meaning of the

statute, if his whereabouts were unknown to his family or relatives. *Jones v. Zoller (N. Y.)* 29 Hun, 551, 554; *Id.*, 32 Hun, 280, 283.

**Judge.**

"Absence, sickness, or other inability," as used in a statute giving a justice of the peace jurisdiction in the "absence, sickness, or other inability" of a municipal judge, cannot be construed to include an arbitrary refusal of the judge to act in a given case. *Klause v. State*, 27 Wis. 462, 463.

Code 1851, § 111, providing that, in case of the "absence" of a county judge, the county clerk shall fill the place of such judge, means "absence" from the county seat, but does not mean that the judge is to be regarded as out of office while absent, or that he shall do no official act during that period. Judicial power is necessarily local in its nature, and its exercise, to be valid, must be local also; but it is otherwise as to ministerial power, and the act of a county judge in signing, sealing, and issuing bonds for the erection of a courthouse, which he was authorized to do, and was merely ministerial in its character, was properly done by him, instead of by the clerk, though he was without the state, for by being absent he did not wholly abdicate his office, certain powers thereof with which he was clothed merely falling into abeyance and continuing until his absence ceased. *Lynde v. Winnebago County*, 83 U. S. (16 Wall.) 6, 14, 21 L. Ed. 272.

Although a District Judge of a Circuit Court of the United States was on the bench at the time of the hearing of a cause, yet if he did not sit in the cause nor participate in the trial he was absent in contemplation of law. *Bingham v. Cabbot*, 3 U. S. (3 Dall.) 19, 36, 1 L. Ed. 491.

"Absent," as used in Acts 1888, p. 64, authorizing the chief justice to hold court in the absence of a law judge, means nonpresence in the courts. When the law judge is temporarily away, he must be presumed to be away by reason of some inability to attend, and he is absent in the statutory sense. *State v. Engeman*, 23 Atl. 676, 677, 54 N. J. Law (25 Vroom) 247.

**Parties in judicial proceedings.**

Comp. St. p. 645 (Code, § 1001), declaring that, when judgment shall have been rendered against a defendant in his "absence," the same may be set aside under certain conditions, means where a judgment is rendered against a defendant who did not appear. *Strine v. Kauffman*, 11 N. W. 867, 868, 12 Neb. 423.

Gen. St. c. 146, § 21, limits the right of review to petitions filed within a year from the date of the judgment complained of except where the judgment was rendered in the



"absence" of petitioner. Held, that the word "absence" as so used should not be construed as meaning absent from the commonwealth, but that a defendant was absent within the meaning of the statute where his presence was not secured either by his appearance or by service of summons, in which case a judgment rendered on his involuntary default was rendered in his absence. *James v. Townsend*, 104 Mass. 367, 371.

In Comp. Laws 1879, c. 81, § 14, providing that, when judgment is rendered in justice court against defendants in their absence, it may be set aside, absence is not equivalent to the term "failed to appear," but is to be construed as meaning "not actually present at the time of the actual trial," and hence the section authorizes the setting aside of such judgment when the defendant appeared, but was not present at the time of the trial. *Covart v. Haskins*, 18 Pac. 522, 523, 39 Kan. 571.

Where defendant has been served with personal service, and enters his appearance, but fails to appear and defend, relying on a promise of notice, the judgment was not rendered in his "absence," within the meaning of Pub. St. c. 187, § 22, providing that a judgment so rendered may be reviewed within a year. *Riley v. Hale*, 16 N. E. 276, 278, 146 Mass. 465.

#### Protest.

"Absence of protest," as used in 1 Supp. Rev. St. U. S. 81, providing that whenever duties upon any imported goods shall have been determined and paid, and such goods shall have been delivered to the owner, such statement of duty shall, after the expiration of one year from the time of entry, in the absence of protest by the owner, be final and conclusive upon the parties, means "the absence of any existing protest pending and in force at the expiration of a year or at the date of the proposed repudiation; that is, a protest upon which proceedings are then pending, or which may serve as a basis for some future appeal to the Secretary or of some suit in the courts." *United States v. Lang* (U. S.) 18 Fed. 15, 18.

#### Public officer.

Many words of common use in our language have two or more meanings. It is not infrequent that a word having one meaning in its ordinary employment has a materially different or modified meaning in its legal use. The word "absence" is a fair example. It is held that one may be absent, though actually present, as where a judge, though on the bench, does not sit in the cause. *Bingham v. Cabbot*, 3 Dall. 19, 1 L. Ed. 491. It has also been held to mean not present. *Paine v. Drew*, 44 N. H. 306. It has been held, too, as not meaning out of the state only. "Absence" and "disability"

are words which, from their use in statutes, may have two different meanings. They are quite frequently found in some form in the statutes of this and other states, as well as in the Constitutions of many of the states. The Legislature has not defined the sense in which either of them is to be construed. "Disability" is a word of scarcely less ambiguity, as generally used in common parlance, than "absence." It is a difficult task, if not an impossible one, to lay down a rule that could apply to all cases, defining the meaning of "absence" as used in the statute. The word "absence" as used in the statute providing that, on the "absence" of the mayor of a city, the president of the board of aldermen shall act as mayor, means not merely physical absence of the mayor from the city, but such an absence as renders him incapable for the time being of performing the act that may be in question, which act must present such a necessity for immediate attention as to require it to be then executed. *Watkins v. Mooney* (Ky.) 71 S. W. 622, 624.

The words "necessarily absent," as used in the Louisiana statute authorizing district judges to appoint an attorney to represent the state when from any cause the district attorney is recused, "necessarily absent," or sick, means necessarily absent from the court, not from the parish; and the court was authorized to appoint an attorney to represent the state, where the district attorney was necessarily absent from the court, though not from the parish. *State v. Smith*, 31 South. 693, 694, 107 La. 129.

"Absence," as used in Act April 21, 1876 (1 Gen. St. p. 841), providing that a deputy clerk is empowered to take the verdict of a jury during the "absence" of the clerk, means the nonpresence in the courts. *Manners v. Ribsam* (N. J.) 41 Atl. 676, 677 (citing *State v. Engeman*, 54 N. J. Law, 247, 23 Atl. 676).

Gen. St. 1899, § 1931, providing that all writs, orders, and processes of the probate court shall be issued and directed to the sheriff to be served, except in the case of his "absence" or nonattendance, means absence from the county where the process is to be served. *Skinner v. Board of Com'rs of Cowley*, 66 Pac. 635, 637, 63 Kan. 557.

Act 1831 authorizes the deputy clerk of a county to perform the duties of clerk whenever the clerk shall be absent from his office. Held, that the word "absent," so used, should be construed at a distance, or to mean "a withdrawal of the clerk from the performance of his official duties, and hence the deputy has no authority to act if the clerk, though without the office, is in the place in which the office is situated at the time." *Lucas v. Ensign*, 4 N. Y. Leg. Obs. 142, 143.

#### Servant.

St. 4 Geo. IV, c. 34, § 3, making it an offense for a person who has contracted to

serve another for a certain term to absent himself from his service, means a willful absence from such service without lawful cause. In *re Turner*, 9 Adol. & E. (N. S.) 80, 90.

**Soldier.**

"Absented himself," as used in Rev. St. U. S. § 1342 (Article of War, 103), providing that no person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless by reason of having "absented himself," or of some other manifest impediment, he shall not have been amenable to justice within that period, should be construed to mean such an absence as imposes an impediment to the bringing of the offender to trial and punishment. It means absence from the jurisdiction of the military courts—that is, absence from the United States; and the statute does not admit of the strict construction that the business referred to is limited to absence from post of duty. Hence the statute applies to desertions. In *re Davison* (U. S.) 4 Fed. 507, 509.

**ABSENT FROM DUTY.**

Act March 3, 1863, providing that any officer "absent from duty with leave" shall, during his absence, receive half of the pay and allowance prescribed by law, cannot be construed to apply to an officer ordered to proceed to a particular place and there to await orders; for, while absent from duty with leave, the officer is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses. If he reports himself at the expiration of his leave, it is all that can be asked of him. The obligations of an officer directed to proceed to a place specified, there to await orders, are quite different. It is his duty to go to that place, and to remain at that place. He cannot go elsewhere. He cannot return until ordered. He is as much under orders, and can no more question the duty of obedience, than if ordered to an ambush to lie in wait for an enemy, to march to the front in a particular direction, or to the rear by a specified time. *United States v. Williamson*, 90 U. S. (23 Wall.) 411, 414, 23 L. Ed. 89.

**ABSENT WITHOUT LEAVE.**

Absence without leave does not constitute the offense of desertion under the articles of war, or willful desertion. When committed by a soldier, it is a violation of duty; but, as it is accompanied always with an intent to return, and to submit himself, if necessary, to punishment, if it has been incurred, it is a very different offense to that of abandoning the service permanently, or for some indefinite time, unaccompanied by an intent

to return, which constitutes a desertion. *Inhabitants of Hanson v. Inhabitants of South Scituate*, 115 Mass. 336, 339.

Absence of a patrolman from roll call because of serious illness, word having been sent giving information of such fact, but not until an hour after roll call, was not "absence without leave," for which such patrolman could be legally removed from office. *People v. Board of Police*, 8 N. Y. Supp. 640, 55 Hun, 445.

**ABSENTEE.**

An "absentee" is a person who has resided in the state and has departed without leaving any one to represent him. *State v. Judge of Parish Court*, 15 La. 81, 85; *State ex rel. Denny v. Judge of Second Dist. Court of New Orleans*, 16 La. Ann. 390, 392.

An absentee may be either a person who has resided in the state and has departed without leaving any one to represent him or a person who was never domiciled in the state and resides abroad. *Samory v. Montgomery*, 19 La. Ann. 333, 338; *Dreville v. Cucullu*, 18 La. Ann. 695, 696; *Succession of Guillemain*, 2 La. Ann. 634, 636; *Hill v. Bowman*, 14 La. 445, 447; *Morris v. Bienvenu*, 30 La. Ann. 878, 880.

The term is the opposite of "resident," and hence a person cannot be both a resident and an absentee at the same time. Therefore persons residing in a city within the state, who went outside the state to a resort during a part of the year without leaving an agent to represent them, could not be considered as absentees, authorizing proceedings against them in personam on being cited to a curator ad hoc. *Dreville v. Cucullu*, 18 La. Ann. 695, 696; *Morris v. Bienvenu*, 30 La. Ann. 878, 880.

One who has a dwelling in the state and resides in it for some months during each year, but is a citizen of another state, is an "absentee," who, if he have no known representative, may be legally represented in a suit brought against him by a curator ad hoc. *Morris v. Bienvenue*, 30 La. Ann. 878, 880.

An "absentee" is a person who has resided in the state, and has departed without leaving any one to represent him. It means, also, the person who never was domiciliated in the state and resides abroad. In matters of succession, the heir whose residence is not known is deemed an absentee. *Civ. Code La. 1900*, art. 3556, subd. 3.

**ABSINTHE.**

As a spirit, see "Spirit—Spirits."

"Absinthe," according to the *Century Dictionary*, is "the common name of a highly

aromatic liqueur of an opaline green color and bitter taste," and is prepared by "steeping in alcohol or strong spirits bitter herbs," the chief of them being wormwood. It is used as a beverage, and is not a proprietary preparation. It appeared that the wormwood "has a medicinal effect upon the human system as a tonic" and that the article contains anisette, a cordial. *Erhardt v. Steinhart*, 153 U. S. 177, 179, 182, 14 Sup. Ct. 775, 777, 38 L. Ed. 678, 679.

## ABSOLUTE.

"Absolute" came originally from the Latin, and means to "loose from." Webster gives many definitions of the word, as "completed, or regarded as complete; finished; perfect; total; as absolute perfection, absolute beauty. Freed or loosed from any limitation or condition. Positive; clear; certain. Unconditioned; unrelated." *People v. Ferry*, 24 Pac. 33, 34, 84 Cal. 31; *Wilson v. White*, 33 N. E. 361, 364, 133 Ind. 614, 19 L. R. A. 581.

The word "absolute" has various significations, which it receives in popular use. It means "complete, unconditional, not relative, not limited, independent of anything extraneous." In its signification of "complete, not limited," it is used in the law to distinguish an estate in fee from an estate in remainder. In its signification of "unconditional," it describes a bond, a conveyance, or estate without condition. In its signification of "not relative," it describes the rights of a man in the state of nature, as contradistinguished from those which pertain to him in the social relations. *Johnson's Adm'r v. Johnson*, 82 Ala. 637, 640.

The term "absolute," as used in insurance policies, has been held to be synonymous with "vested," and used in contradistinction to "contingent" or "conditional." *German Fire Ins. Co. v. Stewart*, 42 N. E. 286, 289, 13 Ind. App. 627 (citing *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581); *Wooddy v. Old Dominion Ins. Co.*, 31 Grat. (Va.) 362, 375.

A statute of South Carolina authorized the sale and conveyance of a canal and appurtenances, subject to certain conditions, among which was one that the state should be furnished with 500 horse power of water power and the right of the state to the free use of said 500 horse power shall be "absolute." It was held that "absolute" meant unrestricted and unconditional, so that the state was entitled to grant the right to third parties to use any part of the water power so reserved. "Absolute," as so used, does not mean merely "perpetual," or "for all time," but is to be construed in its usual legal sense. Thus an absolute estate in land is an estate in fee simple; in the law of insurance,

an absolute interest in property is one which is so completely vested in the individual that there should be no danger of his being deprived of it without his own consent. *Columbia Water Power Co. v. Columbia Electric St. Ry., Light & Power Co.*, 19 Sup. Ct. 247, 253, 172 U. S. 475, 43 L. Ed. 521.

An absolute conveyance, an absolute right, an absolute estate, or an absolute sale, is that which cannot be defeated or changed by any condition, restriction, or limitation. A conditional sale, and so on, as above specified, is one which is restricted or limited by some condition, the nonperformance of which will hinder it from operation and effect, if it be a condition precedent. *Falconer v. Baltimore & J. R. Co.*, 69 N. Y. 491, 498.

## ABSOLUTE CONVICTION.

In a prosecution for robbery, the court charged that the jury's opinion of the guilt of the accused must "approach absolute conviction," in consideration of which the court said that the word "absolute" was given many meanings, among others, "completed, or regarded as complete; finished, perfect, total; freed or loosed from any condition or limitation; positive, clear, certain." Hence absolute conviction means conviction beyond a possibility of doubt, which the law does not require a jury to attain in order to render a verdict against a defendant; but there was no error in directing the jury that their opinion must "approach absolute certainty," viz., a conviction so perfect and unconditional as to exclude the possibility of a doubt. *People v. Ferry*, 24 Pac. 33, 34, 84 Cal. 31.

## ABSOLUTE DELIVERY.

Absolute delivery of a deed is one which is complete upon the actual transfer of the instrument from the possession of the grantor. *Dyer v. Skadan*, 87 N. W. 277, 278, 128 Mich. 348, 92 Am. St. Rep. 461.

## ABSOLUTE DISPOSAL.

A devise in a will was in these words: "I give, bequeath, and devise to my wife, Mary, after payment of my debts and funeral expenses, all my estate, both real and personal, to be at her 'absolute disposal,' according to an agreement made with her," etc. Held, that the words "absolute disposal," as there used, were sufficient to carry the fee, and gave testator's wife the entire estate left by him. *Jackson v. Babcock* (N. Y.) 12 Johns. 389, 393.

## ABSOLUTE DRUNKENNESS.

Absolute drunkenness, within the meaning of the rule that absolute drunkenness is a defense against contracts made while in a state of absolute drunkenness, does not mean complete insensibility. A man may be

absolutely drunk, without being dead drunk. *Cavender v. Waddingham*, 5 Mo. App. 457, 465.

### ABSOLUTE ESTATE.

By "absolute estate," as used in a will giving an estate absolutely and in fee to certain persons named, is intended a full and complete estate. *Cooper v. Cooper*, 38 Atl. 198, 200, 56 N. J. Eq. 48.

"Absolute" is not a word used to distinguish a fee from a life estate, but to distinguish a qualified or conditional from a simple fee; and in a devise to testator's son, with a provision that, should he have other children, "then the devise to him, his heirs and assigns, to be absolute," it means that, in the event of the son having other children, his estate should no longer be subject to certain executory devises over, but should be absolute. *Greenawalt v. Greenawalt*, 71 Pa. (21 P. F. Smith) 483, 487.

### ABSOLUTE FEE.

See "Fee Simple Absolute."

### ABSOLUTE GIFT.

There is a difference between an absolute gift and one made *mortis causa*. In the former case the donee becomes in the lifetime of the donor the absolute owner of the thing given; but *donatio mortis causa* leaves the whole title in the donor, unless the event occurs, to wit, the death of the donor, which is to divest him. *Buecker v. Carr*, 47 Atl. 34, 35, 60 N. J. Eq. 300.

### ABSOLUTE GUARANTY.

An absolute guaranty is an unconditional promise of payment or performance on default of the principal. *White Sewing Mach. Co. v. Powell* (Ky.) 74 S. W. 746 (citing *Mast v. Lehman*, 100 Ky. 466, 83 S. W. 1056).

An "absolute guaranty," in the law of negotiable instruments, is an unconditional undertaking on the part of the guarantor that the maker will pay the note. *Beardsley v. Hawes*, 40 Atl. 1043, 1044, 71 Conn. 39.

An "absolute guaranty" of a bill or note is a guaranty of the payment of the bill or note, and one who guarantees payment becomes absolutely liable on any default of payment by its principal. *Esberg-Bachman Leaf Tobacco Co. v. Heid* (U. S.) 62 Fed. 962, 963.

An "absolute guaranty" is one simultaneously acted upon, as in the case of goods then sold and delivered to a third party on the credit of the guaranty, or that has no element of futurity in it. *Farmers' Bank v. Tatnall*, 31 Atl. 879, 880, 7 Houst. 287.

An absolute guaranty is an unconditional promise of payment or performance on default of the principal. To bind the principal, it is not necessary that there should be notice of acceptance of the guaranty and default of the principal, or that any steps should be taken to enforce the contract guaranteed against the principal. The guarantee may proceed against the guarantor on default of the principal. *Yager v. Kentucky Title Co.*, 23 Ky. Law Rep. 2240, 2241, 66 S. W. 1027.

### ABSOLUTE IMBECILITY.

The word "absolute," used in an instruction that the fact that testator's mind was impaired by age or disease, if not to the point of lunacy or "absolute" imbecility, would not take away his legal capacity to make a will, is defined as completed, or regarded as complete, finished, perfect, total; and the synonyms are "perfect; total; complete." The instruction was held erroneous, on the ground that such an extent of mental weakness was not required to avoid a will.—*Campbell v. Campbell*, 22 N. E. 620, 622, 130 Ill. 466, 6 L. R. A. 167.

### ABSOLUTE INTEREST.

In a condition of a policy providing that any interest in property insured, not "absolute," must be represented to the company, the word "absolute" refers to the character or quality of the estate, and is synonymous with "vested," and used in contradistinction to "contingent" or "conditional." *Wooddy v. Old Dominion Ins. Co.* (Va.) 31 Grat. 362, 375, 81 Am. Rep. 732; *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 21, 76 Am. Dec. 581; *German Fire Ins. Co. v. Stewart*, 42 N. E. 286, 289, 18 Ind. App. 627; *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 13, 17, 93 Am. Dec. 289.

The owner of an "absolute interest" in property, within the meaning of a policy of insurance, is one who "has dominion of a thing, real or personal, corporeal or incorporeal," with the right to enjoy, use, or destroy the same, as far as the law permits or he is not prevented by covenant or agreement. The owner of a fee may commit waste, but the owner of a life interest cannot lawfully do so. "Sole owner" must mean that no one else has or owns an interest in the real estate, and there is no distinction between sole owner and the owner of an "absolute interest." A sole interest and an absolute interest mean the same thing. *Garver v. Hawkeye Ins. Co.*, 28 N. W. 555, 556, 69 Iowa, 202.

The term has no fixed, unvarying meaning, when used in connection with an interest in property. It is not always synonymous with "unqualified." Used in connection with an estate, it means an estate in lands not

subject to, or defeasible on, any condition. It may be quite as often and pertinently used in contradistinction to "contingent" or "conditional" as to "qualified" or "unincumbered," and in a contract of insurance requiring the interest, if not a leasehold or not absolute, to be noted in the policy, it is so used. It did not require that the policy should express a mortgage upon the property owned by the insured in fee simple. *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 431, 8 Am. Rep. 149.

#### **Equitable title.**

An equitable title, that would be protected by a court of equity as such, may be an ownership as absolute as the legal title. *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 13, 17, 93 Am. Dec. 289.

The term "absolute interest," as used in an insurance policy, providing that, if the interest in the property to be insured is not absolute, it must be so represented to the company and expressed in writing, etc., should be construed to include the interest of a person in property the legal title to which was in another party, with whom the insured had, at the time of the application, made a parol contract for its purchase for a price agreed upon, which the insured had agreed absolutely to pay and a part of which he had paid, and where the insured had entered into possession as purchaser and had made valuable improvements on the property, so that he must sustain the loss. The subject of insurance was an interest, not a title. It is an interest, not a title, of which the conditions of insurance speak. The terms "interest" and "title" are synonymous. *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 19, 76 Am. Dec. 581.

When a policy provides that, if the title is not absolute, it must be so stated in the policy, or it shall be void, the question is, first, whether the insured had really an insurable interest in the property, and, second, whether, if the property is destroyed, the entire loss falls upon him. Hence, after a contract for the sale of real estate, the purchaser being the equitable owner thereof, and responsible for the purchase money, and liable to the whole loss that may befall it, including the loss of the buildings by fire, he has an "absolute interest." *Elliott v. Ashland Mut. Fire Ins. Co.*, 12 Atl. 676, 678, 117 Pa. 548, 2 Am. St. Rep. 703.

Under a policy requiring the interest of assured, if less than the "absolute" ownership, to be so stated in the policy, an assured, who held an absolute, unconditional title in fee, but held such title as mortgagee only, did not hold the title absolutely, and was therefore not entitled to recover; his interest not having been so stated. *Williams v. Buffalo German Ins. Co. (U. S.)* 17 Fed. 63, 65.

#### **Life estate.**

A fire insurance policy providing that, if the interest of assured be a leasehold or other "interest" not "absolute," it must be so stated in the policy, must be construed to mean a complete and perfect interest, amounting to an estate in fee, and not an estate for life or for years; hence, where assured had but a life estate in the property, a policy not stating such fact and containing such condition was void. *Davis v. Iowa State Ins. Co.*, 25 N. W. 745, 746, 87 Iowa, 494.

Under an insurance policy providing that the insurer shall not be liable if the interest of the assured is not one of absolute and sole ownership, no recovery can be had if such interest is only that of a tenant for life. *Collins v. St. Paul Fire & Marine Ins. Co.*, 46 N. W. 906, 907, 44 Minn. 440.

#### **ABSOLUTE LIEN.**

A lien in an attachment is dependent for its final effect on the result of the suit, and in that sense the lien is conditional and contingent; but it is not on that account any less an absolute and fixed lien. By the term "absolute" is not meant that the lien is unconditional, but that it is complete and perfect as a lien, during its continuance, as much so as a lien by judgment or any other lien. No lien whatever upon property is an absolute, indefeasible interest in the property; but all liens are in their nature defeasible. *In re Reed (U. S.)* 21 Vt. 635, 638, 20 Fed. Cas. 417, 419.

#### **ABSOLUTE MORAL CERTAINTY.**

In a prosecution for grand larceny, based on circumstantial evidence, the court was requested to charge that the prosecution's hypothesis should be established to an absolute moral certainty. The request was denied, which was held proper on appeal; the court saying: "A philologist may be able to say that the word 'absolute' in the instruction adds no force to the words 'moral certainty'; but the word suggests a degree of certainty greater than that moral certainty which can be reached on such evidence as securable in courts of justice." *People v. Davis*, 64 Cal. 440, 1 Pac. 889, 890 (cited in *People v. Ferry*, 24 Pac. 32, 34, 84 Cal. 31).

The word "absolute," used in connection with "moral certainty" in an instruction referring to the degree of proof, imports a degree of certainty greater than moral certainty, which can be reached on such evidence as is securable in a court of justice, and hence, in a prosecution for robbery, it was not error for the court to strike the word from a requested instruction that the identity of the accused must be established to an "absolute" moral certainty. *People v. Nelson*, 24 Pac. 1006, 1008, 85 Cal. 421.

**ABSOLUTE NULLITIES.**

Absolute nullities, prior to the revolution of Texas, consisted of two kinds—those resulting from stipulations derogating from the force of laws made for the preservation of public order, and those established for the interest of individuals. The former were not susceptible of ratification; but, if by subsequent dispositions of law or by succession of time they cease to be illegal, they may from that time be ratified. *Olay v. Clay's Heirs*, 35 Tex. 500, 530; *Means v. Robinson*, 7 Tex. 502, 516. But, in relation to absolute nullities established for the interest of individuals, the rule as to onerous contracts is without exception that the party in whose favor they are established may ratify the contracts, either expressly or impliedly, and that in all cases of executed contracts, susceptible of tacit ratification, the prescription or ratification *juris et de jure* results from silence and inaction during the time fixed for prescription; and hence a deed of a minor of his real estate may be ratified, either expressly or impliedly, after he becomes of age. *Means v. Robinson*, 7 Tex. 502, 516.

**ABSOLUTE OWNER.**

Until the death of the husband, leaving her surviving, the wife has no claim on realty owned by him in fee and conveyed by him alone after the marriage; and hence the husband's grantee becomes "absolute owner" of the property, within the meaning of a question in an application for insurance thereon, the answer to which was made a warranty. *Ohio Farmers' Ins. Co. v. Bevis*, 46 N. E. 928, 18 Ind. App. 17.

**ABSOLUTE OWNERSHIP.**

The phrase "absolute ownership," as used in 1 Rev. St. p. 773, § 1, declaring that the absolute ownership of personal property shall not be suspended by any limitation or condition whatever for a longer period than during the continuance and until the termination of not more than two lives in being, etc., signifies ownership without any condition or incumbrance. *Steinway v. Steinway*, 10 Misc. Rep. 563, 571, 572, 32 N. Y. Supp. 183.

The word "absolute," as used in 1 Rev. St. p. 773, § 1, providing that the absolute ownership of personal property shall not be suspended by any limitation or condition whatever for a longer period than during the continuance and until the termination of not more than two lives in being, etc., was used as the opposite of "conditional," and in the same sense as "perfect." It signifies "without any condition or incumbrance." This construes the statute as if it read, "The unconditional and unincumbered ownership of personal property shall not be sus-

pended," etc. *Williams v. Lande*, 26 N. Y. Supp. 703, 704, 74 Hun, 425; *Converse v. Kellogg*, 7 Barb. 590, 597.

The title to personal property cannot be said to be perfect, or the ownership "absolute," while one person is the general owner and another has possession with a right to possession. *Converse v. Kellogg* (N. Y.) 7 Barb. 590, 597.

The term "absolute ownership" hardly needs definition. An ownership liable to be devested by any contingency arising by any instrument creating the ownership is not absolute. The right to suspend the power of alienation of real property may continue through two lives and a minority. The absolute ownership of personal property, under Laws 1897, c. 417, § 2, can be suspended only for two lives; and where testator bequeathed his personal property to his two sons, in trust for their children, until they should attain the age of 21 years, and, if any of them should die before becoming 21 years old, then to go to the child who should attain that age, and when the will was executed and at testator's death one son had three minor children and the other none, the will provided for the suspension of absolute ownership for more than two lives in being. In *re Howland's Will*, 77 N. Y. Supp. 1025, 1027, 75 App. Div. 207.

The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws. Rev. Codes N. D. 1899, § 3279; Civ. Code S. D. 1903, § 195; Civ. Code Cal. 1903, § 679.

**ABSOLUTE POWER OF ALIENATION.**

The word "absolute," in an Indiana statute prohibiting suspension of the "absolute" power of alienation for a longer period than the duration of a life or lives in being, has no reference to the time, but rather to the power or the privilege of aliening. The word "absolute" could not mean for all time, since that would disagree with the word "suspended," implying temporary denial, and with the declared right to suspend the power during the period of certain lives, and, by implication at least, not beyond such period. *Fowler v. Duhme*, 42 N. E. 623, 638, 143 Ind. 248.

The term "absolute power of alienation," as used in Rev. St. § 2039, declaring that the absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate, is defined by section 2038, as follows: "Such power of alienation is suspended where there are no persons in being by whom an absolute fee of possession

can be conveyed." *Becker v. Chester*, 91 N. W. 87, 93, 115 Wis. 90.

### ABSOLUTE POWER OF DISPOSITION.

Every power of disposition is deemed absolute by means of which the holder is enabled in his lifetime to dispose of the entire fee, in possession or in expectancy, for his own benefit. *Rev. St. Okl. 1903, § 4142.*

### ABSOLUTE PREDESTINATION.

"Absolute predestination" means that God foreknew and predestined all things whatsoever that may come to pass, whether with reference to the material universe or the salvation of souls; that is, God predestined all things which happen. He foreknew and predestined that President McKinley would be assassinated in Buffalo, etc. *Bennett v. Morgan*, 23 Ky. Law Rep. 1824, 1827, 66 S. W. 287, 289.

### ABSOLUTE PROPERTY.

Property is absolute when an external object or thing is objectively and lawfully appropriated by one to his own use in exclusion of all others. *Griffith v. Charlotte, C. & A. R. Co.*, 23 S. C. 25, 38, 55 Am. Rep. 1.

After a bequest for life, a limitation was granted to the issue of the beneficiary, to be their absolute property, forever. Held, that the word in this connection carried the fee. *Myers v. Anderson* (S. C.) 1 Strob. Eq. 344, 347, 47 Am. Dec. 537.

A deed to a trustee, to hold as the "absolute property" of the grantor's wife, conveyed a fee simple. *Fackler v. Berry*, 25 S. E. 887, 888, 93 Va. 565, 57 Am. St. Rep. 819.

The word "absolute," as defined by Webster, means "loosed from any limitation or condition," complete in itself, perfect, consummate; and hence, where a will bequeathed certain property to a legatee, to be her absolute property during her life, it belonged to her freed from any limitation or condition, and could not be used therefor to pay taxes on the property from which the interest sprang. *Wilson v. White*, 33 N. E. 361, 364, 133 Ind. 614, 19 L. R. A. 581.

A will giving to two grandchildren, on their arrival at age, "the entire and absolute property thereof," means undivided, unmingled, complete in all its parts, free, and not controlled by others. *Williams v. Van Cleave*, 23 Ky. (7 T. B. Mon.) 388, 393.

### ABSOLUTE RIGHTS.

The word "absolute," in its signification of "not relative," describes the rights of man in a state of nature, as contradistinguished from those which pertain to him in his social relations. *Johnson's Adm'r v. Johnson*, 32 Ala. 637, 641.

The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights are declared to be natural, inherent, and unalienable. *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 40, 29 Am. Rep. 356.

By the "absolute rights" of individuals is meant those which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. The rights of personal security, of personal liberty, and private property do not depend upon the Constitution for their existence. They existed before the Constitution was made, or the government was organized. These are what are termed the "absolute rights" of individuals, which belong to them independently of all government, and which all governments which derive their power from the consent of the governed were instituted to protect. *People v. Berberich* (N. Y.) 20 Barb. 224, 229; *McCartee v. Orphan Asylum Soc.* (N. Y.) 9 Cow. 437, 511, 513, 18 Am. Dec. 516; *People v. Toynbee* (N. Y.) 2 Parker, Cr. R. 329, 369, 370 (quoting 1 Bl. Comm. 123).

Chancellor Kent (2 Kent, Comm. 1) defines the "absolute rights" of individuals as the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered and frequently declared by the people of this country to be natural, inherent, and inalienable, and it may be stated as a legal axiom that since the great laboring masses of our country have little or no property but their labor, and the free right to employ it to their own best interests and advantage, it must be considered that the constitutional inhibition against all invasion of property without due process of law was as fully intended to embrace and protect that property as any of the accumulations it may have gained. *In re Jacobs* (N. Y.) 33 Hun, 374, 378.

### ABSOLUTE SALE.

An "absolute sale" is one where the property in personal chattels passes to the buyer upon the completion of the bargain or treaty between the parties. Where one party offers to sell at a certain price and the other agrees to give it, there is a complete bargain and sale, and the property passes from the bargainor to the bargainee; but, though the property passes, delivery cannot be required until the money is paid, where the sale is for cash. *Truax v. Parvia*, 32 Atl. 227, 228, 7 Houst. 330.

### ABSOLUTE TITLE.

As applied to title to land "absolute" means an exclusive title, or at least a title

which excludes all others not compatible with it. An absolute title to land cannot exist at the same time in different persons or in different governments. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with absolute and complete title in the Indians. *Johnson v. McIntosh*, 21 U. S. (8 Wheat.) 543, 588, 5 L. Ed. 681.

### ABSOLUTE TOTAL LOSS.

An "absolute total loss" takes place when the subject insured wholly perishes, or there is a privation of it and its recovery is hopeless. An absolute total loss entitles the assured to claim from the underwriter the whole amount of his subscription. *Murray v. Great Western Ins. Co.*, 25 N. Y. Supp. 414, 416, 72 Hun, 282 (citing 2 Arn. Ins. [6th Ed.] p. 951).

The meaning of "actual or absolute total loss," as distinguished from a technical or constructive total loss, is that an absolute total loss occurs when the subject insured wholly perishes or its recovery is rendered irretrievably hopeless, entitling the assured to claim the total amount of his policy without giving notice of abandonment, while a constructive total loss is one which entitles him to make such claims only on abandoning the ship or that which remains of her; she not having been "actually totally destroyed." *Burt v. Brewers' & Maltsters' Ins. Co. (N. Y.)* 9 Hun, 383, 384.

An absolute total loss is an entire destruction of the thing insured; and hence, under a marine policy insuring "absolute total loss" only, a partial loss cannot be converted into a "constructive total loss" by abandonment. *Monroe v. British & Foreign Marine Ins. Co. (U. S.)* 52 Fed. 777, 780, 3 C. C. A. 280.

An absolute total loss, within the terms of a marine policy, is not made out by a jettison of cargo, either to lighten the ship or for the purpose of saving it. *Monroe v. British & Foreign Marine Ins. Co. (U. S.)* 52 Fed. 777, 780, 3 C. C. A. 280.

The loss of a cargo, resulting from the inability of the master to recover and protect the cargo after its damage by the perils of the sea, constitutes an "absolute total loss" within the meaning of the marine policy. "The loss is in the nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle." *Roux v. Salvador*, 3 Bing. N. C. 266, 279.

The mere abandonment of a vessel by its crew while at sea does not constitute an "absolute total loss," within the meaning of a marine policy, when possession of the ves-

sel is afterwards taken by persons acting in behalf of the owners of the cargo and vessel, and it is taken to port in a damaged condition, where it is libeled and sold for salvage. *Thornely v. Hebson*, 2 Barn. & Ald. 518, 519.

### ABSOLUTE TRANSFER.

Civ. Code Cal. § 8047, declares that, where a buyer of real property gives to the seller a written contract for payment of all or part of the price, "an absolute transfer" of such contract by the seller waives his lien for the unpaid price. Held, that a transfer of a note by indorsement, which rendered the vendor liable for the debt remaining due, was not an absolute transfer within the statute, so that the lien for the payment of the balance of the purchase price of the land for which the note was given was not waived. *Bancroft v. Cosby*, 16 Pac. 504, 505, 74 Cal. 583.

### ABSOLUTE VESTED INTEREST.

"Absolute vested interests" are not estates which, though vested, are liable to be subsequently devested by the happening of a contingent event. In *re Allen's Estate*, 109 Pa. 489, 496, 1 Atl. 82; *Appeal of Pennsylvania Co.*, 1 Atl. 82, 83, 109 Pa. 489.

### ABSOLUTELY.

"Absolutely," as used in the term "absolutely void," is equivalent to "utterly." *Pearsoll v. Chapin*, 44 Pa. (8 Wright) 9, 14.

The will provided that the shares allotted to testator's different daughters should vest "absolutely" in them and their heirs tail. It was contended that this created an absolute estate in the daughters, who were *femes covert*, and excluded their husbands from any share in the legacy. Held, that the word "absolute" was not, in general, used to import an exclusion of marital rights, but that the most usual acceptation of the term "absolute," when used in reference to estates, is not independent, but the opposite of "partial" or "conditional," and used to define the kind of estate. It is never used to designate an estate vested in a married woman to the exclusion of her husband. *Johnson's Adm'r v. Johnson*, 32 Ala. 637, 640.

The word "absolutely," in a will giving to testator's wife all his personal property, except as otherwise disposed of, and directing that she take possession thereof immediately after his death without inventory or appraisement, and hold it as her own "absolutely," does not indicate an intention on the part of the testator that his wife should take the property free from liability for debts; but it was used in contradistinction to the phrase "for the term of her life." "Absolutely" was intended to define the duration and extent of the widow's estate, and was



employed to guard against the idea of a life estate only. In *re Thompson's Estate*, 37 Atl. 940, 941, 182 Pa. 340.

Where a devise is to another "absolutely," accompanied with words of recommendation or request that the legatee would dispose of the gift as his own, the beneficiary will take the property in trust, provided the words of request are imperative and the objects and property certain; the word "absolutely," or one of equal signification, being necessary in such a case to create an interest in the beneficiary in the corpus of the estate, and to distinguish it from a power, which differs widely from the trust. *Appeal of Coates*, 2 Pa. (2 Barr) 129, 138.

#### As conveying a fee simple.

A devise of so much of a man's real and personal estate as the law allows her to his wife "absolutely" gives the wife a fee simple as to such property, as to hold otherwise would give no effect whatever to a word of known signification. *Oswald v. Kopp*, 26 Pa. (2 Casey) 516, 518 (cited in *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254, 257).

"The testator gave a life estate in all his real and personal property, fully, freely, and absolutely to his son and daughter, the property at their deaths to be equally divided between their children. He here used terms that etymologically and in law import unlimited and independent bequests. An absolute estate is one free from incumbrance or condition of any description. It signifies complete and unqualified ownership and dominion. In order to give due effect to the word 'absolutely' as used by the testator, it is necessary to hold that he bequeathed the undivided one-half part of the use and income of his estate to his son and daughter in severalty." *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254, 257, 38 Wkly. Notes Cas. 536.

A will bequeathed a certain sum to defendant "absolutely, to be distributed to him at the end of three years." Held, that the phrase "absolutely," etc., should be construed as giving defendant a vested interest in fee in the property, postponed merely as to its enjoyment. *Williams v. Williams*, 14 Pac. 394, 396, 73 Cal. 99.

Mr. Blackstone, in 2 Comm. p. 104, in speaking of freehold estates of inheritance, uses "absolutely" as synonymous with "fee simple." *Rap. & L. Law Dict.*, in speaking of the owner of the estate in fee simple, said: "He is the absolute owner of the land or other realty." The same dictionary, in speaking of the legal definition of the term "absolute," says the meaning is "complete, final, perfect, unconditional, unrestricted." In *Myers v. Anderson* (S. C.) 1 Strob. Eq. 344, 47 Am. Dec. 537, after the bequest for life, the limitation to the issue, "to be their absolute property, forever." The word "absolute" car-

ried the fee. In *McLure v. Young* (S. C.) 3 Rich. Eq. 559, the court quoted approvingly the language in the foregoing case, and held the words, after a life estate, "to lineal descendants absolutely and forever," to mean that such descendants took as purchasers. Therefore, where a will provides that an estate in land shall vest absolutely, the devisee will take the fee. *Fuller v. Misroon*, 14 S. E. 714, 718, 35 S. C. 314.

The terms "absolutely and forever," in a devise of testator's house to his wife, may be said to characterize the quality of the estate which the testator devised, and merely show an intention to give an absolute fee, as distinguished, for instance, from a life estate, or from some other qualified fee, and cannot be held to devise something which the testator had no right to give. Therefore such a provision is not inconsistent with the widow's right of dower, for the reason that the testator had no control over the dower, and could not dispose of that by will, any more than he could have disposed of a right of a mortgagee of the property. *Fenton v. Fenton*, 71 N. Y. Supp. 1083, 1088, 35 Misc. Rep. 479.

"The word 'absolute,' when used in connection with a gift or grant of personal or real property, has been frequently interpreted to carry a fee. But it is not to be given that as its fixed and unvaried meaning. The context of the instrument in which the word appears may determine the effect to be given it. It may be used in connection with an interest in property, and yet not be regarded as the equivalent of 'unqualified.' *Williams v. Vancleave*, 23 Ky. (7 T. B. Mon.) 393; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149. In *Smith v. Bell*, 81 U. S. (6 Pet.) 72, 8 L. Ed. 322, the word 'absolutely,' used with reference to an estate in personalty, was held to be qualified by other words of the bequest, and thereby explained to mean only such absolute rights as a tenant for life could enjoy. In *Bradley v. Westcott*, 13 Ves. 450, the word was given a similarly restricted meaning and operation. In *Boyd v. Strahan*, 36 Ill. 355, the cases of *Smith v. Bell*, supra, and *Bradley v. Westcott*, supra, were cited with approval, and the doctrine of those cases applied to the controversy then under consideration. In *Kratz v. Kratz*, 189 Ill. 276, 59 N. E. 519, the words 'absolutely and unqualifiedly,' used in a will in connection with an estate in lands, were so qualified in meaning as to refer only the right to hold and enjoy an estate as a tenant for life, or during the widowhood of the devisee." The word "absolutely" in a devise of a tract of land, together with a right of way to the land from a highway not adjoining the land, to be his "absolutely," was construed not to operate to give the beneficiary a fee in such right of way, but only an easement. *Truax v. Gregory*, 63 N. E. 674, 677, 196 Ill. 83.

The term "absolutely," as used in a will providing that the property bequeathed to the wife shall be hers absolutely during her life, to use and enjoy as she may see proper, does not enlarge the estate. It must be construed as applying to the estate granted by the express words. In other words, it means that her life estate and the use and enjoyment of the property shall not be limited by any conditions. *Underwood v. Cave*, 75 S. W. 451, 454, 176 Mo. 1.

### **ABSOLUTELY DUE.**

Rev. St. c. 86, § 55, cl. 4, providing that no trustee (garnishee) shall be charged unless at the time of the service of the writ the amount due the defendant is "due absolutely," was construed to require only that the debt should have been fully created, and did not require that the time for payment thereof had expired. Thus, where a railroad company was garnished on the 4th of June to subject an employé's pay earned in May, the company was properly charged, though by its contract with the employé the amount so earned was not payable until June 15th. *Ware v. Gowen*, 65 Me. 534, 535.

### **ABSOLUTELY INCOMPATIBLE.**

An instruction that, in order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be "absolutely incompatible" with the innocence of the accused, means that the proof of defendant's guilt must be established beyond the possibility of a doubt. *State v. Rover*, 13 Nev. 17, 24.

### **ABSOLUTELY NECESSARY.**

"Necessary" admits of all degrees of comparison. A thing may be necessary, very necessary, or absolutely or indispensably necessary; and the prefixing of the word "absolutely" to the word "necessary" must be construed as an intention to materially affect the meaning of the word. *McCulloch v. State*, 17 U. S. (4 Wheat.) 316, 414, 4 L. Ed. 579.

A will authorizing and empowering the executor to sell a part or all of the estate, where it is "absolutely necessary," means such a necessity as, being not conformed to, will result in irremediable injury or loss to the estate. It does not mean that a difference of opinion between the executor and his co-owners will entitle him to substitute his will for theirs, and justify the sale as one of absolute necessity. The necessity contemplated is imperative necessity, and, being such, must refer to some pressing exigency of the estate growing out of a deficiency of revenue to meet the demands upon it, such as might be brought about by some unexpected contingency or disaster. The testator, by emphasizing the word "necessary" by using

the word "absolutely," designed to indicate a superlative degree of necessity. The bare advisability of such a sale as a mode of swelling the revenues already sufficient for demands in the judgment of the executor, or, it may be, of judicial financiers, would not meet the condition imposed by the testator. *Moale v. Cutting*, 59 Md. 510, 515.

In a statute authorizing a druggist to sell spirituous liquors, to specify that they are absolutely necessary, "absolutely" is used to emphasize the degree of necessity which is intended to express an extreme case. While in a general sense the word "necessary," like the word "perfect," implies a superlative degree, and when it is declared to be necessary no additional emphasis is given by the use of the word "absolutely," yet this use is sanctioned by custom, and it cannot be said to be improper or meaningless. *State v. Tetrick*, 11 S. E. 1002, 1003, 34 W. Va. 137.

### **ABSOLUTELY OWN.**

Plaintiff, at the time of the execution of a note by her which was indorsed by defendants, and which was made to secure a loan to enable her to pay an assessment on certain stock, executed an instrument under seal by which she assigned the stock to defendants, which provided that, if she did not pay the note at maturity and defendants did pay, they should "absolutely own" the stock. Held, that the words "absolutely own" imported a sale of the stock, and not a pledge thereof as collateral security, and that on plaintiff's failure to pay the note and on payment thereof by defendant the latter became absolute owner of the stock. *Morgenstern v. Davis*, 14 N. Y. Supp. 31, 32, 59 Hun, 626.

### **ABSOLUTELY PRIVILEGED.**

An absolutely privileged communication or publication is one in respect to which, by reason of the occasion upon which it is made, no remedy is provided for the damages in a civil action for slander or libel. *George Knapp & Co. v. Campbell*, 36 S. W. 765, 767, 14 Tex. Civ. App. 199; *Ruohs v. Backer*, 53 Tenn. (6 Helsk.) 395, 405, 19 Am. Rep. 598. Of such are the words spoken or written by judges in the exercise of their judicial functions, by legislators in the performance of their duties, and many others. *Noonan v. Orton*, 32 Wis. 106, 111.

Absolutely privileged publications are legislative and judicial proceedings and naval and military affairs. In case of absolute privileged communications, the law, out of regard for the public welfare, considers that all persons shall be permitted to express their sentiments, regardless of truth, and affords them absolute immunity from any prosecution therefor, either civil or criminal, though the publication may be knowingly and willfully false and with express malice. *Finley*

v. Steele, 60 S. W. 108, 109, 159 Mo. 290, 52 L. R. A. 852.

## ABSORBED.

In an insurance policy providing that a policy did not cover injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, absorbed, and inhaled, the word "absorbed" does not apply to an accidental asphyxiation by illuminating gas which escaped into the room where assured slept; the word manifestly having reference only to the process of absorption by sucking up or imbibing through the pores of the body. *Fidelity & Casualty Co. of New York v. Waterman*, 44 N. E. 283, 284, 161 Ill. 632, 32 L. R. A. 654.

## ABSQUE HOC.

See "Covenants Performed Absque Hoc."

"Absque hoc" means "without this," and is used in pleading as a technical form of special denial by way of special traverse, and introduces the negative part of a plea following an admission or inducement. The phrase is also used in actions of covenant, where defendant, having pleaded "covenant performed," follows with the words "absque hoc" covenants nonperformed, which without this would not put plaintiff to proof of his allegation of covenant performed. *Martin v. Hammon*, 8 Pa. (8 Barr) 270, 272; *Zents v. Legnard*, 70 Pa. (20 P. F. Smith) 192, 194; *Hite v. Kier*, 38 Pa. (2 Wright) 72, 75; *Reiter v. Morton*, 96 Pa. 229, 239.

In an action of covenant against a corporation, a plea of covenants performed "absque hoc" admits the execution of the instrument declared on, and only puts in issue the performance on the part of the plaintiff as alleged in the declaration. *Farmers' & Mechanics' Turnpike Co. v. McCullough*, 25 Pa. (1 Casey) 303, 304.

## ABSQUE HOC WITH LEAVE.

See "With Leave."

## ABSQUE INJURIA.

See "Damnum Absque Injuria."

## ABSTRACT.

An "abstract" is defined to be that which comprises or concentrates in itself the essential qualities of a larger thing or of several things; an abridgment, compendium, epitome, or synopsis. *Hess v. D. T. Draffen & Co.*, 74 S. W. 440, 441, 99 Mo. App. 580.

A charge is not abstract when there is any evidence, however weak, at all tending to support it. *Hair v. Little*, 28 Ala. 236.

But unless there is some evidence tending to establish all the hypotheses upon which an instruction is based, or some evidence from which the jury might have inferred the existence of the facts stated, then the instruction was erroneous. *Dixon v. Ahern*, 14 Pac. 598, 601, 19 Nev. 422.

### As a copy.

The word "abstract," in a certificate by a register of a land office that a certain plat is a correct abstract of the records in his office, though not as formal as the use of the word "copy" would have been, is still a sufficient compliance with the statute providing that copies of any entries made by the register of the land office shall be received in evidence. *Wilhite v. Barr*, 67 Mo. 294, 296.

An abstract ordinarily means a mere brief, and not a copy of that from which it is taken; and hence an abstract of an alleged judgment, attested only as an abstract, is not a copy of such judgment, within Code, c. 130, § 5, providing that a copy of any record in the clerk's office of any court, attested by the clerk, may be admitted in evidence in lieu of the original. *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390, 413.

The abstract of record required by Rev. St. 1899, § 813, does not require entries made by the clerk to be copied literally, but nothing more is required in an abstract than a recital of the various entries. *Scott v. Black*, 70 S. W. 523, 525, 96 Mo. App. 472.

### Transcript distinguished.

An "abstract" of a record is a statement of the substantial contents thereof, and differs from a transcript, in that the latter is a copy of the record. *Harrison v. Southern Porcelain Mfg. Co.*, 10 S. C. (10 Rich.) 278, 283.

## ABSTRACT—ABSTRACTION.

The term "abstract," as used in Rev. St. U. S. § 5209, making it a crime for every president, director, etc., of a national banking association to embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of the association, is to be understood, in its ordinary and popular sense, as taking or withdrawing from, so that to abstract the moneys, funds, credits, and assets of a national bank by any of its officers named in the act is to take or withdraw the same from the possession or control of the association; but the mere taking or withdrawing of its funds or moneys or other assets from the bank's possession is not, in and of itself, sufficient to constitute the criminal offense of abstraction which is described in the statute. It must further appear, in order to complete the offense, that this taking or withdrawing was without the knowledge and consent of the association, and that the funds and assets so taken and withdrawn were con-

verted to the use and benefit and advantage of the officer or agent of the bank abstracting the same, with intent to injure or defraud or deceive. The essential ingredients which go to constitute the criminal offense of abstraction are, therefore: First, the defendant's official relation to the bank; second, the taking or withdrawing, by him or by his direction, of the moneys, funds, credits, or assets of the association; third, that such taking or withdrawal was without the knowledge or consent of the bank or of its board of directors; fourth, that the moneys, funds, or effects so taken and withdrawn from the possession of the bank were converted to his own use, or to the use and benefit of some person other than the association; fifth, that it is done with the intent to defraud or injure the association. *United States v. Harper* (U. S.) 33 Fed. 471, 479.

It is not material by what means or contrivances or devices the abstraction of its funds from the possession of the bank was effected, since the methods of its accomplishment do not change the character of the act; the ultimate result being to wrongfully obtain the funds of the bank. *United States v. Harper* (U. S.) 33 Fed. 471, 479.

"Abstract," as used in Rev. St. U. S. § 5209, "is a word of simple popular meaning, without ambiguity. It means to take or withdraw from; so that to abstract the funds of a bank, or a portion of them, is to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted. To constitute that offense, within the meaning of the act, it is necessary that the money and funds should be abstracted from the bank without its knowledge and consent, with intent to injure and defraud it, or some person or persons, or to deceive some officer of the association, or an agent appointed to examine its affairs." *United States v. Northway*, 7 Sup. Ct. 580, 584, 120 U. S. 327, 30 L. Ed. 664.

The verb "abstract" is defined in the *Century Dictionary* as "draw away; take away; withdraw; remove." Within this definition, the removing of cream from milk is an abstraction. *Rose v. State*, 5 O. C. D. 72, 76, 11 Ohio Cir. Ct. R. 87.

#### **Embezzlement distinguished.**

The crime of "abstraction," provided for in Rev. St. U. S. § 5209, making it criminal for any president, director, teller, etc., of any national bank to be guilty of the abstraction of its funds, "applies to cases where one for his own benefit takes the property of another; but it is not necessary that any position of trust should exist between the parties, nor is it necessary that the property should come lawfully into the possession of the person abstracting it," as required in order to constitute the crime of embezzlement. *United States v. Lee* (U. S.) 12 Fed.

816, 818; *United States v. Youtsey* (U. S.) 91 Fed. 864, 867.

#### **Larceny distinguished.**

An indictment under Rev. St. U. S. § 5209, charged the president of a bank with willfully and unlawfully "abstracting" certain of its moneys with an intent to injure the bank. Held, that the word "abstracting" was not synonymous or equivalent to the word "larceny," and hence it was not necessary that the indictment under such section should describe the offense in words necessary to constitute a larceny. *United States v. Northway*, 7 Sup. Ct. 580, 584, 120 U. S. 327, 30 L. Ed. 664.

#### **Misapply distinguished.**

The fifty-fifth section of the national banking act of 1864 provides for the punishment of those who "embezzle, abstract, and willfully misapply" the funds of the bank "with intent to injure or defraud the association." Held, that the word "embezzle," and perhaps, also, the word "abstract," refers to acts done for the benefit of the actor as against the bank, while the word "misapply" covers acts having no relation to pecuniary profit or advantage of the doer thereof. *United States v. Taintor* (U. S.) 28 Fed. Cas. 7, 9.

#### **ABSTRACT BOOKS.**

As personal property, see "Personal Property."

Books which contain only an index to the books of the recorder of deeds for the county, showing the different conveyances of land, and the books and pages where they might be found, not containing an abridgment of the contents of the different instruments, including the acknowledgments or the manner in which they were executed, nor their dates, are not complete abstract books. *Hess v. D. T. Draffen & Co.*, 74 S. W. 440, 441, 99 Mo. App. 580.

#### **ABSTRACT OF TITLE.**

"It seems that 'abstract of title' has a somewhat different meaning in different countries. Warv. Abst. §§ 4-6. It is thus defined in *Anderson's Law Dictionary*, which is perhaps the most accurate definition for this country: 'A concise statement of the record evidence of one's title or interest in realty.'" *Loring v. Oxford*, 45 S. W. 395, 396, 18 Tex. Civ. App. 415.

"Abstract," as used by a vendor in an agreement to furnish an abstract, means an abstract of the records in the recorder's office and of all the records showing his title to the real estate. *Stevenson v. Polk*, 32 N. W. 340, 345, 71 Iowa, 278.

An abstract of title is a statement in substance of what appears in the public rec-

ords affecting the title to real property. *Union Safe Deposit Co. v. Chisholm*, 33 Ill. App. 647.

By an "abstract of title" is meant a statement in substance of what appears on the public records affecting the title, and also a statement in substance of such facts as do not appear on the public records which are necessary to perfect the title. *Hollfield v. Landrum*, 71 S. W. 979, 982, 31 Tex. Civ. App. 187.

A contract for the sale of real estate, which requires the vendor to furnish an "abstract of title," requires the vendor to furnish a paper prepared by a skilled searcher of records, which will show an abstract of whatever appears on the public records of a county affecting the title. *Smith v. Taylor*, 23 Pac. 217, 219, 82 Cal. 538.

An abstract of title is a summary of the most important parts of deeds and other instruments composing the evidences of a title to real estate, arranged usually in chronological order and intended to show the origin, cause, and incidents of the title, without the necessity of referring to the deeds themselves. It also contains a statement of all charges, incumbrances, liens, and liabilities to which the property may be subjected, and of which it is in any way material for purchasers to be apprised. *Banker v. Caldwell*, 3 Minn. 94, 100 (Gil. 46, 52).

An abstract of title is "a summary or an epitome of the facts relied on as evidence of title. Such being its meaning, it might consist of a note of a single conveyance, as it always does where the patentee furnishes an abstract of his title. But an abstract, properly so called, must contain a note of all conveyances, transfers, or other facts relied on as evidence of the claimant's title, together with all such facts appearing of record as may impair it." *Heinsen v. Lamb*, 7 N. E. 75, 79, 117 Ill. 549.

In an order of county commissioners, authorizing and directing a certain person to trace up and compile a book of "abstracts of title," for the use of the county commissioners' office, of all unassessed lands in the county, the word "abstract" will be construed in its ordinary legal meaning, making it the duty of such person to ascertain the names of the owners and to give an epitome or short statement of the successive title deeds or other evidence of ownership. *Tasker v. Garrett County*, 33 Atl. 407, 408, 82 Md. 150.

#### **As good title.**

The term "abstract of title," as used in an agreement that the vendor should deliver an abstract of title, meant the delivery of an abstract showing a good title to convey. *Sharland v. Lelfchild*, 4 C. B. 529, 537.

In a contract for the sale of lands, in which the vendor agrees to furnish the purchaser with a full and sufficient abstract of the title to said land, the term "full and sufficient abstract of title" did not mean a full and sufficient abstract of a complete marketable title, but only a full and fair abstract of all the muniments which the defendant had in his possession, power, or knowledge, and a fair statement of the deduction of his title; and, with respect to the identity of the land, the abstract referring to a map or plan in one of the deeds abstracted affords sufficient means of identification. A map or plan is not deemed to be necessary as a part of the abstract. *Blackburn v. Smith*, 2 Exch. 783, 790-792.

#### **ABSTRACT POWER.**

It is held and generally understood that, if any way is provided by law for accomplishing a desired purpose, "power in the abstract" may be said to exist for doing it. Thus, where statutory provisions provide some way for increasing the capital stock of a national bank, and authorize the increase under certain circumstances and subject to certain requirements, they thereby provide abstract power for doing the act. *Latimer v. Bard* (U. S.) 76 Fed. 536, 543.

#### **ABSTRACTING.**

As business, see "Business."

#### **ABSURDITY.**

By an "absurdity," as applied to a statute, is meant not only that which is physically impossible, but also that which is morally so; and that is to be regarded as morally impossible which is contrary to reason, or, in other words, which could not be attributed to a man in his right sense. *State v. Hayes*, 81 Mo. 574, 585.

#### **ABUSE.**

To "abuse," is composed of "ab" and "utor"; and in strictness it signifies to injure, diminish in value, or wear away by using improperly. Abuse includes misuse. Abuse or misuse of the corporate privileges of a corporation consists in any positive acts in violation of the charter and in derogation of public right, willfully done, or caused to be done, by those appointed to manage the general concerns of the corporation. *City of Baltimore v. Cornellville & S. P. Ry. Co.*, 6 Phila. 190, 191, 8 Pittsb. R. 20, 23.

As the term "abuse" is used in the charter of a railroad company, reserving a right to the Legislature to repeal it if the franchises should be abused, it means to improperly use. The words are used in their popular sense, and are not terms of art or law. To

"abuse" is compounded of "ab" and "utor," and in strictness signifies to injure, diminish in value, to wear away by using improperly. Catiline abused the ancients of the Roman Senate. A man abuses his constitution by excesses which impair his vigor. A judge abuses his office not only by taking bribes, but in misconduct which detracts from its dignity and usefulness. "To abuse the freedom of the press, or the right of debating, is a force from which we take a perfectly definite idea. We know very well what is meant when it is said that legislative authority or executive power has been abused," and hence we know that a corporate privilege has been abused when we see it used as a color and pretext for that which the law pronounces a wrong and injury to the public. *Erie & N. E. R. Co. v. Casey*, 26 Pa. (2 Casey) 287, 318.

The word "abuses" in Const. art. 10, § 2, giving the Legislature power to regulate railroad freight and passenger tariffs, correct "abuses," and prevent unjust discrimination and extortion, means any improper use of a right or privilege, as abuse of a franchise. The words "to correct abuses" in the provision embrace everything which is expressed in the language that precedes and that which follows it, but they express more, and to give effect to them we must hold that they were intended to have the full force of their ordinary meaning. *Railroad Commission v. Houston & T. C. R. Co.*, 38 S. W. 750, 753, 90 Tex. 340.

Code Civ. Proc. § 1798, authorizing the Attorney General to sue for forfeiture of the charter of a corporation which has violated any provision of law whereby it has forfeited its charter or been dissolved by an "abuse of its powers," is not satisfied by the failure of the railroad to run its trains for five days, since that is not an abuse of, but a mere failure to use, its corporate powers. *People v. Atlantic Ave. R. Co.*, 26 N. E. 622, 623, 125 N. Y. 513.

### ABUSE OF DISCRETION.

The term as used in the decision of courts and in the books as implying, in common parlance, a bad motive or wrong purpose, is not the most appropriate. It is really a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence. "Where a court does not exercise a discretion in the sense of being discreet, circumspect, prudent, and exercising cautious judgment, it is an abuse of discretion." *Murray v. Buell*, 41 N. W. 1010, 1011, 74 Wis. 14.

"In a legal sense discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all the circumstances before it being considered." It does not necessarily imply "a willful abuse or intention-

al wrong." *Sharon v. Sharon*, 16 Pac. 345, 366, 75 Cal. 1.

The "abuse of discretion," to justify interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. *Citizens' St. R. Co. v. Heath*, 62 N. E. 107, 111, 29 Ind. App. 895; *Stewart v. Stewart*, 62 N. E. 1023-1025, 28 Ind. App. 378; *People v. New York Cent. R. Co.*, 29 N. Y. 418, 431.

The exercise of an honest judgment, however erroneous it may appear to be, does not constitute abuse of discretion, but the question is, has the result arrived at been produced by exercise of an arbitrary and unlawful discretion? *People v. New York Cent. R. Co.*, 29 N. Y. 418, 431.

The term "abuse of discretion," in speaking of an abuse of discretion sufficient to authorize the setting aside of a decree, includes a case in which, in order to reach a decree, the court itself overrides the established law. Thus a decree setting aside a judicial sale on the ground of gross inadequacy of price shows an abuse of discretion, as such inadequacy does not authorize such a decree. *Stroup v. Raymond*, 38 Atl. 628, 627, 183 Pa. 279, 63 Am. St. Rep. 758.

Difference in judicial opinion is not synonymous with abuse of judicial discretion. Such discretion was not abused where, on a cross-examination of a defendant in a personal injury action who was testifying in his own behalf, the court permitted the question as to whether he was insured against loss in case the verdict went against him. *Day v. Donohue*, 41 Atl. 934, 935, 62 N. J. Law, 380.

### ABUSE OF FEMALE CHILD.

"Abuse is stated by Webster to be a synonym of injury, and in its largest sense signifies ill use or improper treatment of another. Thus, in a statute making it an offense to carnally know and abuse a female child, it does not necessarily involve penetration, but includes any injury to the genital organs." *Dawkins v. State*, 58 Ala. 376, 379, 29 Am. Rep. 754.

"Abuse," as used in Gen. St. 1894, § 6524, making it a crime to carnally know and "abuse" a female child under the age of 16, refers to and characterizes an illegal rather than an honorable and proper relation, and hence the statute does not conflict with section 4769, authorizing contracts of marriage by females under the age of 15 years. *State v. Rollins*, 83 N. W. 141, 142, 80 Minn. 216.

"Abuse," as used in Cr. Code, § 12, providing that if any male person of the age of 17 years and upward shall carnally know and "abuse" any female child under the age of 12 years he shall be deemed guilty of rape,

is synonymous with "ravish." Webster defines the verb "abuse" thus: "to violate; to ravish;" and the noun "abuse" he defines as "violation, rape; as abuse of a female child." *Palin v. State*, 57 N. W. 743, 745, 38 Neb. 862.

"Abuse," as used in the offense to carnality know and abuse a female child is synonymous with "rape." In England the definitions of "rape" have sometimes included the statutory offense of carnal knowledge of a young child. Thus: "Rape is felony by the common law, declared by Parliament, for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years with or against her will." 1 Hale, P. C. 628. See, also, page 631. In East, P. C. 436, it is said: "This last offense (viz., unlawful abuse of a child) is not, properly speaking, a rape, which implies a carnal knowledge against the will of the party, but a felony created by this statute (18 Eliz. c. 7, § 4), under which the consent or non-consent of the child under the age of ten years is immaterial." Other writers have directly, or by implication, included the statutory offense within the term "rape." See 4 Bl. Comm. 212; 1 Gabb. Cr. Law, 832; Roscoe, Cr. Ev. (7th Ed.) 289, 851. But, however it may have been elsewhere, in Massachusetts the offense of unlawfully and carnally knowing and abusing a female child under the age of 10 years is, and for more than 200 years has been, known and designated as rape. *Commonwealth v. Roosnell*, 8 N. E. 747, 750, 143 Mass. 32.

On the trial of defendant accused of carnal abuse of a female child under the age of 15 years, the judge instructed the jury that "carnal abuse does not necessarily mean abuse by sexual intercourse, or by attempted sexual intercourse." This instruction was held erroneous, and that the word "abuse," in the sense it is used in Cr. Code, § 12, is synonymous with "ravish." *Chambers v. State*, 64 N. W. 1078, 46 Neb. 447.

#### ABUSE OF PROCESS.

See "Malicious Abuse of Process."

An abuse of legal process is where a party employs it for some unlawful object, and not to effect the purpose for which it was intended by law; in other words, a perversion of it. *Lauzon v. Charroux*, 28 Atl. 975, 976, 18 R. I. 467; *Mayer v. Walter*, 64 Pa. (14 P. F. Smith) 283, 285; *King v. Johnston*, 51 N. W. 1011, 81 Wis. 578; *Bartlett v. Christhilf*, 14 Atl. 518, 521, 69 Md. 219 (citing *Grainer v. Hill*, 4 Bing. [N. C.] 212; *Sommer v. Wilt* [Pa.] 4 Serg. & R. 19); *Kline v. Hibbard*, 29 N. Y. Supp. 807, 809, 80 Hun, 50. Thus, if a man is arrested or his goods seized in order to extort money from him, even though it be to pay a just claim other than that in suit,

or to compel him to give up possession of something of value not the legal object of the process, it is abuse of legal process. *Lauzon v. Charroux*, 28 Atl. 975, 976, 18 R. I. 467.

#### ABUTMENT.

As part of bridge, see "Bridge."

An abutment is a mass of stone or solid work at the end of a bridge, by which the extreme arches or timbers are sustained. The term is sometimes used to designate that which unites one end of a thing to another, and in this sense includes the part of the way which connects the abutment (proper) of the bridge with the land ordinarily called the "filling up." It is all a part of the bridge. *Sussex County v. Strader*, 18 N. J. Law (3 Har.) 108, 112.

#### ABUTTING.

"Abutting" means "joined to" or "adjoining," but does not necessarily imply that the things spoken of are in contact. Thus, where a strip of land 92 feet wide was dedicated for a street, and the city improved 90 feet, leaving 1 foot unused on each side, which was not abandoned by the public, but could properly be used to obtain access to the street, the owners of property adjoining such strip own property "abutting" on the improvement, and were therefore liable for taxation for the same. *Richards v. City of Cincinnati*, 31 Ohio St. 508, 514.

A lot lying in the rear of a lot fronting on a street to be improved, and no part of which touches the street, is not an abutting property within the meaning of an ordinance directing the improvement of the street, and assessing the cost on the abutting property owners. *City of Springfield v. Green*, 11 N. E. 261, 263, 120 Ill. 269.

Mun. Code, § 584, providing that any owner or owners of lots or lands bounding or "abutting" on a proposed improvement shall file a claim for damages in writing, does not imply that the lots spoken of are necessarily in contact with the improvement, and has no such inflexible meaning as to require the lots to touch the improvement, though the usual meaning of the word is that the things spoken of do actually join; and, to ascertain the meaning of the word, regard must be had to the intent of the lawmaker. Where an elevated viaduct in the street in front was 45 feet above plaintiff's lot, the lot did not "abut" on the viaduct within the meaning of the statute. *Cohen v. Cleveland*, 1 N. E. 589, 593, 43 Ohio St. 190, 196.

An estate opposite a park, and separated therefrom by a county road, is not an "abutting estate," and therefore is not subject to

a special assessment, which can only be levied against abutting estates. *Holt v. City Council of Summerville*, 127 Mass. 408.

Where a strip of land from one side of a street is appropriated for the purpose of widening such street, the lots and lands fronting on the opposite side of the street at the part widened will be held to "bound and abut" on the improvement, although the street may intervene between the abutting lots and lands and the strip of ground appropriated. *City of Cincinnati v. Batsche*, 40 N. E. 21, 24, 52 Ohio St. 324.

Where one has a private right of way connecting his premises with a public way, he may be held to be an "abutter" on the street by means of the private way, so that a discontinuance of the public way would work him a peculiar injury. *Beutel v. West Bay City Sugar Co.* (Mich.) 94 N. W. 202, 204.

As applied to the rights of parties on the use of a street by an elevated road, a lot bounded on the side by a public street, in the bed or soil of which the owner of the lot has no title, estate, or interest except such as are incident to a lot so situated, viz., a right to light, air, access, etc., is an abutting lot (*Hughes v. Metropolitan El. Ry. Co.*, 28 N. E. 765, 767, 130 N. Y. 14), and the owner is an abutting owner. *Abendroth v. Manhattan Ry. Co.*, 25 N. E. 496, 497, 122 N. Y. 1, 11 L. R. A. 634, 19 Am. St. Rep. 461.

The terms "abutting or adjacent property" and "property butting on," as used in the chapter relating to cities under special charters, shall be held to include the easement and right of way of any railroad company located along any street, or on lands abutting on or adjacent thereto, in all cases where no property of any person, firm, or corporation, except a municipal corporation, intervenes between such easement or right of way and the traveled portion of such street or highway. Code Iowa 1897, § 968.

#### As touching front or side of lot.

In a narrow and restricted sense "abutting" is used in reference to that which touches a lot at the end and adjoining to that which is on the side, but in a statute authorizing levying of assessments for improvements on the ground abutting on the improvement it includes everything which touches the lot, whether in front or on the sides. *City of Lawrence v. Killam*, 11 Kan. 499, 511.

"Abutting," as used in an ordinance providing for a levy of assessment on all lots "abutting" on the line of a street to be improved, was intended to apply to lots whose sides, as well as ends, were bounded by the line of the street to be improved, and, where the streets in front and at the side were both to be paved, the corner lot should bear the expense of the improvement in front of

the side as well as of the end of the lot. *City of Springfield v. Green*, 11 N. E. 261, 263, 120 Ill. 269.

#### Right of way in street.

A city charter, authorizing the assessment of lands "abutting" on a street for improvements thereof, does not apply to a railroad right of way which lies wholly within the street. *Indianapolis & V. Ry. Co. v. Capitol Pav. & Const. Co.*, 54 N. E. 1076, 1077, 24 Ind. App. 114.

Act 1879, § 2, authorizing assessments for the improvement of public streets upon "contiguous property abutting" upon such streets, cannot be construed to include and authorize the assessment of the right of occupancy, franchises, property, and interest of a railroad corporation in a street which had been improved. Nothing but some tangible object or thing can with propriety be said to "abut" on a street. If the interests or rights of the railroad in the street have any corporeal or physical existence, they must be represented by the street itself, and a street cannot be contiguous to and abut on itself. *South Park Com'rs v. Chicago, B. & Q. R. Co.*, 107 Ill. 105, 108.

#### Streets.

Streets crossing one on which an improvement is made are not "abutting property" within the meaning of the statute authorizing special assessments on abutting property for the payment of the cost of local improvements, and hence a municipality cannot be assessed for the benefit done to cross streets. *Holt v. City of East St. Louis*, 37 N. E. 927, 150 Ill. 530.

## ACADEMY.

See "Incorporated Academy."

As public school, see "Public School."

"Academy" originally meant a garden, grove, or villa where Plato and his followers held their philosophical conferences, but that is not the present meaning of the word. It has acquired by the usage of modern times a variety of meanings; it is sometimes used to designate a school for teaching a particular art or science, but it is most commonly understood to mean a school or seminary of learning, and held to range between a university and college and a common school in which arts and sciences in general are taught. The term, as used in a statute exempting from taxation universities, colleges, academies, and schoolhouses, does not include such an institution as an academy of fine arts. *Academy of Fine Arts v. Philadelphia County*, 22 Pa. (10 Harris) 496, 498.

The word "academy" is applied to institutions which are confined to some special grades of instruction. This word "academy"



has become a common dictionary word, which may be appropriated by any person as a name for a school. *Commonwealth v. Banks*, 48 Atl. 277, 278, 198 Pa. 397.

Act March 2, 1875, which prohibits the sale or giving away of liquor within three miles of any "academy," college, university, or institute of learning, includes only the higher institutions of learning, such as those specifically enumerated. The act does not apply to the common schools provided for by the Legislature, though they are taught in the building of an academy or college. *Blackwell v. State*, 36 Ark. 178, 190.

## ACCEPT.

See "Not Accepted."

In a complaint in an action in debt, founded on an act of the Legislature by which the state leased certain lands to defendant, to be occupied for the purposes of a railroad, in consideration of a certain amount, which complaint concluded with the averment that the defendant "accepted" the said act, by the force and effect of which act there became due to plaintiff from defendant the sum fixed, "accepted" must be construed to signify assent and agreement to all the terms and provisions contained in such act or charter. This is its usual and natural meaning, and in this sense it must be understood in this declaration, as the lease and its provisions constitute the entire body of the act; and hence there was a sufficient allegation that the defendants were liable as lessees. *State v. Newark & N. Y. R. Co.*, 34 N. J. Law (5 Vroom) 301, 303.

"Accepted," as used in an indictment charging a bank officer with having "accepted" and received deposits knowing that the bank was insolvent, implies that the bank received, and that he agreed and assented to the reception, so that he could not accept without knowing what was received; and hence proof of such fact is necessary to a conviction. *State v. Warner*, 55 Pac. 342, 344, 80 Kan. 94.

Act Cong. 1875, c. 137, as amended 1888, and chapter 866, relating to the removal of cases to the United States courts, and providing that it shall be the duty of the state court to "accept" the petition for removal and bond, construed to require the state court to act upon the petition and bond. *Roberts v. Chicago, St. P., M. & O. Ry. Co.*, 51 N. W. 478, 480, 48 Minn. 521.

The words "accept and agree" in a deed of land subject to mortgage, which deed contains a covenant against incumbrances except the mortgages, which mortgages the said second party accepts and agrees to pay, do not show an assumption of the mortgages by the grantee, in the absence of other evi-

dence explaining the language. *Hopper v. Calhoun*, 35 Pac. 816, 817, 52 Kan. 703, 39 Am. St. Rep. 363.

The words "accepted" and "recorded" in Comp. St. c. 23, § 9, providing that commissioners to assign dower shall be sworn, etc., and shall set off the dower and make return of their doings in writing, which on being accepted and recorded shall cause the dower to remain fixed and certain, unless such confirmation be set aside, etc., are used in the sense of "confirmed"; that is, if the assignment of dower by the commissioners is satisfactory to the judge, then he shall accept and record the same. *Serry v. Curry*, 42 N. W. 97-100, 26 Neb. 353.

"Accept," in reference to the sale of goods, means receiving the possession of the goods with the intention of retaining them in performance of the contract. *Ford v. Friedman*, 20 S. E. 930, 982, 40 W. Va. 177.

It means more than a mere delivery by the vendor, and implies such acceptance as precludes the purchaser from thereafter objecting to the quantity, quality, etc., of the goods. *Maxwell v. Brown*, 39 Me. 98, 100, 63 Am. Dec. 605.

## ACCEPT AND RECEIVE.

"Accept and receive," as used in the statute of frauds, providing that a parol contract for the sale of goods to the value of \$50 shall be void unless in writing, or unless the buyer shall accept and receive a part of the goods, means such an acceptance and receipt by the purchaser as would amount to a final appropriation to himself of the whole or a part of the goods. *Rodgers v. Phillips*, 40 N. Y. 519, 530 (citing *Story, Sales*).

"Accept," as used in the seventeenth section of the statute of frauds, declaring no contract for the sale of merchandise shall be allowed to be good unless there be some memoranda, or the buyer accept part of the goods, means that there must not only be a delivery to the vendee with the intention of vesting title in him, but an actual acceptance on his part with intention of taking possession as owner. *Maberley v. Sheppard*, 10 Bing. 99.

The phrase "accept and receive," as used in the statute of frauds, means an actual physical receipt. *Castle v. Swarder*, 5 Hurl. & N. 281, 286.

The words "accept and receive" cannot be construed as requiring that there should be an actual manual taking or occupation of the goods, but that there may be a constructive accepting and receiving. But the delivery of goods on board a vessel, and the taking of them by the carrier, is not a "receipt" of them by the vendee within the provision of the statute, though he had ordered them to be forwarded in that way, nor is a con-

signing of the goods by the vendors to their agent. *Frostburg Min. Co. v. New England Glass Co.*, 63 Mass. (9 Cush.) 115, 118. They import some act done, aside from the mere verbal contract of sale. *Woodford v. Patterson* (N. Y.) 32 Barb. 630, 632.

Under a statute making sales of intoxicating liquors void unless a part of the goods have been "accepted and received" by the buyer, the acceptance and receipt contemplated may be constructive, and it is a question for the jury whether the circumstances proved do or do not amount to an acceptance or receipt within the statute. *Garfield v. Paris*, 96 U. S. 557, 563, 24 L. Ed. 821.

## ACCEPTANCE

See "Actual Acceptance"; "Conditional Acceptance"; "Express Acceptance"; "General Acceptance"; "Implied Acceptance"; "Lend an Acceptance"; "Qualified Acceptance"; "Special Acceptance."

Receipt distinguished, see "Receipt."

"Acceptance" comprehends both physical receipt and mental assent. In re *George M. Hill Co.* (U. S.) 123 Fed. 866, 867, 59 C. C. A. 354.

The word "acceptance" fairly implies a piece of commercial paper which might then pass into the hands of an innocent holder, so that where the defendant ordered goods to be shipped on open account, and the seller's acceptance of the order stipulated that it should be sold on 30 days' "acceptance," there was a material modification of the offer. *Russell v. Falls Mfg. Co.*, 82 N. W. 134, 135, 106 Wis. 329.

The word "acceptance," as used in a note by which a bank promised to pay the principal at 10 days' sight, with 3 per cent. interest to the day of "acceptance," did not mean the ordinary acceptance which is required in a bill of exchange, but the term as used in the note meant "at sight." *Sutton v. Toomer*, 7 Barn. & C. 416, 418.

To constitute an "acceptance" there must be an act of the will. Every receipt is not an acceptance. If the party accepts the thing, though but for a moment, he cannot afterwards, by dissatisfaction, get rid of the effect of it. *Hardman v. Bellhouse*, 9 Mees. & W. 596, 600.

## Of award.

The "acceptance" of an award by the court to which it is returned in order that it may become the basis of a judgment undoubtedly requires an exercise of the judicial will of the court in its favor. "To accept" means to receive with approval; to adopt; to agree to. In re *Curtis*, 30 Atl. 769, 64 Conn. 501, 42 Am. St. Rep. 200.

## Of bill of exchange.

The "acceptance" of a draft is the assent to the proposition contained in the draft, which on its part is an offer, and which offer and assent constitute a contract right or relation between the parties. *Herter v. Goss & Edsall Co.*, 30 Atl. 252, 254, 57 N. J. Law, 42 (citing *Swope v. Ross*, 40 Pa. [4 Wright] 186, 80 Am. Dec. 567).

"An acceptance is an engagement to pay the bill according to the tenor of acceptance; a general acceptance is an engagement to pay according to the tenor of the bill." *Cox v. National Bank of New York*, 100 U. S. 704, 712, 25 L. Ed. 739 (quoting *Bayley*, Bills [5th Ed.] 154; *Chit. Bills* [13th Am. Ed.] 342); *Thomas v. Thomas*, 7 Wis. 476, 481.

"An acceptance is an assent or agreement to comply with the request or order contained in the bill, or, in other words, an assent or agreement to pay the bill, according to the tenor of the acceptance, when due." *Gallagher v. Nichols*, 60 N. Y. 438, 445; *Ray v. Faulkner*, 73 Ill. 469, 472; *Woodard v. Griffiths-Marshall Grain Commission Co.*, 45 N. W. 433, 434, 43 Minn. 260.

"Acceptance," as the term is used with reference to bills of exchange, means a promise on the part of the drawees to pay the bill according to its tenor, and any promise or any words amounting to a promise to pay will amount to an acceptance. The acceptance or promise is usually evidenced by the word "accepted" written on the bill, and signed by the drawee named, but such writing is not required, since any act or word evidencing a promise to pay the bill according to its tenor is sufficient to constitute an acceptance. *Boyce v. Edwards*, 29 U. S. (4 Pet.) 111, 7 L. Ed. 799; *First Nat. Bank v. Whitman*, 94 U. S. 343, 345, 24 L. Ed. 229; *Kennedy v. Geddes* (Ala.) 8 Port. 263, 268; *Whilden v. Merchants' & Planters' Nat. Bank*, 64 Ala. 1, 29, 38 Am. Rep. 1; *First Nat. Bank v. Leach*, 52 N. Y. 350, 352, 11 Am. Rep. 708; *Meads v. Merchants' Bank*, 25 N. Y. 143, 147, 82 Am. Dec. 331.

"By the 'acceptance' of a bill of exchange is meant the act or declaration by which the drawee therein named evinces—makes manifest—his assent and agreement to comply with and be bound by the request and order contained in the bill drawn to him, according to its tenor, if the 'acceptance' be absolute. It is in substance an agreement to pay the sum of money specified in the bill as therein directed. No particular words or form of words or manner are necessary to a valid acceptance, but it should generally be in writing, because that is orderly, promotes the convenience of business transactions, renders them more certain, and facilitates the proof of acceptance." *Greene v. Duncan*, 15 S. E. 956, 958, 37 S. C. 239; *Short v. Blunt*, 5 S. E. 191, 192, 99 N. C. 49. How-

ever, writing is not essential, in the absence of statutory regulation requiring it. Either method is valid, but it must appear in express words or by reasonable implication. The intention of the acceptor to pay the bill must clearly appear, in whatever manner evinced. Usually the acceptance is made by writing across the face of the bill the word "accepted," with the signature of the acceptor, but it may be made by any word or phraseology which implies substantially the same thing, and, though the acceptor may not accept on presentment of the bill, if he afterwards does so it is sufficient to bind him. *Short v. Blunt*, 5 S. E. 191, 192, 99 N. C. 49.

An acceptance of an order for payment of money may be in writing or oral, but when it is conditional the acceptor is only liable upon the happening of the condition, and the terms of an acceptance in writing cannot be varied by contemporaneous parol agreement. *Kervan v. Townsend*, 49 N. Y. Supp. 136, 140, 25 App. Div. 256.

A promise to accept an existing bill of exchange is an acceptance. A promise to pay it is also an acceptance. A promise, therefore, to accept or to pay, cannot be less than an acceptance. It amounts, in effect, to this: "Whether we shall send for the bill again and accept it in form or not is uncertain, but at any rate you may depend on its being paid." *Wynne v. Raikes*, 5 East, 514, 521.

A promise in writing to accept a bill of exchange, made within a reasonable time before it is drawn, will amount to an acceptance of the bill in favor of a person to whom the promise is communicated, and who takes the bill, for a valuable consideration, on the faith and credit of the promise. *Woodard v. Griffiths-Marshall Grain Commission Co.*, 45 N. W. 433, 434, 43 Minn. 260.

In an action on a bill as to which the drawee had written that the bill would meet with due honor from him, the court said: "It would have been much better doctrine if it had been originally determined that nothing else should amount to an acceptance than a written acceptance on the bill itself; but it is now too late to revert to that, it having been determined by many cases that an acceptance may be by parol. What is an acceptance, but an engagement to pay the bill when due? This, then, is stronger than a parol acceptance, because it is a written engagement"—and held that such promise to honor the bill was an acceptance. *Clarke v. Cock*, 4 East, 57, 72. So, also, a promise by parol to honor a bill is an acceptance. *Powell v. Monnier*, 1 Atk. 611, 612.

The acceptance of a bill of exchange raises no implication that the drawer has funds to meet it, for a bill of exchange is not drawn on deposits necessarily, and in this respect an acceptance differs from the in-

dorsement that a bank check is good, for such an indorsement implies that when it was made there were funds there to pay the check. An acceptance of a bill of exchange is a new promise by the acceptor to pay, funds or no funds. The acceptor is supposed to know the signature of its correspondent, and cannot dispute the signature afterwards. By such acceptance the acceptor becomes primarily liable as if he were the maker of a promissory note. *Espy v. First Nat. Bank*, 85 U. S. (18 Wall.) 604, 605, 21 L. Ed. 947.

The acceptance of a draft is a promise to pay it according to its terms, and a promise to pay, coupled with a condition changing the terms, is not an acceptance. *Bonnell v. Mawha*, 37 N. J. Law (8 Vroom) 198, 200.

Payment of a check of the Treasurer of the United States on a national bank duly designated as a depositor of public moneys, on an unauthorized indorsement on the name of the payee, is not an acceptance of the check, so as to authorize an action by the real owner to recover its amount as on an accepted check. A payment is not an acceptance under any circumstances. The one is a promise to perform the act, and the other an actual performance. A banker may be ready to make actual payment of a check when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay, than to meet the promise when required. *First Nat. Bank v. Whitman*, 94 U. S. 343, 345, 24 L. Ed. 229.

The word "acceptance," as used in the negotiable instruments act, means an acceptance completed by delivery or notification. *Ann. Codes & St. Or.* 1901, § 4592; *Bates' Ann. St. Ohio* 1904, § 3178; *Code Va. Supp.* 1898, § 2841a; *Rev. Laws Mass.* 1902, p. 562, c. 73, § 207; *Rev. Codes N. D.* 1899, § 1060.

The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. *Code Supp. Va.* 1898, § 2841a; *Bates' Ann. St. Ohio* 1904, § 3175w.

An acceptance of a bill must be made in writing, by the drawee or by an acceptor for honor, and may be made by the acceptor writing his name across the face of the bill, with or without other words. *Civ. Code Mont.* 1895, § 4140.

#### In contracts.

An acceptance is an engagement of one party acceding to the proposition of the other. *Jeune v. Ward*, 1 Barn. & Ald. 653, 659.

"Acceptance," as the word is used to denote an element of a contract, to wit, the acceptance of the offer, comprehends the assent of the person to whom the offer was made to the whole proposition contained in

the offer, coextensive with it in all its provisions, and not qualified or departed from it by insertion of any new matter. *Hutcherson v. Blakeman*, 60 Ky. (3 Metc.) 80, 81.

"Acceptance," as used in the law of sales of personalty, where the bargain is conducted by mail, means a paper writing deposited in the mails by one of the contracting parties, whereby the bargain is closed. *Vassar v. Camp* (N. Y.) 14 Barb. 341, 354.

A mental determination, not indicated by speech or put in course of indication by the act to the other party, is not an acceptance which would bind the other, nor does an act which in itself is no indication of an acceptance become such because accompanied by an unevinced mental determination. *White v. Corlies*, 46 N. Y. 467, 469; *Mactier's Adm'rs v. Frith*, 6 Wend. 103, 120, 21 Am. Dec. 262; *Trounstone v. Sellers*, 11 Pac. 441, 445, 35 Kan. 447.

An "acceptance" of an offer made by letter, to constitute a contract between the parties, does not consist of mere volitions or a determination to accept the proposal. The writing of a letter accepting the offer is no more an "acceptance" of such offer than a bare determination locked in the acceptor's own bosom, and not communicated, would have been. There was no "acceptance" of an offer by letter until it went into the post office, which must be done within a reasonable time after the receiving of the offer. *Averill v. Hedge*, 12 Conn. 424, 433.

"Acceptance," as used in the law of sales of personalty, means anything that amounts to a manifestation of a determination on the part of the vendee to accept the offer of the seller which has been communicated or put in a proper way to be communicated to the party making the offer. Just what constitutes an acceptance depends naturally in a great measure upon the circumstances in each particular case. Keeping silent under some circumstances may amount to an acceptance. *Mactier's Adm'rs v. Frith*, 6 Wend. 103, 120, 21 Am. Dec. 262.

An acceptance upon terms varying from those offered is a rejection of the offer, and puts an end to the negotiations, unless the party who made the original offer renews it or assents to the modified suggestion. *Minneapolis & St. L. R. Co. v. Columbus Rolling Mill Co.*, 7 Sup. Ct. 168, 169, 119 U. S. 149, 30 L. Ed. 376; *First Nat. Bank v. Hall*, 101 U. S. 43, 50, 25 L. Ed. 822; *Baker v. Johnson County*, 37 Iowa, 186, 189; *Fox v. Turner*, 1 Ill. App. (1 Bradw.) 153, 159.

"An 'acceptance' of an offer, to constitute a binding contract, must be in the words of, or must be entirely accordant with the terms and conditions of, the offer; for, if not, it is the acceptance of a different thing than the offer." *Myers v. Smith* (N. Y.) 48 Barb. 614, 634.

In order to constitute an acceptance of an option or offer to sell, the acceptance must be unconditional. *Washington v. Rosario Min. & Mill. Co.*, 67 S. W. 459, 464, 28 Tex. Civ. App. 430; *Bruner v. Wheaton*, 48 Mo. 363, 366, 367.

#### Of corporate charter.

The "acceptance" of a charter of a corporation need not be by formal vote of the incorporators, but it may be inferred from the exercise of corporate acts by them under the charter. *Glymont Improvement & Excursion Co. v. Toler*, 30 Atl. 651, 652, 80 Md. 278.

#### Of dedication.

The acceptance necessary to establish a highway by dedication is the use of such highway by the public in the manner intended, and not any act of the town manifesting an intention to adopt or accept it by repairing it, or in some other way. *Green v. Town of Canaan*, 29 Conn. 157, 163.

"Acceptance" requisite to establish a highway by dedication means an act by the town authorities manifesting an intention to take and use the road as a public highway. The acts of appropriating money and labor upon the making and repair of streets so dedicated is an act of acceptance of the dedication, and makes the place in question a complete highway. *Wright v. Tukey*, 57 Mass. (3 Cush.) 290, 295.

An action by municipal authorities to obtain possession of land dedicated to public uses has been repeatedly approved, and it is impossible to conceive how "acceptance" to such dedication could be more plainly disclosed than by such an action. *Atlantic City v. Groff*, 45 Atl. 916, 64 N. J. Law, 527.

The approval by the common council of the city of a plat of a proposed addition is a certificate that the plat conforms to the law, but is in no sense an acceptance of the street as a public highway, nor does it cast upon the city the duty of keeping it in repair. *Downend v. City of Kansas*, 56 S. W. 902, 904, 156 Mo. 60, 51 L. R. A. 170.

Within the rule that there must be an acceptance of property dedicated to public use, acceptance requires no formal act. A resolution of the mayor and common council of a city, asserting the right of control over property dedicated, is equivalent to an "acceptance" by the public of the use tendered by the dedication. *Coast Co. v. Borough of Spring Lake*, 36 Atl. 21, 28, 56 N. J. Eq. 615.

In order to establish a highway there must be, in addition to a dedication, an "acceptance" by competent authority, and such an acceptance may ordinarily be evidenced in one of three ways, viz., by deed or other record, by acts in pais, such as opening, grading, or keeping the road in repair at public expense, or by long-continued user on the

part of the public. *City of Baltimore v. Broumel*, 37 Atl. 648, 649, 86 Md. 153 (citing *State v. Kent County Com'rs*, 83 Md. 377, 85 Atl. 62, 33 L. R. A. 291).

The individual recognition of a street by members of a common council cannot be regarded as a municipal "acceptance" of that street. While it is true that the acceptance need not be evidenced in any formal way, yet, if the act relied upon as constituting the acceptance is a legislative act, it must be evidenced with legislative formality. It must be either by ordinance or resolution passed at a legal meeting of the members of the legislative body. It therefore follows that an ordinance passed by the common council of a borough authorizing a railroad company to construct its road along a certain avenue, being *ultra vires*, is not an "acceptance" by the borough of the avenue as a street. *Thompson v. Ocean City R. Co.* (N. J.) 37 Atl. 129, 131.

#### Of deed.

When a grantee is aware of a conveyance and does not dissent, and the conveyance is positively beneficial to him or her, acceptance will be presumed. *Kingman & Co. v. Cornell-Tibbetts Machine & Buggy Co.*, 51 S. W. 727, 735, 150 Mo. 282 (citing *Appleman v. Appleman*, 41 S. W. 794, 62 Am. St. Rep. 732).

A lunatic is presumed to accept a deed clearly beneficial to him, and it appears that the same rule applies also to infancy or any other legal disability. *McCartney v. McCartney* (Tex.) 53 S. W. 388, 389, 391.

Where an unconditional beneficiary deed is delivered, at the time of its execution, into the hands of the father of the grantee, the grantee at that time being but two years of age, a presumption is raised of acceptance by the infant. *Hall v. Hall*, 17 S. W. 811, 812, 107 Mo. 101 (citing *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 392; *Rogers v. Carey*, 47 Mo. 236, 4 Am. Rep. 322; *Palmer v. Palmer*, 62 Iowa, 204, 17 N. W. 463; *Bryan v. Wash*, 7 Ill. [2 Gilman] 557; *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112; *Masterson v. Check*, 23 Ill. [13 Peck] 72; 3 Washb. Real Prop. 284).

Where a deed at the time of its execution was delivered to the father of a child non compos mentis, for the benefit of such child, and with an intent to pass title, an acceptance of the conveyance will be presumed, and the delivery is complete. *Eastham v. Powell*, 11 S. W. 823, 824, 51 Ark. 530.

#### In sales.

"Acceptance," in a sale of goods, "is an act done by two parties, one of whom is content to deliver, and the other to receive, the subject-matter of the contract." *Acraman v. Morrice*, 8 Man. Gr. & S. 449, 459.

Acceptance of articles sold is the receipt of goods by a purchaser thereof with an intention of retaining them, indicated by some act or words sufficient for that purpose. *Schmidt v. Thomas*, 44 N. W. 771, 772, 75 Wis. 529, 532.

#### In statute of frauds.

See, also, "Accept and Receive."

2 Rev. St. p. 136, § 8, providing that a contract for the sale of goods over a certain value will not be binding unless there is a note or memorandum in writing or earnest paid, or an "acceptance and receipt" of the whole or a part of the property by the buyer, does not require an actual delivery and acceptance of the goods, but is satisfied by a constructive or symbolical delivery. But in order to satisfy the statute there must be something more than mere words; the act of "accepting and receiving" required to dispense with a note in writing requires more than a simple act of the mind. The acts of the parties must be of such a character as unequivocally place the property within the power and under the exclusive dominion of the buyer. There must be not merely a delivery and acceptance of the property in the goods, but also a complete acceptance of the possession by the buyer. *Shindler v. Houston*, 1 N. Y. (1 Comst.) 261, 267, 49 Am. Dec. 316.

Rev. St. c. 74, § 4, requiring an "acceptance" of goods of the value of more than \$50, which have been sold without a memorandum in writing or a payment on the purchase price, in order to make the contract binding, cannot be construed to mean that the "acceptance" must be by the purchaser personally; but receiving of the property purchased by an agent duly authorized to purchase constitutes an acceptance by the purchaser, and hence, where the vendor had transported goods, and delivered them at the place where the purchaser's agents directed, and again shipped by the agent, there was a sufficient acceptance within the statute. *Snow v. Warner*, 51 Mass. (10 Metc.) 132, 137, 43 Am. Dec. 417.

An "acceptance" of goods, within the statute of frauds, must be an actual intentional receiving by a purchaser or his agent. The mere delivery of the goods to a carrier selected by the seller for transportation could not be construed as an "acceptance" by a purchaser, as that term is used in the statute, since such fact did not include any act on the purchaser's part. *Hanson v. Armitage*, 5 Barn. & Ald. 557, 558.

An "acceptance" of personalty which has been made the subject of a verbal sale is not sufficient to take the sale out of the operation of the statute of frauds as long as the seller's lien on the goods for their price remains, and the buyer cannot maintain tro-

ver for their detention. To constitute a delivery and acceptance, something more than mere words is necessary. There must be some act of the parties amounting to a transfer of possession before there can be an acceptance by the buyer. *Edwards v. Grand Trunk Ry. of Canada*, 54 Me. 105, 111.

The acceptance and actual receipt of goods which make a written memorandum of the sale unnecessary under the statute of frauds is not such an acceptance and receipt as will preclude the purchaser from questioning the quantity or quality of the goods or in any way disputing the fact of the performance of the contract by the seller. The effect of such statutory acceptance and receipt is merely to dispense with the necessity of the written memorandum of the contract. *Morton v. Tibbett*, 15 Adol. & E. (N. S.) 428, 437.

The abandonment by a seller of his lien on the property by giving the buyer absolute control over it, so that he had a right to take the goods and dispose of them as he pleased, constituted an acceptance within the statute of frauds. *Simpson v. Krumdick*, 10 N. W. 18, 19, 28 Minn. 352.

Acceptance may be made without a receipt of the property where the sale is of a specific lot of goods, and the bargain itself identifies the goods as those sold, and of the quality which the buyer agrees to purchase. *Simpson v. Krumdick*, 10 N. W. 18, 19, 28 Minn. 355.

#### Of structure.

Under Cal. Code Civ. Proc. § 1187, requiring a materialman furnishing material to a contractor to file his lien claim within 30 days after the completion of the structure, and providing that the occupation of the structure by the owner or its "acceptance" by him should be deemed conclusive evidence of completion, acceptance should be construed to include the releasing of the contractor and the taking control of the work by the owner for the purpose of completing it. *Giant Powder Co. v. San Diego Flume Co.*, 25 Pac. 976, 88 Cal. 20.

#### ACCEPTED.

A juror is "accepted" when he has passed successfully the scrutiny of examination and has been told by both sides to take a seat in the jury box, which he has done, neither being challenged by either side for cause or peremptorily. *United States v. Davis* (U. S.) 103 F. 457, 459.

An offer of a bargain by one person to another is not "accepted" by the latter unless it is done according to the terms in which the offer was made. Any qualification of or departure from those terms invalidates the offer unless the same be agreed to by the person who made it. *Ellason v.*

*Henshaw*, 17 U. S. (4 Wheat.) 225, 228, 4 L. Ed. 556.

The words "accepted and recorded" in Comp. St. c. 23, § 9, providing that commissioners to assign dower shall be sworn, etc., and shall set off the dower and make return of their doings in writing, which on being accepted and recorded shall cause the dower to remain fixed and certain, unless such confirmation be set aside, etc., are used in the sense of "confirmed." That is, if the assignment of dower by the commissioners is satisfactory to the judge, then he shall accept and record the same. *Serry v. Curry*, 42 N. W. 97-100, 26 Neb. 353.

#### As acceptance of bill or note.

Where the acceptance of a bill of exchange is in writing, the words "accepted," "seen," "presented," written on the bill or on any other paper relating to the transaction, will amount to an acceptance. *Barnet v. Smith*, 30 N. H. (10 Fost.) 256, 266, 64 Am. Dec. 290; *Spear v. Pratt* (N. Y.) 2 Hill, 582, 38 Am. Dec. 600 (quoting Bayley on Bills, 163 [Am. Ed. 1836]).

The word "accepted," when written on the back of a bill of exchange, above the signature of the drawee, is to be construed as showing an acceptance of the bill by the latter. *Miller v. Butler* (U. S.) 17 Fed. Cas. 814.

The party on whom an order to pay \$140 was drawn wrote his name across the face, and over his signature were the words, "Paid on this order \$40." In an action against him as acceptor to recover the balance of the order, in which he claimed he had not accepted it, the court said: "Our statute requires an acceptance to be in writing, but it does not prescribe in what form of words it shall be expressed. The authorities require very little to make out an acceptance. Anything written by the drawee indicating an intent to accept is sufficient. To say, 'accepted,' or 'honored,' or 'seen,' is sufficient, even though no signature is appended, and the mere writing of the drawee's name across the face of the bill is an acceptance, for this, as Judge Cowen well remarks, is a still clearer indication of intent to accept than any of the single words mentioned, and is a very common mode of acceptance." *Peterson v. Hubbard*, 28 Mich. 197, 199.

"The word 'accepted' on a bill of exchange is an engagement to pay the money when due." *Cowan v. Hallack*, 13 Pac. 700, 703, 9 Colo. 572.

Defendant arranged with a merchant for the furnishing of clothing to third parties. The bills therefor were made out against the persons purchasing the goods in the usual form, and across the face of each was written "accepted," and signed by the defendant. *Held*, that the word "accepted" could not

be construed as importing a guaranty of the payment of the bill by defendant, such not being its usual meaning and connection when so written. *Hatch v. Antrim*, 51 Ill. 106, 108.

## ACCESS.

Where property in a building is assigned and the key to the building is given to the assignee for the purpose of "access" to the property, the use of the word "access" in such relation means the right to approach and inspect the property. *Gilkerson-Sloss Commission Co. v. London*, 13 S. W. 513, 514, 53 Ark. 88, 7 L. R. A. 403; *Rice v. Frayser* (U. S.) 24 Fed. 460, 463.

### ACCESS (Easement of).

An "easement of access" is the right which an abutting owner has of ingress and egress to and from his premises, in addition to the public easement in the street. *Chicago & N. W. Ry. Co. v. Milwaukee R. & K. Electric Ry. Co.*, 70 N. W. 678, 680, 95 Wis. 561, 37 L. R. A. 856, 60 Am. St. Rep. 136.

An "easement of access" from the street of an abutting property holder is a property right existing by virtue of ownership of the land abutting upon the street, and cannot be impaired or taken away without compensation. *Ferguson v. Covington & C. El. Railroad & Transfer & Bridge Co.*, 57 S. W. 460, 462, 108 Ky. 662.

The easement of "access" which the owner of property has cannot be the mere right of going out from his home or place of business on the street and returning therefrom on his own land, which he may do by virtue of his personal liberty, but means a certain convenience in the use of his property with respect to the rest of the world. If the landowner is a trader, an hotel keeper, a manufacturer, his easement of access is somewhat commensurate with the uses to which his property is devoted. The right of access includes the opportunity for a man's customers to come to his place of business without unreasonable hindrance or interruption. A property devoted to business is of little value when business is turned away by obstructions and barriers. The owner may stand his teams and wagons in the street in proximity with his land a reasonable length of time in a reasonable manner, and may occupy a portion of the street, reasonably, convenient for his purposes. This access is broad enough for the beneficial enjoyment of his property, so that if his place of business is situated so as to invite trade and custom from the opposite side of the street, or from places on the street beyond in either direction, such patronage ought not to be turned away from him by obstructions on his front. *Reining v. New York, L. & W. Ry. Co.*, 13 N. Y. Supp. 238, 240.

## ACCESSIBLE.

See "Inaccessible."

Act 1881, c. 649, amending the general act, gave the right to condemn land for earth and gravel for embankments, but limiting the right to lands which were contiguous to the road and reasonably "accessible" to where the same was to be used. *Held*, that "accessible," in connection with the other language, only authorized a condemnation of land so near as to permit the dirt and gravel to be carried away. *In re Long Island R. Co.*, 21 N. Y. Supp. 489, 490, 66 Hun. 631; *In re Moran*, Id.

## ACCESSIO.

"Accessio" is defined by Bouvier as a manner of acquiring the property in a thing which becomes united with that which a person already possesses. *Mather v. Chapman*, 40 Conn. 382, 397, 16 Am. Rep. 46.

## ACCESSION.

Accession is a right, derived from the civil law, to all of that which one's own property produces, and to that which is united to it either naturally or artificially. The civil law required the thing to be changed into a different species, and to be incapable of being restored to its ancient form, as grapes made into wine, before the original proprietor could lose his title; nor even then did the other party acquire any title by the accession, unless the materials had been taken away in ignorance of their being the property of another. By the English common law, whatever alteration of form any property has undergone, the owner may seize it in its new shape if he can prove the identity of the original material, as if leather be made into shoes, cloth into a coat, or trees squared into timber, the article in its altered form is still the property of the owner of the materials, if they can be identified. *Betts v. Lee*, 5 Johns. 348, 350, 4 Am. Dec. 368.

To deprive one of his right to things produced or made of the soil belonging to him by "accession," the change must be so great as to convert the materials themselves into a different species. Thus, the cloth of another made into a coat or other garment does not vest in the operator, but all the owner has to do to reclaim his property in its new shape is to identify the materials. But if corn were made into meal, the change is into a new species, and is so great that the original materials cannot be reproduced out of the articles, and the new article belongs to the operator. Hence bricks not burnt, which have been made from soil which the maker did not own when he made the bricks, belong to the original owner, for they are

soil and earth still; and as to bricks which have been burnt, though they have undergone a considerable change, so great as to place them nearly on the boundary line of right, still the change is not sufficient to strip the original proprietor of the soil of his right to them, for they can be dissolved and made again into soil; therefore the property is not changed, and belongs to the owner of the soil, and not the maker of the brick. *Lampton's Ex'rs v. Preston's Ex'rs*, 24 Ky. (1 J. J. Marsh.) 454, 455, 19 Am. Dec. 104.

It was a principle, settled as early as the time of the Year Books, that, whatever alteration of form any property had undergone, the owner might seize it in its new shape and be entitled to the ownership of it in its state of improvement, if he could prove the identity of the original materials; as, if leather be made into shoes, or cloth into a coat. Plaintiff delivered \$40 worth of duck to H., who agreed to have it manufactured into a sail, and that it should remain the property of the plaintiff until it was paid for. He caused it to be manufactured as by agreement, at a cost of \$18, and, without ever paying the plaintiff, sold the sail to C., who sold it to the defendant. Held, that replevin could be maintained on the principle of accession. *Eaton v. Munroe*, 52 Me. 63, 64.

It is a general rule of law that if the materials of one person are united to the materials of another by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole by right of accession. *Pulcifer v. Page*, 32 Me. 404, 405, 54 Am. Dec. 532.

The ownership of a thing, whether it be movable or immovable, carries with it the right to all that the thing produces and to all that becomes united to it, either naturally or artificially. This is called the "right of accession." Civ. Code La. 1900, art. 498.

## ACCESSORY.

An "accessory" is he or she who stands by and aids, abets, or assists, or who, not being present aiding, abetting, or assisting, had advised and encouraged the perpetration of the crime. *Mills' Ann. St. Colo.* 1891, § 1168; *Comp. Laws Nev.* 1900, § 4665; *People v. Schwartz*, 32 Cal. 160, 164; *Fixmer v. People*, 38 N. E. 667, 668, 153 Ill. 123.

"An accessory is one who is not the chief actor in a felonious offense, not present at its performance, but is in some way connected therein, either before or after the act committed." *State v. Berger* (Iowa) 96 N. W. 1004, 1095; *Pen. Code Ga.* 1895, § 44; *United States v. Hartwell* (U. S.) 26 Fed. Cas. 198, 199 (quoting 4 Bl. Comm. 34).

All persons who, after the commission of any felony, conceal or aid the offender, with

knowledge that he has committed a felony, and with intent that he may avoid or escape from arrest, trial, conviction, or punishment, are accessories. *Rev. Codes N. D.* 1899, § 6826; *Pen. Code S. D.* 1903, § 28; *Rev. St. Okl.* 1903, § 1949.

All persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor and protect the person charged therewith or convicted thereof, are accessories. *Rev. St. Utah* 1898, § 4075.

An accessory is one who, knowing that an offense has been committed, conceals the offender, or gives him any other aid in order that he may evade an arrest or trial or the execution of his sentence. But no person who aids the offender in making or preparing his defense at law, or procures him to be bailed, though he afterwards escapes, shall be considered an accessory. The following persons cannot be accessories: (1) The husband or wife of an offender; (2) his relations in the ascending or descending line by consanguinity or affinity; (3) his brothers or sisters; (4) his domestic servants. *Pen. Code Tex.* 1895, arts. 86, 87.

A person who, after the commission of a felony, harbors, conceals, or aids the offender, with intent that he may avoid or escape from arrest, trial, conviction, or punishment, having knowledge or reasonable ground to believe that such offender is liable to arrest, has been arrested, is indicted or convicted, or has committed a felony, is an accessory to the felony. *Pen. Code N. Y.* 1903, § 30.

An accessory is one who stands by and aids and abets and assists, or who counsels and advises the perpetration of the crime. *People v. Ah Ping*, 27 Cal. 489, 490.

While certain crimes can only be committed by a particular class of the community, others not of the class may be principals in the second degree or accessories thereto, since one may assist in a crime he cannot commit. *Bishop v. State*, 45 S. E. 614, 118 Ga. 799.

"Mere silence or approval of the commission of an act after it is done does not constitute one an accessory." *Harrel v. State*, 80 Am. Dec. 97, note (citing *Cooper v. Johnson* [sub nom. *People v. Johnson*] 81 Mo. 483).

Under Cr. Code, div. 2, § 2 (Starr & C. Ann. St. par. 331), declaring that an accessory is he who stands by and aids, or who, not being present aiding, has advised the perpetration of the crime, and shall be considered as principal, an indictment alleging that one man murdered another, and that defendant did "feloniously, unlawfully, and maliciously incite, move, procure, counsel, advise, encourage, assist, aid and abet the said [mur-



derer], the said felony and murder in manner and form aforesaid to do and commit," without alleging that defendant murdered the deceased, does not charge an indictable offense. *Usselson v. People*, 36 N. E. 952, 953, 149 Ill. 612 (following *Baxter v. People*, 8 Ill. [3 Gilman] 368).

"An 'accessory' is defined to be any one who, knowing that an offense has been committed, conceals the offender, or gives him any other aid in order that he may evade arrest, or trial, or the execution of his sentence." *Anderson v. State*, 45 S. W. 15, 16, 39 Tex. Cr. R. 83; *Peeler v. State*, 3 Tex. App. 533, 535; *Schackey v. State*, 53 S. W. 877, 878, 41 Tex. Cr. R. 255; *Chitister v. State*, 28 S. W. 683, 33 Tex. Cr. R. 635; *Street v. State*, 45 S. W. 577, 578, 39 Tex. Cr. R. 134. The person charged as an accessory must have given some personal help to the offender, and the naked fact that he receives stolen property, knowing it to have been stolen, does not render him an "accessory." *Street v. State*, 45 S. W. 577, 578, 39 Tex. Cr. R. 134. But a person who aids an offender in making or preparing his defense at law, or procures him to be bailed, though he afterwards escapes, is not an accessory. *Tex. Pen. Code*, art. 86. *Schackey v. State*, 53 S. W. 877, 878, 41 Tex. Cr. R. 255. The mere fact that accused gave witness property to secure his departure does not render the witness an accessory. *Chitister v. State*, 28 S. W. 683, 33 Tex. Cr. R. 635.

#### ACCESSORY AFTER THE FACT.

An accessory after the fact is a person who, after full knowledge that a crime has been committed, conceals it from the magistrate, and harbors, assists, or protects the person who is charged with or convicted of the crime. *Pen. Code Ga.* 1895, § 47; *Comp. Laws Nev.* 1900, § 4666; *Mills' Ann. St. Colo.* 1891, § 1168.

Every person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, to the offender, who, after the commission of any felony, shall harbor, conceal, or maintain or assist any principal felon or accessory before the fact, or who shall give the offender any other aid, knowing that he had committed the felony, or had been accessory thereto before the fact, with intent that he shall avoid or escape from detection, arrest, trial, or punishment, shall be deemed accessory after the fact. *Ballinger's Ann. Codes & St. Wash.* 1897, § 6783; *Rev. St. Fla.* 1892, § 2356.

"An accessory after the fact is one who, knowing a felony to have been committed, receives, comforts, or assists the felon," *United States v. Hartwell* (U. S.) 26 Fed. Cas. 196, 199 (quoting 4 Bl. Comm. 37; 1 Hale.

P. C. 618); *Lloyd v. State*, 42 Ga. 221, 225; *Pearce v. Territory*, 68 Pac. 504, 506, 11 Okl. 438. The absence of the party at the time the crime was actually committed is necessarily implied in this definition. *United States v. Hartwell* (U. S.) 26 Fed. Cas. 196, 199.

"The true test whether one is an accessory after the fact or not is whether what he did was by way of personal help to his principal to elude punishment." *Blakeley v. State*, 7 S. W. 233, 235, 24 Tex. App. 616, 5-Am. St. Rep. 912 (quoting 1 Bishop Cr. Law [7th Ed.] § 695); *Lloyd v. State*, 42 Ga. 221, 225.

An accessory after the fact is one who, with knowledge that a felony has been committed by another, aids, relieves, comforts, or assists the felon, whether he be a principal or an accessory before the fact. *Albritton v. State*, 13 South. 955, 956, 32 Fla. 358.

At common law an "accessory after the fact" is one who, knowing a felony has been committed by another, receives, relieves, comforts, or assists the felon, to constitute which three things were requisite: The felony must be completed; the party relieving must know that the felon is guilty; and must receive, relieve, comfort, or assist him. *State v. Davis*, 14 R. I. 281, 283.

The offense of being an accessory to a felony after the fact is preserved by the Penal Code, and is defined in section 30 to be "a person who, after the commission of a felony, harbors, conceals, or aids the offender, with intent that he may avoid or escape from arrest, conviction or punishment, having knowledge or reasonable grounds to believe that such offender is liable to arrest, has been arrested, is indicted, or convicted, or has committed a felony, is an accessory to the felony." This is substantially the definition given by the common law to the offense of being accessory after the fact. *People v. Sanborn*, 14 N. Y. St. Rep. 123, 127.

One cannot be convicted as an "accessory after the fact" unless the felony be complete, and, until such felony has been consummated, any aid or assistance rendered to a party in order to enable him to escape the consequences of his crime will not make the person affording the assistance an accessory after the fact. *Harrel v. State*, 39 Miss. 702, 705, 80 Am. Dec. 95.

One who has done no act which renders him liable for murder is only liable as an accessory after the fact by aiding and concealing the dead body of the victim. *People v. Keefer*, 3 Pac. 818, 821, 65 Cal. 232, 2 West Coast Rep. 878.

As to what shall be deemed to be within the general definition depends upon the

facts in the particular case. To receive stolen goods, knowing them to be stolen, does not fall under any of the definitions of the common law, and does not constitute the receiver an accessory, but is in itself a distinct and separate offense. *Loyd v. State*, 42 Ga. 221, 225.

Within the definition of Mansf. Dig. § 1507, as "a person who, after a full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime," a woman who lived in the house with a husband and his wife, and who knew that the husband was about to kill his wife, and after he had killed her knew that he had done so, who failed to notify the authorities of the fact, not from any desire to shield the husband, but from fear that she would be killed if she did tell, is not an accessory after the fact. *Carroll v. State*, 45 Ark. 539, 545.

Any assistance given to one known to be a felon, in order to prevent his apprehension, trial, or punishment, is sufficient to make a man an accessory after the fact. *Blakely v. State*, 7 S. W. 233, 235, 24 Tex. App. 616, 5 Am. St. Rep. 912.

#### Accomplice distinguished.

An "accessory after the fact" does not come within Wharton's definition of an "accomplice" as one who "knowingly and voluntarily, and with a common intent with the principal offender, unites in the commission of the crime." Whart. Cr. Ev. § 440. The offense of an accessory after the fact is distinctly his own, and he is liable to a different punishment; nor can he be indicted jointly with the principal for the principal's offense. *State v. Umble*, 22 S. W. 378, 380, 115 Mo. 452 (citing *Commonwealth v. Wood*, 77 Mass. [11 Gray] 86).

One who is a principal cannot be an accessory after the fact, and so cannot be an accomplice. *People v. Chadwick*, 25 Pac. 737, 738, 7 Utah, 134.

#### ACCESSORY BEFORE THE FACT.

An accessory before the fact is one who, being absent at the time the crime is committed, yet procures, counsels, or commands another to commit it. *United States v. Hartwell* (U. S.) 26 Fed. Cas. 196, 199 (citing 1 Hale, P. C. 615); *Trial of Aaron Burr*, 8 U. S. (4 Cranch) 470, 492, 2 L. Ed. 684; *State v. Beebe*, 17 Minn. 241, 246 (Gil. 218, 224); *Albritton v. State*, 13 South. 955, 956, 32 Fla. 858; *Pearce v. Territory*, 68 Pac. 504, 506, 11 Okl. 438; *Komrs v. People*, 73 Pac. 25, 31 Colo. 212; *Pen. Code Ga.* 1895, § 45.

Any person who shall feloniously move, incite, counsel, hire, command, or procure any other person to commit a felony is an

accessory before the fact. *Shannon's Code Tenn.* 1896, § 6430.

"An 'accessory before the fact' is one who counsels, commands, or procures another to commit a crime, not being himself actually or constructively present at the time of its commission. It is not essential that any specific mode of perpetrating the crime should be counseled or commanded, or that it should be done in the particular way instigated. The inciter may be indicted, convicted, and punished under the statute if the principal commits the crime, though he may vary the mode or circumstances of perpetration, or though no particular manner, time or place may have been counseled or instigated." *Griffith v. State*, 8 South. 812, 814, 90 Ala. 583.

*Foster* (Crown Law, p. 349), in showing what acts of concurrence will make a man a principal, says: "He must be present at the perpetration, otherwise he can be no more than an accessory before the fact." There are no accessories in high treason; all are principals. Every instance of incitement, aid, or protection which in the case of felony will render a man an accessory before the fact, in the case of high treason, whether it be treason at common law or by statute, will make him a principal in treason. *United States v. Burr* (U. S.) 25 Fed. Cas. 55, 171.

The bare fact of receiving information that a felony is likely to be committed has never been considered sufficient to make one an accessory before the fact. *Edmondson v. State* (Ark.) 10 S. W. 21, 22 (quoting 2 Hawk. P. C. c. 29, § 23).

An "accessory before the fact" is defined to be a person whose will contributes to a felony committed by another as principal, while himself too far away to aid in the felonious act. *Pearce v. Territory*, 68 Pac. 504, 506, 11 Okl. 438; *Spear v. Hiles*, 30 N. W. 511, 512, 67 Wis. 361.

In 2 Hawk. c. 29, § 16, it is said that: "It seems to be generally holden that those who, by showing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, are all of them accessories before the fact, both to the felony intended and all other felonies which shall happen in and by the execution of it, unless they retract and countermand their encouragement before it is actually committed." One who basely conceals a felony which he knows to be intended is not an accessory. 2 Hawk. c. 29, § 23. Neither is tacit acquiescence when words which imply mere permission sufficient to constitute the offense. There must be some active proceeding on the part of him who is charged as an accessory, or he is not guilty of the offense. *Spear v. Hiles*, 30 N. W. 511, 512, 67 Wis. 361.

An accessory before the fact is one aiding and assisting in the carrying out of a crime before the commission thereof, and hence does not include the joining of an organization for the purpose of exposing it, and acts in carrying out such design. *Commonwealth v. Hollister*, 27 Atl. 386, 157 Pa. 13, 25 L. R. A. 349.

An accessory before the fact, as defined by the common law, is a person, being absent at the time the felony was committed, who procured, counseled, commanded or aided another to commit a felony; and he could not be tried and convicted until after the conviction of the principal offender. The common law recognizes a difference between the principal to a crime and the accessory thereto before the fact, and a person proven by the evidence to be a principal cannot be convicted on an indictment charging him with being an accessory before the fact. They were by the common law regarded as distinct offenses. *People v. Sanborn*, 14 N. Y. St. Rep. 123, 126.

#### **Accomplice synonymous.**

See "Accomplice."

#### **Principal distinguished.**

The distinction between "principal" and "accessory before the fact" is this: The principal is the one who actually does the criminal act, or participates in the doing of it, whether actually or only constructively present, or who is actually present at the time of the doing of it, aiding and abetting; while the accessory is one who has such connection with the crime, by reason of preparation, procurement, advice, or encouragement, as to be deemed criminally liable therefor, but does not participate in the final commission of the crime, and is not present thereat. *State v. Prater*, 43 S. E. 230, 236, 52 W. Va. 132 (citing *McClain*, Cr. Law, § 204).

#### **ACCESSORY CONTRACT.**

An "accessory contract" is made for assuring the performance of the prior contract, either by the same parties or by others; such as suretyship, mortgage, and pledge. Civ. Code La. 1900, art. 1771.

#### **ACCESSORY DURING THE FACT.**

An "accessory during the fact" is a person who stands by without interfering or giving such help as may be in his or her power to prevent a criminal offense from being committed. *Mills' Ann. St.* 1891, § 1168. An indictment under such provision which fails to show that it was in the power of the defendant to prevent the commission of a crime without placing himself in danger is insufficient. *Farrell v. People*, 46 Pac. 841, 842, 8 Colo. App. 524.

## **ACCIDENT—ACCIDENTAL**

See "Avoidable Accident"; "Extraordinary Accident"; "Inevitable Accident"; "Pure Accident"; "Railway Accident"; "Simple Accident"; "Unavoidable Accident."

See, also, "Casualty."

Accidental or otherwise, see "Otherwise."

Fortuitous accident, see "Fortuitous."

"An accident is a coming or falling; an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, and therefore not expected; chance; casualty; contingency." *Webst. Dict.* *Henry v. Grand Ave. R. Co.*, 21 S. W. 214, 216, 113 Mo. 525; *Burkhard v. Travellers' Ins. Co.*, 102 Pa. 262, 268, 48 Am. Rep. 205; *Grant v. Moseley*, 29 Ala. 302, 305; *Ripley v. Railway Passengers' Assur. Co. (U. S.)* 20 Fed. Cas. 823, 825; *Schneider v. Provident Life Ins. Co.*, 24 Wis. 28, 30, 1 Am. Rep. 203; *Bacon v. United States Mut. Acc. Ass'n*, 44 Hun. 599, 606.

"Accident is defined by Worcester to be an event proceeding from an unknown cause, or happening without the design of the agent; an unforeseen event; incident; casualty; chance; so that death is accidental where the injury was not designed nor the danger known." *Burkhard v. Travelers' Ins. Co.*, 102 Pa. 262, 268, 48 Am. Rep. 205.

"Accidental" means "happening by chance, or unexpectedly taking place not according to the usual course of events; casual; fortuitous. We speak of a thing as accidental when it falls to us by chance, and not in the regular course of things, as an accidental meeting, accidental advantage," etc. *North America Life & Accident Ins. Co. v. Burroughs*, 69 Pa. (19 P. F. Smith) 43, 51, 8 Am. Rep. 212.

An "accident" is an event happening without the concurrence or the will of the person by whose agency it was caused; any event that takes place without one's foresight or expectation; anything occurring unexpectedly, or without known or assignable cause; that which happens without one's direct intention. The opposite of accident is design, volition, intent. *Ætna Life Ins. Co. v. Vandecar (U. S.)* 86 Fed. 282, 285, 30 C. A. 48.

"Accident," as used in an insurance policy providing for insuring against accidents, is to be construed "in its ordinary and usual signification, as being an event which takes place without one's foresight or expectation." *Supreme Council Order of Chosen Friends v. Garrigus*, 3 N. E. 818, 822, 104 Ind. 133, 54 Am. Rep. 298; *Western Travelers' Acc. Ass'n v. Holbrook (Neb.)* 94 N. W. 816, 818. It is often an undesigned and unforeseen occurrence of an afflictive or unfortunate char-

acter. *Western Travelers' Acc. Ass'n v. Holbrook* (Neb.) 94 N. W. 816, 818.

"Accidental," as used in an insurance policy providing for an indemnity whenever the death of a member occurred from an "accidental" cause, is an event happening without any human agency, or, if happening through human agency, an event which under the circumstances is unusual, and not expected, to the person to whom it happens. *Carnes v. Iowa Travelling Men's Ass'n*, 76 N. W. 683, 684, 106 Iowa, 281, 68 Am. St. Rep. 306; *Feder v. Iowa State Traveling Men's Ass'n*, 78 N. W. 252, 253, 107 Iowa, 538, 43 L. R. A. 693, 70 Am. St. Rep. 212; *McGlinchey v. Fidelity & Casualty Co.*, 14 Atl. 13, 14, 80 Me. 251, 6 Am. St. Rep. 190; *Hey v. Guarantors' Liability Indemnity Co.*, 37 Atl. 402, 181 Pa. 220, 59 Am. St. Rep. 644; *American Acc. Co. v. Carson*, 36 S. W. 169, 170, 99 Ky. 441; *Hutchcraft's Ex'r v. Travelers' Ins. Co.*, 8 S. W. 570, 571, 87 Ky. 300, 12 Am. St. Rep. 484; *Lovelace v. Travelers' Protective Ass'n*, 28 S. W. 877, 878, 126 Mo. 104, 30 L. R. A. 209, 47 Am. St. Rep. 638; *Accident Ins. Co. of North America v. Bennett*, 16 S. W. 723, 724, 90 Tenn. (6 Pickle) 256, 25 Am. St. Rep. 685.

An "accident," within the meaning of an insurance policy, is an event happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected. *Newman v. Railway Officials' & Employes' Acc. Ass'n*, 42 N. E. 650, 651, 15 Ind. App. 29; *Crandal v. Accident Ins. Co. (U. S.)* 27 Fed. 40, 42; *United States Mut. Acc. Ass'n v. Barry*, 9 Sup. Ct. 755, 759, 131 U. S. 100, 33 L. Ed. 60; *Barry v. United States Mut. Acc. Ass'n (U. S.)* 23 Fed. 712, 714; *Ætna Life Ins. Co. v. Vandecar (U. S.)* 86 Fed. 282, 285, 30 C. C. A. 48; *Travelers' Ins. Co. v. Selden (U. S.)* 78 Fed. 285, 288, 24 C. C. A. 92; *Konrad v. Union Casualty & Surety Co.*, 21 South. 721, 723, 49 La. Ann. 636; *Standard Life & Acc. Ins. Co. v. Langston*, 30 S. W. 427, 428, 60 Ark. 881; *Atlanta Acc. Ass'n v. Alexander*, 30 S. E. 939, 104 Ga. 709, 42 L. R. A. 188. If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but if the act preceding the injury is something unforeseen, unexpected, unusual, then the injury has resulted through "accidental" means. *Atlanta Acc. Ass'n v. Alexander*, 30 S. E. 939, 104 Ga. 709, 42 L. R. A. 188.

An accident is an unusual or unexpected result attending the operation or performance of a usual or necessary act or event. *Hey v. Guarantors' Liability Indemnity Co. (Pa.)* 40 Wkly. Notes Cas. 423, 424. "An unusual and unexpected result attending the performance of a usual and necessary act." *Williams v. United States Mut. Acc. Ass'n*, 14 N. Y. Supp. 728, 730, 60 Hun, 580.

Accidents are unforeseen, unexpected, and unthought of occurrences. *Breed v. Glasgow Inv. Co. (U. S.)* 92 Fed. 760, 764.

An accident is something which takes place without any intelligent or apparent cause, without design, and of course. *Malory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410; *Crandal v. Accident Ins. Co. (U. S.)* 27 Fed. 40, 42.

An accident is the result of an unknown cause, or an unusual and unexpected result of a known cause. *Crutchfield v. Richmond & D. R. Co.*, 76 N. C. 820; *Ripley v. Railway Passengers' Assur. Co. (U. S.)* 20 Fed. Cas. 823, 825; *Ralford v. Wilmington & W. R. Co.*, 41 S. E. 806, 130 N. C. 597; *Bailey v. Interstate Casualty Co.*, 40 N. Y. Supp. 513, 515, 8 App. Div. 127.

An accident is the happening of an event without the design and aid of the person, and which is unforeseen. *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 478, 20 N. E. 847, 3 L. R. A. 443, 8 Am. St. Rep. 758; *Williams v. United States Mut. Acc. Ass'n*, 14 N. Y. Supp. 728, 730, 60 Hun, 580; *Guldenkirch v. Same*, 5 N. Y. Supp. 428, 430; *Ætna Life Ins. Co. v. Vandecar (U. S.)* 86 Fed. 282, 285, 30 C. C. A. 48.

An accident is any event which takes place without the foresight or expectation of the person acted upon or affected by the event. *Crandal v. Accident Ins. Co. (U. S.)* 27 Fed. 40, 42; *Ripley v. Railway Passengers' Assur. Co. (U. S.)* 20 Fed. Cas. 823, 825; *Providence Life Ins. & Inv. Co. v. Martin*, 32 Md. 310, 315; *United States Mut. Acc. Ass'n v. Hubbell*, 47 N. E. 544, 546, 56 Ohio St. 516, 40 L. R. A. 453.

The word "accident" in its popular meaning means "a casualty, something out of the usual course of events, and which happens suddenly and unexpectedly, without any design on the part of the person injured." *Richards v. Travelers' Ins. Co.*, 26 Pac. 762, 763, 89 Cal. 170, 23 Am. St. Rep. 455.

"Accidental" is that which happens without design or expectation. *Williams v. United States Mut. Acc. Ass'n*, 14 N. Y. Supp. 728, 730, 60 Hun, 580.

The term "accident," as used in a policy of insurance against bodily injuries sustained through external, violent, and accidental means, means happening by chance; unexpectedly taking place; not according to the usual course of things. And therefore a result ordinarily and naturally flowing from the conduct of the party insured cannot be said to be accidental, even where he may not have foreseen the consequences. *Dozier v. Fidelity & Casualty Co. of New York (U. S.)* 46 Fed. 446, 449, 13 L. R. A. 114.

In Cyc. Law & Proc. vol. 1, 249, in treating of accidents, it is said: "Where, however, the effect is not the natural and probable

consequence of the means which produce it—an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of the means, or an effect which the actor did not intend to produce and which he cannot be charged with a design of producing—it is produced by accidental means." *Maryland Casualty Co. v. Hudgins (Tex.)* 72 S. W. 1047, 1049.

According to lexicographers, an accident is a sudden, unforeseen, and unexpected event. It has been held by courts, adopting this or any similar definition, that, where a man is killed by robbers, this was a case of death by accident, in the sense in which that word is used, in accident insurance policies. So, too, it has been held that death from a blow struck by one who has attempted to blackmail the assured was an accident covered by an accident insurance policy. In these and in all like cases in which death occurs by violent means, external to the man, and against or without intention or concurrence of will on the part of the man, death may probably be called an accident. A learned and laborious writer states the true rule for determining whether injuries are accidental. With great simplicity, clearness, and strength, Biddle says: "An injury may be said objectively to be accidental, though subjectively it is not, and, if it occurs without the agency of the insured, it may logically be termed 'accidental,' though it was brought about designedly by another person." *Fidelity & Casualty Co. v. Johnson*, 17 South. 2, 3, 72 Miss. 333, 30 L. R. A. 206 (citing *Bid. Ins.* vol. 2, p. 780).

When something unusual occurs which injures an employé, but such unusual occurrence is not even inferentially the result of an unusual act, and the employer has, so far as he is concerned, been pursuing his usual course, which had theretofore been done in safety, then the unusual occurrence is what is called an "accident." *Wendall v. Chicago & A. R. Co.*, 75 S. W. 689, 691, 100 Mo. App. 556.

An "accident" is an event from an unknown cause. Thus, where plaintiff was injured while unloading a car load of telephone poles, and there was evidence that the method of unloading was the usual one, and it did not appear that there was any lack of the necessary hands, or that the standards on the cars which broke were inferior, and everything was in proper condition, and no mishap or danger anticipated, it was an "accident." *Keck v. American Telephone & Telegraph Co.*, 42 S. E. 610, 131 N. C. 277.

An accident is an event from an unknown cause, or an unusual or unexpected event from a known cause. Thus, where a piece of iron was fastened by a bolt and a nut, and another workman had removed the nut, but had not taken off the piece of iron,

which fell while plaintiff was working, and injured him, such injury was accidental, for, while the cause of the injury was known, the event was most unusual and unexpected. It was almost miraculous that a piece of iron should have been held underneath a bumper to which it was fastened after the support had been removed. *Raiford v. Wilmington & W. R. Co.*, 41 S. E. 806, 130 N. C. 597.

The necessity for additional light caused by the subsequent construction of elevated railroads, and the additional expense of gas and electric lights caused by a combination of the gas and electric light companies, do not constitute "accidents," or casualties, so as to authorize a further appropriation under Rev. St. c. 24, § 90, providing that the expenditure of a city cannot lawfully exceed the amount provided for in the annual appropriation bill, unless an improvement is necessitated by an accident or casualty happening after such annual appropriation is made. *City of Chicago v. Nichols*, 52 N. E. 359, 360, 177 Ill. 97.

#### Absence of negligence.

"An accident is an occurrence to which human fault does not contribute. This is a restricted meaning, for accidents are recognized as occurrences arising from the carelessness of man." *Nave v. Flack*, 90 Ind. 205, 210, 46 Am. Rep. 205 (quoting *Browne. Jud. Interp.* 4).

"That which is an accident in the law is something that occurs after the exercise of a care that the law requires to be exercised to prevent the occurrence." *United States v. Boyd (U. S.)* 45 Fed. 851, 855.

"Accident" is defined as an event happening unexpectedly and without fault. *Osborne v. Van Dyke*, 85 N. W. 784, 785, 113 Iowa, 557 (citing *Leame v. Bray*, 8 East, 593); *Kellar v. Shippee*, 45 Ill. App. 377, 381.

Accident is any casualty which could not be prevented by ordinary care and diligence. *Armiño v. Abeytia*, 25 Pac. 777, 781, 5 N. M. 533.

Accident is an occurrence which human prescience and prudence cannot foresee or forestall. *St. Louis, I. M. & S. Ry. Co. v. Barnett*, 45 S. W. 550, 551, 65 Ark. 255.

Where both parties used ordinary care, then a misfortune to one was an accident without the fault of either, and the law must rest where the misfortune placed it. *Aurora Branch R. Co. v. Grimes*, 13 Ill. (3 Peck) 585, 587.

To make an accident or casualty, or, as the law sometimes states it, an inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency and in the circumstances in

which he was placed. *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 296.

An accident sufficient to excuse a collision on the highway exists only where the collision was unavoidable and entirely without the fault of the defendant. Thus, where defendant rode a young and spirited horse without a curb chain, and pulled the wrong rein, it was not an accident. *Center v. Finney* (N. Y.) 17 Barb. 94, 98.

"Accident," in jurisprudence, means not merely inevitable casualty or act of God, but rather such unforeseen events, mishaps, losses, or omissions as are not the result of any neglect of his or misconduct in the party who seeks relief. *Alexander v. Bailey*, 70 Tenn. (2 Lea) 636, 639.

Rev. St. §§ 4386, 4388 [U. S. Comp. St. 1901, pp. 2995, 2996], forbidding interstate carriers of animals to confine them more than a certain length of time without unloading for water, etc., unless prevented by storm or "other accidental causes," means other unavoidable accidental causes, so that an effect attributable to the negligence of the carrier is not an unavoidable accident. *Newport News & M. Val. Co. v. United States* (U. S.) 61 Fed. 488, 490, 9 C. C. A. 579.

"Death by accident" is where one is engaged in doing a lawful act and unfortunately kills another. A familiar example is where a person is using a hatchet in a lawful manner, and it flies off the handle and kills another. This is pure accident, and not punishable. To justify a verdict of not guilty on the ground of accident, it must appear to the jury from the proof before them that the act done was the unfortunate result of a perfectly lawful act in itself, done with reasonable care and regard for the lives and persons of others. If there be any negligence or want of proper care, the loss of life or injury to the person cannot be said to be purely accidental, but partly the consequence of the default of the individual killing the other, and therefore subject to indictment for the casualty. *State v. Becker* (Del.) 33 Atl. 178, 180.

"Accident," as used in reference to an injury to a shipment of freight, where the bill of lading relieves the carrier from liability for loss except for its own negligence, is to be construed to mean "such happenings as the exercise of proper care would have prevented." *Pennsylvania R. Co. v. Ralordon*, 13 Atl. 324, 326, 119 Pa. 577, 4 Am. St. Rep. 670.

A fire is accidental, and there is no liability on the person kindling such fire on his premises for damages caused by the spread thereof, unless there is negligence in its kindling or guarding. *Read v. Pennsylvania R. Co.*, 44 N. J. Law (15 Vroom) 280, 282; *Dorr v. Harkness*, 10 Atl. 400, 402, 49 N. J.

*Law* (20 Vroom) 571, 60 Am. Rep. 656; *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420, 427, 10 Am. Rep. 389; *Brummit v. Furness*, 27 N. E. 656, 658, 1 Ind. App. 401, 50 Am. St. Rep. 215; *Filliter v. Phippard*, 11 Adol. & El. (N. S.) 347, 357; *Lothrop v. Thayer*, 188 Mass. 466, 470, 52 Am. Rep. 286.

An instruction, in a personal injury case, that if the jury believed that the injuries sustained by the plaintiff were merely the result of accident, then the verdict should be for defendant, was not erroneous on the ground that the use of the word "accident" eliminated the question of negligence. *Henry v. Grand Ave. Ry. Co.*, 113 Mo. 525, 537, 21 S. W. 214.

#### Chance distinguished.

There is a wide difference between chance and accident; the one is the intervention of some unlooked for circumstance which prevents an expected result, and the other is the uncalculated effect of mere luck. In fact, pure chance consists in the entire absence of all the means of calculating results, and an accident is the unusual prevention of an effect naturally resulting from the means employed. That the fleetest horse sometimes stumbles in the race course and leaves the victory to its more fortunate antagonist is the result of accident, but the gambler whose success depends on the playing of the cards or the throwing of dice trusts his fortune to chance. *Harless v. United States* (Iowa) *Morris*, 169, 173.

#### As injury.

In an action for injuries caused by the derailment of a car, the court charged that, in order to bar the plaintiff, the defendant must show that some negligence of the plaintiff contributed to the "accident" in such a way that if the plaintiff had not been negligent the "accident" would not have happened, and refused to charge that, if plaintiff was guilty of any negligence contributing to the "injury" for which recovery is sought, he cannot recover. It was argued that the use of the word "accident" instead of the word "injury" was erroneous, the argument being that the word "accident" referred to the derailment, while the "injury"—that is, the wounding of plaintiff—occurred by the fall of the car to the bottom of the embankment. It was held that the terms with respect to causation are practically indistinguishable. If the derailment was not caused by the air brakes being uncoupled, neither was the fall of the car from the bank so caused. So that, for the purpose of the case, it was proper to treat "accident" and "injury" as synonymous. *Smith v. Erie R. Co.*, 52 Atl. 634, 638, 67 N. J. Law, 636, 59 L. R. A. 302.

The term "accident" includes not only the injury resulting therefrom, but the attendant circumstances. *Griffen v. Manice*,

59 N. E. 925, 928, 166 N. Y. 188, 52 L. R. A. 922, 82 Am. St. Rep. 630.

**Intent excluded.**

The word "accidental" in an accident insurance policy, in reference to accidental injuries, means not brought about by the purpose or intention of insured. *Duncan v. Preferred Mut. Acc. Ass'n of N. Y.*, 13 N. Y. Supp. 620, 621, 59 Super. Ct. (27 Jones & S.) 145.

The word "accident," when used to express a result produced by human action, is generally, if not universally, understood to mean a thing done or disaster caused or produced without design or intention. *The Blue Wing v. Buckner*, 51 Ky. (12 B. Mon.) 246, 250.

An injury not anticipated, and not naturally to be expected as a probable result, by the insured, though intentionally inflicted by another, is "accidental" within the terms of the policy. *Collins v. Fidelity & Casualty Co.*, 63 Mo. App. 253-256.

"Accidental means," within the meaning of an accident policy, stipulating that it only covers injuries effected by external, violent, and accidental means, but which does not in terms provide against a recovery if the death is caused by injury intentionally inflicted by the insured or any other person, applies to an injury not anticipated nor naturally to be expected by the insured, though intentionally inflicted by another. *Accident Ins. Co. v. Bennett*, 16 S. W. 723, 724, 90 Tenn. 256, 25 Am. St. Rep. 685.

An "accident," as the term is commonly understood, is an occurrence which is not intended, and therefore a thing which is done intentionally is not done accidentally. But the term in an accident policy limiting the insurer's liability has a narrower meaning, and applies only to the conduct of the insured. Thus, a murderous assault resulting in serious injury to insured is an accident, though the injuries were intended to be inflicted by assailant. *Phelan v. Travelers' Ins. Co.*, 38 Mo. App. 640, 645.

An accident insurance policy providing that it did not insure against death or disablement arising from anything "accidentally inhaled" should be construed to include inhaling illuminating gas which accidentally escaped into an hotel room where the insured was sleeping. The words "accidentally inhaled" do not apply to the voluntary and intelligent act in inhaling of an anaesthetic in aid of a surgical operation. *Mennelly v. Employers' Liability Assur. Corp.*, 25 N. Y. Supp. 230, 231, 72 Hun. 477.

**As mistake.**

An accident is an unforeseen or unexpected event of which the party's own conduct is not the proximate cause, and hence the de-

scription of a block by one number, while the grantor's deeds described another block by the same number, is an "accident" within the meaning of the term. *West Portland Homestead Ass'n v. Lownsdale* (U. S.) 17 Fed. 614, 616.

Rev. St. c. 62, § 21, provides that when any testator shall omit to provide in his will for any of his children they shall take the same as if he had died intestate, unless it shall appear that the omission was intentional, and not occasioned by "mistake or accident." Held, that the word "accident" means a mistake, an accident in the expression of the will or in its transcription, and does not imply such an accident as would or might have caused the testator to entertain a different intention from that which omission from the will would show. *Hurley v. O'Sullivan*, 137 Mass. 86, 89. Under a like statute it was held that accident meant where the testator had, through forgetfulness or error, omitted to bestow anything on the child. *Lorings v. Marsh*, 73 U. S. (6 Wall.) 337, 350. 18 L. Ed. 802.

The terms "accident" and "mistake" may not import the same thing, and therefore it cannot be argued that the use of the word "mistake" in provision in the eighty-fourth section of the act of March 22, 1890, providing that goods entered in the office of the collector under a false denomination by "accident" or "mistake" shall not be forfeited, imports a mistake of law; and where it appears that sugar was wrongfully entered as "refined sugar," without any casualty or any unforeseen or unexpected occurrence which caused the use of this denomination, it cannot be said that it was so entered by "accident." *United States v. Eighty-five Hogsheads of Sugar* (U. S.) 25 Fed. Cas. 991, 995.

**As negligence.**

"Accident," as used in a narrow sense, does not refer to the result of actionable negligence, but it is commonly used without any qualifying word in speaking of such result, and so may refer to the result of negligence. *Ullman v. Chicago & N. W. Ry. Co.*, 88 N. W. 41, 46, 112 Wis. 150, 88 Am. St. Rep. 949.

The opposite to "accident" is said not to be "negligence," but "design." If accident and negligence be not opposites, we cannot regard them as identical without confounding cause and effect. Accident and its synonyms, "casualty" and "misfortune," may proceed or result from negligence or other cause, known or unknown. *McCarty v. New York & E. R. Co.*, 30 Pa. (6 Casey) 247, 251.

"An accident is an event from an unknown cause, or an unusual and unexpected event from a known cause; chance; casualty. As if a railroad bed be in good order, and the engines and cars in good order, and

the engineer and other attendants be skillful and careful, and yet a rail breaks, the train is crushed, and the employes and passengers are killed, that is an unusual and unexpected event from a known cause—an accident. But if the track be out of order, and the engine worn and unmanageable, and on account thereof there be a like result as above stated on a good road, that is not an unexpected event, but a usual and an expected event from such a cause, which is not an accident, but which is negligence." *Crutchfield v. Richmond & D. R. Co.*, 78 N. C. 320, 322.

An accident is a result the inducing cause of which was not put in motion by the voluntary and intentional act of the person injured. It does not matter in this connection that negligence even may be made to appear. If involuntary and unintentional, the result cannot be characterized otherwise than as an "accident." *Payne v. Fraternal Acc. Ass'n of America*, 93 N. W. 861, 862, 119 Iowa, 342.

#### **Violent, external agency.**

"Death as the result of accident imports an external and violent agency as the cause." *Healey v. Mutual Acc. Ass'n*, 25 N. E. 52, 133 Ill. 556, 9 L. R. A. 371, 23 Am. St. Rep. 637; *Miller v. Fidelity & Casualty Co.* (U. S.) 97 Fed. 836; *Western Commercial Travelers' Ass'n v. Smith* (U. S.) 85 Fed. 401, 405, 29 C. C. A. 223, 40 L. R. A. 653; *Atlanta Acc. Ass'n v. Alexander*, 30 S. E. 939, 104 Ga. 709, 42 L. R. A. 188; *Maryland Casualty Co. v. Hudgins* (Tex.) 72 S. W. 1047, 1049; *Bacon v. United States Mut. Acc. Ass'n*, 25 N. E. 399, 123 N. Y. 304, 9 L. R. A. 617, 20 Am. St. Rep. 748.

In its popular sense the term "accident" signifies an event or occurrence which happens unexpectedly from the uncontrollable operations of nature exclusively, or an event resulting undesignedly and unexpectedly from human agency alone, or an event resulting from the joint operation of both of the foregoing agencies. *Conner v. Citizens' St. R. Co.*, 45 N. E. 662, 664, 146 Ind. 430; *Morris v. Platt*, 32 Conn. 75, 85.

An "accident," in its application to insurance policies, has been defined as an injury which happened, by reason of some violence, casualty, or vis major, to the assured, without his design or consent or voluntary co-operation. *Equitable Acc. Ins. Co. v. Osborn*, 9 South. 869, 870, 90 Ala. 201, 13 L. R. A. 267.

The term "accident," in the provision of Louisiana Code relative to abatement of rents caused by the loss of crops through "accident," was construed as having the meaning of fortuitous event or irresistible force. *Viterbo v. Friedlander*, 7 Sup. Ct. 962, 973, 120 U. S. 707, 30 L. Ed. 776.

Some violence, casualty, or vis major is necessarily involved in the term "accident." It means an injury which happened by reason of some violence or casualty, without any design, consent, or voluntary co-operation. *Crandal v. Accident Ins. Co.* (U. S.) 27 Fed. 40, 42.

#### **Willful distinguished.**

See "Willful, Willfully."

#### **Affray or altercation.**

"Accident," as used in the relief fund laws of a mutual benefit accident association, means simply an event that takes place without one's foresight or expectation, and one may be injured in a common-law affray and yet be entitled to recover as for an injury by accident, providing that it does not appear that he is in fault. *Supreme Counsel Order of Chosen Friends v. Garrigus*, 3 N. E. 818, 822, 104 Ind. 133, 54 Am. Rep. 298.

A policy of insurance relating to injury or death effected through external, violent, and "accidental" means covers the instance where the insured was shot by another while engaged in an altercation, the insured being at the time unarmed. *Robinson v. United States Mut. Acc. Ass'n* (U. S.) 68 Fed. 825, 826.

Where the insured came to his death in an altercation which he brought on himself, but there was nothing to indicate that at such time the insured had any cause to think death would result, such death is within the provisions of a policy insuring against death by accident. *Lovelace v. Travelers' Protective Ass'n*, 28 S. W. 877, 879, 126 Mo. 104, 30 L. R. A. 209, 47 Am. St. Rep. 638.

A benefit certificate insuring against "death by accident" does not cover a case where the assured was shot in a quarrel in which he was the aggressor and violently attacked his adversary with a pistol, accompanying the act with the exclamation that he must have revenge, and warning his adversary to "put himself in shape." *Tallafiero v. Travelers' Protective Ass'n* (U. S.) 80 Fed. 368, 25 C. C. A. 494.

#### **Bodily injury or strain.**

The bursting of an artery in attempting to close the shutters of a window will not be held to be accidental. *Feder v. Iowa State Traveling Men's Ass'n*, 78 N. W. 252, 253, 107 Iowa, 538, 43 L. R. A. 693, 70 Am. St. Rep. 212.

"Accidental injury," as used in an insurance policy against death resulting from "accidental injury," construed to include an accidental strain resulting in death. *North America Life & Accident Ins. Co. v. Burroughs*, 69 Pa. (19 P. F. Smith) 43, 51, 8 Am. Rep. 212.



The rupture of a blood vessel in the stomach of insured, from which death ensued, caused by a sudden wrench from an engine, was an accident within the meaning of a policy insuring against death from injuries sustained by external, violent, and accidental means. *Standard Life & Accident Ins. Co. v. Schmaltz*, 53 S. W. 49, 52, 66 Ark. 588, 74 Am. St. Rep. 112.

The term applies to a death resulting in an hour from a physical and mental shock received in a runaway, though the person dying receives no outward bruises, and therefore a recovery may be had on an accident policy insuring against accidental death. *McGlinchey v. Fidelity & Casualty Co.*, 14 Atl. 13, 16, 80 Me. 251, 6 Am. St. Rep. 190.

Whether an injury caused by the jarring of a buggy while insured was inserting a hypodermic needle, thereby causing it to penetrate more deeply, was accidental within the meaning of an insurance policy insuring against injuries caused by external, violent, and accidental means, was a question for the jury. *Bailey v. Interstate Casualty Co.*, 40 N. Y. Supp. 513, 515, 8 App. Div. 127.

The death of an insured from septic peritonitis resulting from an inflammation of the appendix, caused by the regular movement of the psoas muscle while riding a bicycle, was not a death from an "accidental" cause, within the meaning of such word in a policy on his life. *Appel v. Aetna Life Ins. Co.*, 83 N. Y. Supp. 238, 240, 86 App. Div. 83.

#### **Business misfortunes.**

"Accident," as used in the statute relieving a defendant of imprisonment for debt in case he is prevented from paying the debt by accident, does not include ordinary business misfortunes. *Langdon v. Bowen*, 46 Vt. 512, 516.

#### **Collision.**

Where two parties driving on a highway exercise due care, and each keep to the right, but a collision occurred because of a standing team, it constitutes an accident, without negligence or fault. *Strouse v. Whittlesey*, 41 Conn. 559, 561.

#### **Disease.**

"Accidental death," as used in an accident policy, construed not to include death resulting from malignant pustules caused by the infection on the body of putrid animal matter containing poisonous bacillus anthrax, since such death is the result of a disease, and not of accident. *Bacon v. United States Mut. Acc. Ass'n*, 25 N. E. 399, 123 N. Y. 304, 9 L. R. A. 617, 20 Am. St. Rep. 748 (reversing *Bacon v. United States Mut. Acc. Assur. Ass'n*, 50 Hun, 605, 606, 3 N. Y. Supp. 237).

"External, violent, and accidental means," within the meaning of insurance policies against death by such means, does not apply to the death of one subject to epileptic fits, who was found dead in the plunge bath in an almost direct standing position, although he has an abrasion between his eyes and the side of his head, in view of medical evidence that the entrance into the bath of one of his then condition would be likely to result in an epileptic attack, and that the fall or blow which caused the abrasion or bruise was not sufficient to have caused death. *Tennant v. Travelers' Ins. Co.* (U. S.) 31 Fed. 322, 326.

Injuries caused by a fall due to a temporary and unexpected disorder are "violent, external, and accidental," within the meaning of such words in an insurance policy. *Meyer v. Fidelity & Casualty Co.*, 65 N. W. 328, 96 Iowa, 378, 59 Am. St. Rep. 874.

In an action on an "accident" insurance policy, the evidence showed that the death of assured was produced by blood poison, and that this was occasioned by the inoculation into a wound on his hand of some poisonous substance at or very soon after the wound was made. The court said: "If the inoculation occurred at the time the wound was made, so that it was in fact a part of the accident, I see no reason why the death might not be attributed to the accident as the sole and proximate cause, although blood poisoning ensued. The latter would be produced by the accident." *Martin v. Equitable Acc. Ass'n*, 16 N. Y. Supp. 279-281, 61 Hun, 467.

#### **Drowning.**

"Death by accident" is defined as an unexpected event, not according to the usual course of things. Applying this definition, it has been held that where a person is drowned while bathing it is an accidental death, although no proof is offered of the circumstances. *Konrad v. Union Casualty & Surety Co.*, 21 South. 721, 723, 49 La. Ann. 636 (citing *Trew v. Assurance Co.*, 6 Hurl. & N. 839).

"External, violent, and accidental means," within the meaning of an accident policy, includes involuntary death by drowning, though caused by a temporary, physical trouble, which was entirely unusual and uncommon, whereby deceased falls into the water. *Manufacturers' Accident Indemnity Co. v. Dorgan* (U. S.) 58 Fed. 945, 954, 7 C. C. A. 581, 22 L. R. A. 620.

#### **Explosion.**

A policy insuring a mill against "accidents" and explosions of a certain nature should not be construed to include only explosions of the kind stipulated in the policy, but is used in its ordinary sense as meaning any unusual occurrence, unpremeditated, and

beyond the control of men, so as to include explosions of a different nature and from other causes than those specifically named. *Chicago Sugar-Refining Co. v. American Steam-Boller Co. (U. S.)* 48 Fed. 198, 200.

#### Floods.

A flood is an "accident" within the meaning of a policy insuring against loss arising from "accident" except by fire or lightning. *Hey v. Guarantors' Liability Indemnity Co.,* 37 Atl. 402, 181 Pa. 220, 59 Am. St. Rep. 644; *Hey v. Guarantors' Liability Indemnity Co. (Pa.)* 40 Wkly. Notes Cas. 423, 424.

#### Hanging or shooting by third persons.

An insurance policy, insuring against injuries by extraordinary violence and "accidental means," means an injury unforeseen, unexpected, not brought about through the insured's agency designedly, or was without his foresight, or was a casualty or mishap not intended to befall him. A person who is unexpectedly shot by another without cause or provocation is injured by accidental means within such policy. *American Accident Co. v. Carson,* 36 S. W. 169, 170, 99 Ky. 441, 84 L. R. A. 301, 59 Am. St. Rep. 473.

It will not do to say that because a desperado waylays, assaults, and wounds a member intentionally, that wounding is not an accident to the member within the meaning of the laws of the order. *Supreme Council Order of Chosen Friends v. Garrigus,* 104 Ind. 133, 140, 3 N. E. 818, 54 Am. Rep. 298.

An assault made upon insured by persons who have waylaid him in order to rob him is an accident. *Ripley v. Railway Passengers' Assur. Co. (U. S.)* 20 Fed. Cas. 823, 825.

"Accidental, external, and violent means," within the meaning of a life or accident policy insuring against such injuries, covers the case of a person who was unexpectedly shot by another without cause or provocation. Thus, where one was waylaid and assassinated for the purpose of robbery, his death was held to have been caused through accidental, external, and violent means. *Hutchcraft's Ex'r v. Travelers' Ins. Co.,* 8 S. W. 570, 572, 87 Ky. 300, 12 Am. St. Rep. 484. So death by hanging at the hands of a mob was held to be an accident within the meaning of a policy against injuries through violent, external, and accidental means. *Fidelity & Casualty Co. v. Johnson (Miss.)* 17 South. 2. So the death of a person who is shot by one whom he is trying to eject by force from a hotel office is a death by accident, and not a risk voluntarily assumed, when he makes the attempt without knowing that the other person is armed. *Lovelace v. Travelers' Protective Ass'n,* 28 S. W. 877, 879, 126 Mo. 104, 30 L. R. A. 209, 47 Am. St. Rep. 895; *Railway Officials' &*

*Employees' Acc. Ass'n v. Drummond,* 76 N. W. 562, 563, 56 Neb. 235.

It does not absolutely exclude the idea of design on the part of any person, as, for instance, injuries received by the victim of a highway robbery, though designed by the robber, are unexpected and without design on the part of the person insured, and are as to him an "accident." *Richards v. Travelers' Ins. Co.,* 26 Pac. 762, 763, 89 Cal. 170, 23 Am. St. Rep. 455.

#### Loss by theft.

Code, § 31, declaring that suit may be brought on a bond which has been lost or destroyed "by accident," apparently includes any loss of the paper not willfully caused by the owner, certainly including a loss by theft. *Mobile County v. Sands,* 29 South. 26, 29, 127 Ala. 498.

#### Poison or suffocation.

An accident policy, providing that an insurer should not be liable for bodily injuries effected through external, violent, and accidental means, construed not to include death caused by taking an overdose of opium. *Bayless v. Travellers' Ins. Co. (U. S.)* 2 Fed. Cas. 1077, 1078.

"Accidental means," as used in an accident policy providing that the insurer should only be liable for injuries caused by external, violent, and accidental means, construed not to include the taking of poison by mistake. *Pollock v. United States Mut. Acc. Ass'n,* 102 Pa. 230, 234, 48 Am. Rep. 204.

Where death resulted from taking a dose of morphine, the court held that, if deceased took more than he intended, the death was accidental, but that, if he took the exact amount intended, and misjudged the effect, the death was not accidental. *Carnes v. Iowa State Travelingmen's Ass'n,* 76 N. W. 683, 684, 106 Iowa, 281, 68 Am. St. Rep. 306 (cited in *Maryland Casualty Co. v. Hudgins [Tex.]* 72 S. W. 1047, 1049).

Where insured knowingly ate oysters, but did not know that he was eating unsound oysters, his death, which was caused thereby, was not the natural and probable consequence of eating sound oysters, and the effect produced by the eating of the unsound oysters could not have been reasonably anticipated or foreseen by him. It was unexpected, unforeseen, unusual, and therefore it cannot be said that he voluntarily ate the unsound oysters. This being true, his death was caused by "accidental means," as that term is used in the policy of insurance. *Maryland Casualty Co. v. Hudgins (Tex.)* 72 S. W. 1047, 1049.

Where a person descended into a driven well to repair a pump, and in a few minutes died from some deadly gas therein, and the dug out portion of the well was only 12 feet

deep, his death was due to accidental injuries within the meaning of an accident policy insuring against that class of injuries. *Pickett v. Pacific Mut. Life Ins. Co.*, 144 Pa. 79, 93, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618.

#### Sunstroke.

"Accidental," as used in a policy of insurance against bodily injuries sustained through external, violent, and "accidental" means, should be construed in its ordinary popular sense as meaning happening by chance, unexpectedly taking place, not according to the usual course of things, so that a result ordinarily naturally flowing from the conduct of the party cannot be said to be accidental, even where he may not have foreseen the consequences. Sunstroke or heat prostration contracted by the insured in the course of his ordinary duty as a supervising architect is not an injury by accidental means within the provisions of the policy. *Dozier v. Fidelity & Casualty Co. of New York* (U. S.) 46 Fed. 446, 448, 13 L. R. A. 114.

#### Suicide.

An accident policy, providing against bodily injuries effected through external, accidental, and violent means, construed to include a death by hanging one's self while insane. *Accident Ins. Co. v. Crandall*, 7 Sup. Ct. 685, 687, 120 U. S. 527, 30 L. Ed. 740.

A presumption of accidental death will be entertained in an action on a life policy where deceased is found dead under such circumstances that his death may have been the result of either accident or suicide, as suicide is contrary to the general conduct of mankind, and shows moral turpitude in a sane person. *Travelers' Ins. Co. v. McConkey*, 8 Sup. Ct. 1360, 1363, 127 U. S. 661, 32 L. Ed. 308; *Same v. Melick* (U. S.) 65 Fed. 178, 181, 12 C. C. A. 544, 27 L. R. A. 629.

An "accident" rather than suicide will be presumed when a man comes to his death in the manner which indicates either accidental drowning or suicide. *Couadeau v. American Accident Co.*, 25 S. W. 6-8, 95 Ky. 280.

"Accident," as used in accident insurance policies, includes the taking of one's life by his own hand. *Crandal v. Accident Ins. Co.* (U. S.) 27 Fed. 40, 42.

#### ACCIDENT (In Equity).

The term "accident," in its legal signification, is difficult to define. Judge Story defines it as embracing "not merely inevitable casualty, or the act of Providence, or what is technically called vis major, or irresistible force, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or mis-

conduct in the party" affected thereby. Mr. Pomeroy justly criticises this definition as including what are not accidents at all, but mistakes, and as omitting the very central element of the equitable conception, and defines it thus: "'Accident' is an unforeseen and unexpected event occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right which it would be a violation of good conscience for the latter person under the circumstances to retain. And the chief point of the thing is that, because of the unforeseen and unexpected character of the occurrence by which the legal relation of the parties has been unintentionally changed, the party injuriously affected thereby is, in good conscience, entitled to relief that will restore those relations to their original character, and place him in his former position." *Kopper v. Dyer*, 9 Atl. 4, 6, 59 Vt. 477, 59 Am. Rep. 742. Mr. Pomeroy's definition is held to be in accord with the adjudications of the courts in *Gotthelf v. Stranahan*, 19 N. Y. Supp. 161, 167, and is quoted and approved in *Lott v. Kaiser*, 61 Tex. 665, 669; *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* (U. S.) 116 Fed. 1, 7, 53 C. C. A. 513; and *Herbert v. Herbert*, 22 Atl. 789, 793, 49 N. J. Eq. (4 Dick.) 70. Judge Story's definition is followed in *Bostwick v. Stiles*, 35 Conn. 195, 198; *Simpson v. Montgomery*, 25 Ark. 365, 373, 99 Am. Dec. 228; and *Magann v. Segal* (U. S.) 92 Fed. 252, 261, 34 C. C. A. 323.

"Accident" is defined by Judge Story to embrace misfortune, losses, accidents, or omissions. *Vose v. Bradstreet*, 27 Me. (14 Shep.) 156, 162.

In *Smith*, Man. Eq. Jur. p. 36, an "accident" is defined as an unforeseen and injurious occurrence, not attributable to mistake or neglect or misconduct. *Magann v. Segal* (U. S.) 92 Fed. 252, 261, 34 C. C. A. 323.

Lord Cowper, speaking on the subject of accident as cognizable in equity, says, "By accident is meant when a case is distinguished from others of a like nature by unusual circumstances;" a definition quite too loose and inaccurate, without some further qualification; for it is entirely consistent with the language that the unusual circumstances may result from the parties' own gross negligence, folly, or rashness. *Simpson v. Montgomery*, 25 Ark. 365, 373, 99 Am. Dec. 228.

If the party's own agency is the proximate cause of the event, it is a mistake rather than an accident; and where the very thing which has occurred could not, in a legal sense, have been unexpected, there can be no accident. *Lott v. Kaiser*, 61 Tex. 665, 669.

An accident, in equity, is distinguished from mistake, which, within the meaning of

equity, is an erroneous mental condition, conception, or conviction induced by ignorance or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both parties to the transaction, but without erroneous character being intended or known at the time. Pom. Eq. Jur. § 839. Thus, where in an action the court decided that a set-off should be allowed, but in computing the amount of it a mistake was made, which was not discovered until after judgment had been rendered and too late for setting aside the judgment at that term, such erroneous computation constituted a mistake on the part of the judge, but an accident to the party. *L. Buckl & Son Lumber Co. v. Atlantic Lumber Co.* (U. S.) 116 Fed. 1, 7, 53 C. C. A. 513.

### ACCIDENT (In Practice).

Though not necessarily synonymous with "surprise," when used as a ground for new trial, "accident" has substantially the same meaning in legal practice, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any fault or neglect of his own, which ordinary prudence could not have guarded against. *Zimmerer v. Fremont Nat. Bank*, 81 N. W. 849, 850, 59 Neb. 661 (citing *McGuire v. Drew*, 83 Cal. 229, 23 Pac. 813).

Residence in another state, and consequent failure to hear of the testator's death, or of the probate of his will until after the time for an appeal from such probate had elapsed, if notice of probate was duly published, is not an "accident" under Gen. St. c. 38, § 5, providing for special appeals in cases of fraud, accident, or mistake. *Burbeck v. Little*, 50 Vt. 713, 715.

It was not an "accident," within R. L. § 1426, allowing appeals after the time for appealing has expired, where a petitioner was prevented from appealing by fraud, accident, or mistake, that a petitioner did not hear of the proceedings because she lived out of the state, where all statutory provisions as to notice had been complied with. *Congdon v. Congdon*, 10 Atl. 732, 735, 59 Vt. 597.

Where a justice denied a defendant the right of an appeal on the ground that an offset filed by him was not filed in good faith, notwithstanding that defendant swore to the offset, and there was no evidence against it, it was held that defendant was entitled to a special appeal under the statute (R. L. § 1428) providing for special appeals in cases of fraud, accident, or mistake. The court said that the denial of defendant's right was a mishap, and for all practical purposes might be called an "accident" or "mistake." *Wildner v. Gilman*, 55 Vt. 503, 504, 506.

Rev. St. c. 84, § 1, authorizing a review where, through accident, mistake, or mis-

fortune, justice has not been done, ordinarily imports something outside of the petitioner's own control, or, at least, something which a reasonably prudent man would not be expected to guard against or to provide for. It has long been regarded as essential to public order, security, and confidence that when the parties have had their full day in court they should abide the result, though renewed efforts afterwards might secure other and better evidence which, if seasonably obtained, might have altered the result. Every mistake either of the tribunal or of the party is not such a mistake as the statute contemplates. Mere mistakes in opinion or judgment are outside of the statute. For such mistakes, which at the most are mere errors in reasoning, to be allowed as causes for reversing solemn judgment after hearing and deliberation, would destroy all their value as authoritative adjudications of title and rights. The fact that the result was not designed, foreseen, or expected did not make it accidental, if it was the natural or direct effect of voluntary acts or omissions or conditions voluntarily assumed. *Pickering v. Cassidy*, 44 Atl. 683, 684, 93 Me. 139.

Code, §§ 3161-3171, authorizing a new trial or rehearing after judgment, on the ground of surprise, accident, mistake, or fraud, does not include a mere oversight of counsel in the preparation or defense of the suit. *Blood v. Beadle*, 65 Ala. 103. Also the absence of counsel in another court when a cause was regularly called for trial, though necessitated by conflicting professional engagements, however urgent, was not within the term "accident," "mistake," etc. *Brock v. South & N. A. R. Co.*, 65 Ala. 79.

The omission of a party pressed to trial to move for delay, when delay is needed for his preparation, is not such "accident, mistake, or misfortune" as will entitle him to a new trial. *Couillard v. Seaver*, 9 Atl. 724, 64 N. H. 614.

Under a statute providing that a person aggrieved by a decree who is prevented from appeal through mistake, accident, or misfortune may petition for leave to appeal, etc., it is held that the mere fact that petitioner had forgotten material facts at the time of the hearing does not constitute a mistake, accident, or misfortune within the meaning of the statute. *In re French*, 17 N. H. 472, 475.

A person, aggrieved by a decision of the judge of probate, who failed to appeal therefrom within 60 days from the time it was made, because he did not know it had been made, may be allowed an appeal on the ground of mistake, accident, or misfortune. *Holton v. Olcott*, 58 N. H. 598.

Where a decree of the probate court allowing the settlement of an administrator's account was made after the terms of the settlement were agreed to by counsel, and

there was no fraud, the only error in the act being such as would have been discovered by reasonable diligence, there was no such mistake, accident, or misfortune as to bring the case within the terms of the statute authorizing a petition for a new trial after the time for perfecting an appeal had expired, where the petitioner had failed to appeal from the decree because of accident, mistake, or misfortune. *Ahearn v. Mann*, 63 N. H. 330, 331.

### ACCIDENT INSURANCE.

One distinguishing feature of what is known as "accident insurance" is that it indemnifies against the effects of accidents resulting in bodily injury or death. Its field is not to insure against loss or damage to property, though occasioned by accident. So far as that class of insurance has been developed, it has been with reference to boilers, plate glass, and perhaps to domestic animals, and of injury to property by street cars, and is known as "casualty insurance." *Employers' Liability Assur. Corp. v. Merrill*, 29 N. E. 529, 531, 155 Mass. 404.

### ACCIDENT INSURANCE COMPANY.

An accident insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value to families or representatives of policy holders, conditioned upon the injury, disablement, or death of persons resulting from traveling or general accidents by land or water. *Rev. St. Tex.* 1895, art. 3096a.

### ACCIDENTAL CAUSES.

Other accidental causes, see "Other."

### ACCIDENTAL DEATH.

See "Accident—Accidental."

### ACCIDENTAL DELAYS.

"Accidental delays," as used in a bill of lading providing that a carrier shall not be liable for injuries resulting from "accidental delays," construed to include a delay caused by the necessity of taking a vessel off its usual run for the purpose of having it repaired. *Lawrence v. New York, P. & B. R. Co.*, 36 Conn. 63, 76.

### ACCIDENTAL FIRE.

A fire is accidental, and there is no liability on the person kindling such fire on his premises for damages caused by the spread thereof, unless there is negligence in its kindling or guarding. *Read v. Pennsylvania R. Co.*, 44 N. J. Law (15 Vroom) 280, 282 (cited in *Lothrop v. Thayer*, 138 Mass. 470, 52 Am. Rep. 286).

A statute exempting a tenant from liability for a loss by fire whenever the fire was accidentally begun, does not exonerate the tenant from liability for a fire which originated through his negligence. *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420, 427, 10 Am. Rep. 389; *Dorr v. Harkness*, 10 Atl. 400, 402, 49 N. J. Law, 571, 60 Am. Rep. 656; *Brummit v. Furness*, 27 N. E. 656, 657, 1 Ind. App. 401, 50 Am. St. Rep. 215.

"Accidental," as used in *Building St. 14 Geo. III, c. 78, § 86*, declaring that no action can be maintained against the owner of premises on which any fire shall "accidentally begin," does not include accidents in which the element of negligence enters, though it is true that in strictness the word "accidental" may be employed in contradistinction to "willful"; so the same fire might both begin accidentally and be the result of negligence. But it may equally mean a fire produced by mere chance or incapable of being traced to any cause. *Filliter v. Phippard*, 11 Adol. & El. (N. S.) 347, 355.

### ACCIDENTAL INJURY.

See "Accident—Accidental."

### ACCIDENTAL MEANS.

See, also, "Accident—Accidental."

The significance of the word "accidental" is best perceived by a consideration of the relation of causes to their effects. The word is descriptive of means which produce effects which are not their natural and probable consequences. The natural consequence of means used is the consequence which ordinarily follows from their use—the result which may be reasonably anticipated from their use, and which ought to be expected. The probable consequence of the use of given means is the consequence which is more likely to follow from their use than it is to fail to follow. An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. On the other hand, an effect which is not the natural and probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce, and which he cannot be charged with the design of producing, is produced by accidental means. *Western Commercial Travelers' Ass'n v. Smith* (U. S.) 85 Fed. 401, 405, 29 C. C. A. 223, 40 L. R. A. 653.

An accident policy providing that the insurer shall not be liable unless death is caused by "accidental means" covers any injury which is not the result of misconduct or the participation of the injured party, but is unforeseen as far as he is concerned. In other words, the means need only be accidental

as far as the party insured is concerned, and the fact that the injury was inflicted intentionally by a third person does not destroy its accidental character, if it is unexpected as to the insured and without his consent. *Campbell v. Fidelity & Casualty Co.*, 80 S. W. 492, 494, 109 Ky. 661.

In a policy insuring against "accidental" injuries, the term "accidental" is used in its ordinary popular sense as meaning "happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected." If the result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but if, in the act which precedes the injury, something unforeseen or unusual occurs which produces the injury, then the injury has resulted through accidental means. *Standard Life & Accident Ins. Co. v. Schmalz*, 53 S. W. 49, 52, 66 Ark. 588, 74 Am. St. Rep. 112; *Southard v. Railway Pass. Assur. Co.* (U. S.) 34 Conn. 574, 578, 22 Fed. Cas. 810, 811.

#### ACCIDENTS OF NAVIGATION.

A bill of lading exempting the carrier from liability for damages occasioned by the "accidents of navigation" does not include damage to the cargo caused by vermin on board the ship. *The Miletus* (U. S.) 17 Fed. Cas. 288, 289.

Accidents of navigation, within the meaning of a bill of lading exempting the carrier from liability for loss or damage occasioned by an accident of navigation, do not include an injury resulting from an explosion of a portion of her cargo after she has reached her port of destination, and while she is engaged in unloading. *The G. R. Booth*, 19 Sup. Ct. 9, 13, 171 U. S. 450, 43 L. Ed. 234.

#### ACCIDENTS OF THE SEA.

A marine insurance policy, providing that the master shall not be responsible for any dangers and "accidents of the seas," means only those caused by the violence of the winds and waves (*vis major*) on a seaworthy and substantial ship, and does not cover damage to a cargo by rats, since such a destruction is not peculiar to the sea or navigation, but one which is equally liable to occur in a warehouse as in a ship at sea. *The Carlotta* (U. S.) 5 Fed. Cas. 76, 79.

Running against a cape or a continent is not one of the usual accidents and unavoidable dangers of the sea. That cannot be termed an accident of the sea, within the exceptions of a bill of lading, which proper foresight and skill in the commanding officer might have avoided. *Bazin v. Steamship Co.* (U. S.) 2 Fed. Cas. 1097, 1100.

#### ACCION.

In the Spanish law the term "accion" means "the right to demand anything, and the method of judicial procedure which we have for the recovery of that which is ours or which another owes us." *Escriche*, Dic. Leg. p. 49. And all choses in action owned by either of the consorts before marriage remained the separate property of such consort. *Welder v. Lambert*, 44 S. W. 281, 284, 31 Tex. 510.

#### ACCOMMODATE—ACCOMMODATION.

The expression "terms accommodating," as used in a letter of acceptance which stated that the buyer would take the vessel at the price fixed by the vendor, and that he expected the vendor would give him a long time for a part at least, as the vendor had said he would make the "terms accommodating," meant that the purchase money, or some part of it, should be permitted to remain in the defendant's name as if a loan for his convenience. *Rice v. McLarren*, 42 Me. 157, 163.

"Accommodation," as used in a deed reciting that a certain roadway was laid out for the "accommodation" of the lot owners, means that the use of the road is to be accorded only by way of accommodation, and that the roadbed was not conveyed. *Peabody Heights Co. v. Sadtler*, 63 Md. 533, 541, 52 Am. Rep. 519.

#### ACCOMMODATED PARTY.

An "accommodated party," in the law of negotiable paper, is the person to whom the credit of an accommodating party is loaned, not a third person who may receive an advantage by the loan of the credit. *Thom v. Kibbee*, 42 Atl. 729, 62 N. J. Law, 753.

#### ACCOMMODATION BILL OR NOTE.

An accommodation bill or note is one to which the accommodating party has put his name without consideration, for the purpose of accommodating some other party, who is to use it, and is expected to pay it. *Jefferson County v. Burlington & M. R. R. Co.*, 16 N. W. 561, 562, 66 Iowa, 385; *Gillmann v. Henry*, 10 N. W. 692, 694, 53 Wis. 465; *Peale v. Addicks*, 34 Atl. 201, 202, 174 Pa. 543; *Vitkovitch v. Kleinke* (Tex.) 75 S. W. 544, 546. Thus where a county issued bonds in consideration of the construction of a railroad through it, and after the payment of such bonds it was decided that the county did not have authority to issue them, they do not become accommodation paper, as regards the railroad which had built its road as required. *Jefferson County v. Burlington & M. R. R. Co.*, 16 N. W. 561, 562, 66 Iowa, 385.

In order to render a bill or note accommodation, the indorser must lend his credit to the maker for the benefit of the latter, and without benefit to the indorser. *Vitkovitch v. Kleinecke* (Tex.) 75 S. W. 544, 546.

Between the accommodating and the accommodated parties, the consideration may be shown to be wanting, but when the instrument is passed into the hands of the third party for value, in the usual course of business, it cannot be done. *Peale v. Addicks*, 34 Atl. 201, 202, 174 Pa. 543.

To constitute a promissory note an "accommodation note," the maker must lend his credit without any restriction as to the manner of its use; and hence the maker cannot complain of a subsequent holder when called upon to perform all he has promised, even though the indorsee has purchased the note for less than appeared to be due upon its face. *Moore v. Baird*, 30 Pa. (6 Casey) 138, 139.

#### ACCOMMODATION INDORSER.

The term "accommodation indorser" is correctly used to designate a third person who indorses a note without any consideration, merely for the benefit of the holder thereof. *Peale v. Addicks*, 34 Atl. 201, 202, 174 Pa. 543.

#### ACCOMMODATION INDORSEMENT.

An accommodation indorsement is *prima facie* a loan of the indorser's credit without restriction; but it may be shown to have been otherwise understood by the parties. *Cozens v. Middleton* (Pa.) 4 Montg. Co. Law Rep'r, 37, 39; *Id.*, 12 Atl. 566, 567, 118 Pa. 622.

From the very meaning of the term, no proof of consideration is requisite in a case of "accommodation indorsement." *Low v. Learned*, 34 N. Y. Supp. 68, 13 Misc. Rep. 150.

#### ACCOMMODATION MAKER.

An "accommodation maker" is one who receives nothing as consideration for the execution of a bill or note, and the accommodated party parts with nothing. *Gillmann v. Henry*, 10 N. W. 692, 694, 53 Wis. 465.

The "accommodation maker" of a note stands as a surety for the person for whose accommodation it was given. *Robertson v. McKibbin*, 46 N. Y. Supp. 380, 381, 20 Misc. Rep. 658.

#### ACCOMMODATION PAPER.

"Accommodation paper," in a legal sense, means paper made without consideration therefor. *Blair v. First Nat. Bank* (U. S.) 3 Fed. Cas. 577, 579.

"Accommodation paper" is such as is made, accepted, or indorsed by one party

for the benefit of another, without consideration. *Chicago Title & Trust Co. v. Brady*, 65 S. W. 303, 305, 165 Mo. 197. "Accommodation paper" is defined as such as is made, accepted, or indorsed by one party for the benefit of another, without consideration. It represents and is a loan of credit to the party accommodated. *Rea v. McDonald*, 71 N. W. 11, 12, 68 Minn. 187.

An "accommodation paper" is a loan of the maker's credit, without restriction as to the manner of its use. *Moreland's Assignee v. Citizens' Sav. Bank*, 30 S. W. 637, 639, 97 Ky. 211; *Lenheim v. Wilmarding*, 55 Pa. (5 P. F. Smith) 73, 75; *Todd v. National Union Bank* (Pa.) 19 Atl. 218; *Rea v. McDonald*, 71 N. W. 11, 12, 68 Minn. 187. An accommodation paper is a loan of the maker's name without restriction on the manner of its use. *Van Brunt v. Potter & Co.* (Pa.) 39 Wkly. Notes Cas. 262, 264.

An "accommodation paper" is a loan of credit by the accommodation party to the party accommodated; to the extent of the value of the paper. *Farley Nat. Bank v. Henderson*, 24 South. 428, 433, 118 Ala. 441. It is not necessary that the party accommodated shall be a party to the paper. *Rea v. McDonald*, 71 N. W. 11, 12, 68 Minn. 187.

Where the maker of a note loans it to the payee, with a view that the latter may negotiate it for his personal benefit, no limitation being made on the person for whose use it was made as to when or how he should use it, it is called "accommodation paper." It is not essential that such paper should have any consideration to support it. A recognized definition of "accommodation paper" is either a negotiable or nonnegotiable note or bill made by one who put his name thereto without consideration, with the intention of lending his credit to the party accommodated. The beneficiary of an accommodation note may transfer it either in payment of his indebtedness or as collateral security for a concurrent or even an antecedent debt, and the maker will have no defense. A note is none the less "accommodation paper" because the maker and indorser are secured against personal liability by a trust deed on real property owned by the party accommodated. *Miller v. Larned*, 108 Ill. 562, 569.

Accommodation paper is a loan of the maker's credit without restriction as to the manner of its use, and he cannot set up the want of consideration as a defense against the note in the hands of a third person, though it be there as collateral security merely. He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequence, and has no more right to complain if his friend accommodates himself by pledging it for an old debt than if he had used it in any other way. *Lord v. Ocean Bank*, 20 Pa. (8 Harria) 384, 386, 59 Am. Dec. 723.

**ACCOMMODATION TRAIN.**

The term "accommodation train" is in such common use as to be generally if not universally known. Webster defines it to be one running at moderate speed, and stopping at all or nearly all stations. Passenger travel is partly local, from station to station, and for different distances along the route as well as to the destination of the train. Through trains and limited trains do not meet the demands of such travel, and in the general understanding an "accommodation train" is one designed to accommodate the travel in that respect, and arranged to stop at most of the stations to effect that object. *Gray v. Chicago, M. & St. P. R. Co.*, 59 N. E. 950, 951, 189 Ill. 400.

**ACCOMPANY.**

"Accompanied" is not equivalent to "accomplished." Thus thunder often accompanies lightning, but is not the agency or means by which the results of lightning are accomplished, or the means of accomplishing an act may have accompanied the doing of it without being the efficient means or agency that is without accomplishing it. So that an instruction that robbery is the felonious taking of personal property, "accompanied" by means of force and fear, is erroneous, as robbery, under the statute, must be accomplished by means of force and fear. *State v. Johnson*, 66 Pac. 290, 291, 26 Mont. 9.

**As annexed to.**

Laws 1887, p. 29, § 2, requiring a proper bond to "accompany" a petition to establish an irrigation district, is satisfied by the filing of a bond on the day of the hearing of the petition before the supervisors, though the petition has been filed prior thereto, since "such a bond may be said to accompany a petition, in the sense of the statute." *Central Irr. Dist. v. De Lappe*, 21 Pac. 825, 827, 79 Cal. 351.

"Accompany," as used in Gen. St. c. 177, § 1, requiring sworn evidence to "accompany" the demand of a governor of one state on the governor of another state for the surrender of a fugitive from justice, construed not to require such evidence to be annexed to the requisition. *Kingsbury's Case*, 106 Mass. 223, 226.

**ACCOMPLICE.****See "Feigned Accomplice."**

An "accomplice" is defined to be a person who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime. *Clapp v. State*, 30 S. W. 214, 216, 94 Tenn. (10 Pickle) 186; *People v. Bolanger*, 11 Pac. 799, 801, 71 Cal. 17; *State v. Umble*, 22 S. W. 378, 380,

115 Mo. 452 (quoting Whart. Cr. Ev. § 440); *State v. Kuhlman*, 53 S. W. 416, 152 Mo. 100, 75 Am. St. Rep. 438; *Carroll v. State*, 45 Ark. 539-542; *State v. Light*, 21 Pac. 132, 133, 17 Or. 358 (citing Whart. Cr. Ev. § 440).

An "accomplice" is defined to be one who is concerned in the commission of a crime. The term in its fullness includes in its meaning all persons who have been concerned in the commission of a crime; all particeps criminis, whether they are considered in strict legal propriety as principals in the first or second degree or merely as accessories before or after the fact. *Cross v. People*, 47 Ill. 152, 158, 95 Am. Dec. 474; *In re Rowe* (U. S.) 77 Fed. 161, 165, 23 C. C. A. 103; *Polk v. State*, 36 Ark. 117, 126; *Miller v. Commonwealth*, 78 Ky. 15, 22, 39 Am. Rep. 194; *Barrara v. State*, 42 Tex. 260, 263. Following this definition, it was held that, under a warrant of extradition, reciting that there are suspicions that a certain man is an accomplice in a crime, he can be tried either as a principal or accessory. *In re Rowe* (U. S.) 77 Fed. 161, 165, 23 C. C. A. 103.

An accomplice, within the meaning of the rule that the testimony for the state of an accomplice must be corroborated, "means any one connected with the crime committed, either as principal offender, as an accomplice, or an accessory, or otherwise. It includes all persons who are connected with the crime or unlawful act or omission on their part transpiring on or before, at the time, or after the commission of the offense, and whether or not he was present and participated in the commission of the crime." *Crawford v. State* (Tex.) 34 S. W. 927; *Armstrong v. State*, 26 S. W. 829, 830, 33 Tex. Cr. R. 417; *Walker v. State* (Tex.) 37 S. W. 423; *Anderson v. State*, 45 S. W. 15, 39 Tex. Cr. R. 83; *Harris v. State*, 75 Tenn. (7 Lea) 124, 126. This definition of "accomplice" was said by the court to be correct as relates to who constitutes an accomplice within the rule that no one can be convicted on the uncorroborated evidence of an accomplice, but was criticised by the court because of its failure to distinguish an accomplice from a principal offender. *Armstrong v. State*, 26 S. W. 829, 830, 33 Tex. Cr. R. 417.

One who, being of mature years, and in possession of his ordinary faculties, knowingly and voluntarily co-operates with or aids or assists another in a commission of a crime, is an "accomplice," without regard to the degree of his guilt. *State v. Carr*, 42 Pac. 215, 216, 28 Or. 389; *People v. Kraker*, 14 Pac. 196, 197, 72 Cal. 459, 1 Am. St. Rep. 65.

Webster's definition of an "accomplice" is as follows: A co-operator or associate in general; an associate in crime; a participant or partner in guilt. Under such definition, the purchaser of liquors is not an ac-



complice of the person making the unauthorized sale. *People v. Smith*, 1 N. Y. Cr. R. 72, 73.

An accomplice is one who is not present at the commission of the offense, but who before the act is done advises, commands, or encourages another to commit an offense, or who, being present, aids by acts or encourages by words the principal offender in the commission of the offense. *Smith v. State*, 13 Tex. App. 507, 511.

"An accomplice is a person involved, either directly or indirectly, in the commission of a crime. To render him such he must in some manner aid or assist or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party by reason of the criminal transaction." *People v. Smith* (N. Y.) 28 Hun, 626, 627; *People v. Emerson*, 5 N. Y. Supp. 374, 376, 6 N. Y. Cr. R. 157. Following such definition, it was held that the buyer of a lottery ticket was not an accomplice with the seller. *People v. Emerson*, 5 N. Y. Supp. 374, 376, 6 N. Y. Cr. R. 157.

To constitute an "accomplice," one must be so connected with a crime that at common law he might himself have been convicted, either as the principal or as an accessory before the fact. To warrant such a conviction, the one accused must have taken part in the perpetration of, or preparation for, the crime, with intent to assist in the crime. The fact that one knew of defendant's purpose to commit a crime, and performed an act tending to assist in the perpetration of the offense, did not, as a matter of law, render him an accomplice, within the rule requiring testimony of accomplices to be corroborated, where it was in dispute whether he did the act with intent that it should aid in the commission of the crime. *People v. Zucker*, 46 N. Y. Supp. 766, 767, 20 App. Div. 363.

The term "accomplice" includes all who are particeps criminis, whether considered in a direct legal sense of the term as principals or accessories, and particularly includes any associate in the crime, and all assisting, co-operating, or aiding in its commission. *State v. Roberts*, 13 Pac. 896, 901, 15 Or. 187; *Zollicoffer v. State*, 16 Tex. App. 312, 318.

An accomplice is one who is in some way concerned or associated in the commission of a crime; one who aids or assists or is an accessory. *State v. Quinlan*, 41 N. W. 299, 300, 40 Minn. 55 (citing 4 Bl. Comm. 331).

An "accomplice" is one who is joined or united with another; one of several concerned in a felony; an associate in a crime; one who co-operates, aids, or assists in committing it. *State v. Ean*, 58 N. W. 898, 899, 90 Iowa, 534 (citing Black's Law Dict.).

One who admits that he aided in a crime, and testifies that defendant also participated,

is called an "accomplice." *State v. Tate*, 56 S. W. 1099, 1101, 156 Mo. 119.

"One who is in some way concerned in the commission of a crime; one who in any manner participates in the act; one who unites in the commission of crime." *State v. Henderson*, 50 N. W. 758, 760, 84 Iowa, 161 (quoting Anderson's Law Dict.); *State v. Quinlan*, 41 N. W. 299, 300, 40 Minn. 55.

An "accomplice" is one who is guilty by complicity in the crime charged, either by being present and aiding or abetting in it, or by having advised and encouraged it, though absent from the place at which it is committed. *State v. Spotted Hawk*, 55 Pac. 1020, 1036, 22 Mont. 33.

The term "accomplice" is used in Code Cr. Proc. art. 741, providing that the uncorroborated testimony of an accomplice is not sufficient to support a conviction, in a different sense from that in which it is used in Pen. Code, art. 219, defining an accomplice as one who is not present at the commission of an offense, but who before the act is done advises, commands, or encourages another to commit it, and furnishes other aid to the person actually committing such crime, as its use in the first statute includes principals and accessories as well as accomplices. *Hornsberger v. State*, 19 Tex. App. 335, 343.

A person who participates in the moral guilt of a crime, but is not connected therewith in such a way that he could be indicted for the offense, is not an accomplice. *Dunn v. People*, 29 N. Y. 523, 527, 86 Am. Dec. 319.

On a prosecution for taking money upon agreement to withhold evidence of a crime, under Cr. Code, § 112, the person who makes the agreement with and pays the money to the accused is not an accomplice, within the meaning of Gen. St. 1878, c. 73, § 104, requiring the testimony of an accomplice to be corroborated before a conviction can be had. *State v. Quinlan*, 41 N. W. 299, 300, 40 Minn. 55, 57.

Criminal intent is a necessary ingredient of crime, and is an essential to render one an accomplice. *Walker v. State*, 45 S. E. 608, 609, 118 Ga. 757.

#### Accessory after the fact.

"An 'accomplice' is a person who knowingly and voluntarily, and with common intent with the principal offender, unites in the commission of the crime." Whart. Cr. Ev. § 440. Under this definition, an accessory after the fact is not an accomplice. His offense is distinctly his own, and he is liable to a different punishment; nor can he be indicted jointly with the principal for the principal's offense. *State v. Umble*, 22 S. W. 378, 380, 115 Mo. 452 (citing Commonwealth v. Wood, 77 Mass. [11 Gray] 86).

One who does not participate in a crime as actual perpetrator, or as principal in the second degree, or as an accessory before the fact, is not an accomplice. Even if one is an accessory after the fact, this alone will not render him an accomplice so as to require his evidence to be corroborated before it can sustain a conviction. *Lowery v. State*, 72 Ga. 649, 654.

A person is an accessory after the fact only after he has full knowledge that a felony has been committed, and then conceals that knowledge from a magistrate, or harbors or protects the person charged or connected therewith. One who is a principal cannot be an accessory after the fact, and so cannot be an accomplice. *People v. Chadwick*, 25 Pac. 737, 738, 7 Utah, 134.

#### Accessory before the fact.

The term "accomplice," as used in Rev. Code, art. 79, providing that a person cannot be convicted on the uncorroborated testimony of an accomplice, is the same as an accessory before the fact at common law; and at common law there could be no accessory before the fact of manslaughter, because manslaughter was an offense which was considered in law sudden and unpremeditated, and therefore there can be no accomplice to manslaughter. *Ogle v. State*, 16 Tex. App. 361, 378.

An "accomplice" is one who is not present at the commission of the offense, but who before the act is done advises, commands, or encourages another to commit the offense, or who agrees with the principal offender to aid him in committing the offense, though he may not have given such aid. Thus, where a defendant entered into an agreement with others to meet them with stolen cattle at a certain place, and to ship them on the railroad on cars previously ordered, but did not in fact do so, but was absent from such place during such time, and the others during his absence drove the cattle, such person was not a principal, but an accomplice. *Rix v. State*, 26 S. W. 506, 508, 83 Tex. Cr. R. 353.

An "accomplice" "is one who is not present at the commission of an offense, but who before the act is done advises, commands, or encourages another to commit the offense. The acts constituting an accomplice are accessory only, all of which may be, and usually are, performed by him anterior and as an inducement to the crime, so that the offense of the accomplice is completed before the crime is actually committed, and his liability with respect thereto only attaching by virtue of his previous acts in bringing it about, through the agency or connection with the third party." *West v. State*, 11 S. W. 685, 28 Tex. App. 1; *Smith v. State*, 17 S. W. 552-554, 21 Tex. App. 107.

"The acts constituting an accomplice an auxiliary only, all of which may be and are performed by him anterior and as inducements to the crime about to be committed, while the principal offender not only may perform some antecedent act in furtherance of the commission of the crime, but when it is actually committed is doing his part of the work assigned him in connection with the plan and in furtherance of the common purpose, whether he be present when the main fact is to be accomplished or not." *Cook v. State*, 14 Tex. App. 98, 101; *O'Neal v. Same*, Id. 582, 591.

#### Detective.

A detective who enters into communication with criminals, without any felonious intent, but for the purpose of disclosing their designs for the benefit of the public, and who acts throughout the transaction with this original purpose, cannot be regarded as an "accomplice." *State v. McKean*, 86 Iowa, 343, 345, 14 Am. Rep. 530; *People v. Bollinger*, 11 Pac. 799, 801, 71 Cal. 17.

#### Knowledge of crime.

Mere knowledge on the part of a witness that the defendant committed the crime does not render such witness an accomplice, so as to require corroboration of his testimony. To require or warrant an instruction on accomplice testimony, there must be some evidence of a witness' complicity in the crime for which the defendant is being tried. *Pitner v. State*, 5 S. W. 210, 215, 23 Tex. App. 366; *Kerrigan v. State*, 2 S. W. 756, 757, 21 Tex. App. 487; *Brown v. State*, 6 Tex. App. 286, 309; *Ham v. State*, 4 Tex. App. 645, 675; *Smith v. State*, 12 S. W. 1104, 1107, 28 Tex. App. 309.

One may be an accomplice either as a principal or accessory; but it is not sufficient to have knowledge of a crime to be committed and be present at its commission. To be an accomplice, one must have co-operated in the commission of the crime; and hence one may be an accessory after the fact without being an accomplice. *Allen v. State*, 74 Ga. 769, 772.

An "accomplice" is one of many equally concerned in a felony, the term being generally applied to those who are tempted to give evidence against their fellow criminals for the furtherance of justice, which might otherwise be eluded; and hence, in a prosecution for the forgery of a check, one who was not a fellow criminal—that is, had not been accused of being in that relation to the prisoner or arrested for complicity, and nothing was shown to implicate him in any manner except the fact that he took the check to the bank, received the money on it, and paid it over to his employer, all the time supposing that the check was genuine, and that he did not immediately on discovering the forgery denounce the forger to the authorities—was not

an "accomplice," but was rather the dupe of the forgery. *Cross v. People*, 47 Ill. 152, 158, 95 Am. Dec. 474.

**Principal distinguished.**

The acts constituting an accomplice are auxiliary only, all of which may be and are performed by him anterior and as inducements to the crime about to be committed, while the principal offender not only may perform some antecedent act in furtherance of the commission of the crime, but when it is actually committed is doing his part of the work assigned to him in connection with the plan and furtherance of the common purpose, whether he be present where the main fact is to be accomplished or not; and, where the offense is committed by the perpetration of different parts which constitute one entire whole, it is not necessary that the offenders should be in fact together at the perpetration of the offense to render them liable as principals. The dividing line between the two is the commencement of the commission of the principal offense, and if the parties acted together, but did not act together in its commission, the one who actually committed it is the principal, while the one who was not present at the commission, and who was not in any way aiding in its commission, as by keeping watch, or by securing the safety or concealment of the principal, would be an accomplice. To constitute a principal, the offender must either be present where the crime is committed, or he must do some act during the time when the offense is being committed which connects him with the act of commission in some of the ways named in the statute. Where the acts committed occur prior to the commission of the principal offense, or subsequent thereto, and are independent of, and disconnected with, the actual commission of the principal offense, and no act is done by the party during the commission of the principal offense, such a party is not a principal offender, but is an accomplice or accessory, according to the facts. *Smith v. State*, 17 S. W. 552, 554, 21 Tex. App. 107; *Bean v. State*, 17 Tex. App. 60, 71; *Dawson v. State*, 41 S. W. 599, 600, 38 Tex. Cr. R. 50. Thus, one who advises and agrees to the burning of a building, but who was not present when the act was done, and did not act in furtherance of the design, is an accomplice, and not a principal. *Dawson v. State*, 41 S. W. 599, 600, 38 Tex. Cr. R. 50.

The distinction between "accomplice" and "principal" is a vexing one to always maintain. The general rule, however, seems to be that the act of the accomplice is a consummated act at the time the crime is committed. The act of the principal is somewhat in the nature of a continuous act. He is simply acting a part of a drama, so to speak, or a tragedy, as the case may be; but, in order to constitute one a principal when not actually present, he must be doing some act in pur-

suance of a common design at the time of the consummation of the crime, such as keeping watch or preventing detection by any means or manner. *Mitchell v. State* (Tex.) 70 S. W. 208, 209.

**Refusal to testify.**

That a witness refuses to testify as to what she knows about a crime, or attempts to conceal its commission, does not make her an "accomplice." *Prewett v. State*, 53 S. W. 879, 880, 41 Tex. Cr. R. 262.

**In abortion.**

The term "accomplice," as used in Code Civ. Proc. § 399, providing that no person shall be convicted of a crime on the testimony of an accomplice without corroboration, must be construed as meaning one culpably implicated in the commission of the crime of which the defendant is accused—that is, one who could be indicted for the same offense; and hence the woman on whom an abortion is produced is not an "accomplice" of the person who produces it, since the statute says that a person who, with intent to procure the miscarriage of a woman, either prescribes, supplies, or administers to a woman, or uses or causes to be used any instrument or other means upon her, is guilty of abortion, and clearly implies that the person on whom the operation is performed cannot be one of the persons guilty of the offenses, her crime being separately defined and punished in a different manner. *People v. Vedder*, 98 N. Y. 630, 631.

Where the statute making the procuring or attempting to procure a miscarriage or abortion a crime does not make the woman on whom it was attempted or procured indictable with the person attempting or procuring it, she is not technically an "accomplice"; and hence the rule as to corroboration of an "accomplice" does not apply to the testimony of the woman. *Commonwealth v. Wood*, 77 Mass. (11 Gray) 85, 93.

**In adultery.**

Where two men procure separate rooms in a building, and take thereto two women, with one of whom the defendant spent the night, the other man was not an accomplice in the crime of adultery, thereby committed, though he may have committed an independent crime. *State v. Ean*, 58 N. W. 898, 899, 90 Iowa, 534.

**In bribery.**

An "accomplice" is an associate in crime; a partaker of the guilt; a participator in the offense; one involved directly or indirectly in the commission of a crime. It is held that a bribe-taker is an accomplice of the bribe-giver, though the bribery of a juror or offer to bribe a juror is a crime by itself, and the acceptance of the bribe by the juror is a sepa-

rate crime. *People v. Winant*, 53 N. Y. Supp. 695, 697, 24 Misc. Rep. 361.

An "accomplice" in legal signification is one who co-operates, aids, or assists another in the consummation of the crime, either as principal or accessory. The general test to determine whether a witness is or is not an accomplice is, could he himself have been indicted for the offense either as principal or as accessory? If he could not, then he is not an accomplice. Each of the two parties to a transaction may be guilty of a crime, and yet, if the two crimes are separate and distinct crimes, the one is not the accomplice of the other. Thus, suppose A. asks B. for a bribe, and B. pays it. A. is guilty of the crime of asking a bribe, and B. of the crime of giving one. But the two crimes are entirely distinct, and neither party could be indicted, either as principal or accessory, for the crime committed by the other. Such a case would not be within the statute forbidding conviction on the uncorroborated evidence of an accomplice. *State v. Durnam*, 75 N. W. 1127, 1131, 73 Minn. 150.

#### In gaming.

An accomplice is a person who with a common intent unites with the principal offender in the commission of a crime, and may be such although in the commission of the crime his interests antagonize those of the principal offender; as, in a case where parties engaged in gambling with cards, each player, being equally guilty of the offense, is an accomplice of the other, though their interests are adverse. *State v. Light*, 21 Pac. 132, 133, 17 Or. 358.

#### In incest.

An "accomplice" is defined in *Whart. Cr. Ev.* § 440, as a person who "knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime." While this definition has often been quoted, and is strictly accurate in the great majority of cases, it is not, we think, universally accurate. Two persons may be equally guilty in the commission of a crime, may both be present and equally participate in its commission. As between them there can be no principal offender, yet each is the accomplice of the other. Black's definition is preferable: "An associate in crime; one who co-operates or aids or assists in committing." That a female participant in incestuous intercourse, whose action in the matter is voluntary and uninfluenced by any elements of coercion, either by force, fear, fraud, or undue influence, is an accomplice in the commission of the crime of incest, is firmly settled by law. *State v. Keller*, 80 N. W. 476, 477, 8 N. D. 563, 73 Am. St. Rep. 776.

In a trial for the crime of incest, the party to the crime not on trial is an accom-

plice, and the other party cannot be convicted on her evidence, unless corroborated by other evidence. *State v. Jarvis*, 23 Pac. 251, 18 Or. 360.

#### In larceny.

An "accomplice" is strictly defined as one who is associated with others in the commission of a crime, all being principals. Participation in the commission of the same criminal act, and in the execution of a common criminal intent, is necessary to render one criminal in a legal sense an accomplice of another; and if between two persons who may be engaged in the criminal enterprise in the execution of which two separate offenses may be committed there is not this concurrence of acts or intent though each may commit a crime, neither is, in legal contemplation, the accomplice of the other. The actual thief, relatively to the receiver of stolen goods, is an independent criminal, and cannot participate with the receiver of such goods in the special offense committed by the latter, knowing them to be stolen. *Springer v. State*, 30 S. E. 971, 102 Ga. 447. So, also, *State v. Kuhlman*, 53 S. W. 416, 152 Mo. 100, 75 Am. St. Rep. 438.

Persons who receive goods knowing them to be stolen are guilty of a substantive crime, and were not accomplices with the thief. *Harris v. State*, 75 Tenn. (7 Lea) 124, 126; *Walker v. State (Tex.)* 37 S. W. 423.

The fact that one has received stolen goods knowing the same to have been feloniously obtained, while it makes him an accomplice in the simple larceny and an accessory after the fact, does not constitute him an accomplice in the burglary by which possession of the goods was acquired. *State v. Hayden*, 45 Iowa, 11, 17.

#### In seduction.

On a prosecution for seduction, the prosecutrix being an "accomplice," in order to warrant a conviction her testimony must be corroborated. *McCullar v. State*, 36 S. W. 585, 586, 36 Tex. Cr. R. 213, 61 Am. St. Rep. 847.

### ACCOMPLISH.

"Accompany" is not equivalent to "accomplish," so that an instruction that robbery is the felonious taking of personal property "accompanied" by means of force and fear is erroneous, as robbery must be accomplished by means of force and fear. *State v. Johnson*, 66 Pac. 290, 291, 26 Mont. 9.

### ACCORD.

"Accord is a satisfaction agreed upon between the party injuring and the party injured, which when performed is a bar to all actions on the same account." *Rorer*

*Iron Co. v. Trout*, 2 S. E. 713, 719, 83 Va. 397, 5 Am. St. Rep. 262 (quoting 3 Bl. Comm. 315); *Sieber v. Amunson*, 47 N. W. 1126, 1128, 78 Wis. 679; *Ætna Ins. Co. v. Stevens*, 48 Ill. 31, 33; *Kromer v. Heim*, 75 N. Y. 574, 576, 31 Am. Rep. 491; *Ollwill v. Verdenhalven*, 15 N. Y. Supp. 94, 96; *Mitchell v. Hawley* (N. Y.) 4 Denio, 414, 418, 47 Am. Dec. 260. "It must be advantageous to the creditor, and he must receive an actual benefit therefrom. Everything must be done which the party undertakes to do. To constitute a good accord and satisfaction, it must be accepted as such." *Sieber v. Amunson*, 47 N. W. 1126, 1128, 78 Wis. 679. The bar rests on the agreement, and not on the mere reception of property; for, whatever amount may have been received, the right of action is not extinguished, unless it is agreed that the property received is in satisfaction. *Mitchell v. Hawley* (N. Y.) 4 Denio, 414, 418.

An "accord" is an agreement, in the case of contracts, where the creditor agrees to accept some other thing in lieu of that which is contracted or promised to be done. *Way v. Russell* (U. S.) 33 Fed. 5, 7; *Swofford Bros. Dry-Goods Co. v. Goss*, 65 Mo. App. 55, 59.

An accord is an agreement, consent, or concurrence of the minds and intentions of two or more individuals. It is an agreement between a party injuring and a party injured to make satisfaction for the injury, which when performed is a bar to a recovery for the original claim. The principle is that the party who has a legal right of action against another may accept of some other thing in discharge of his claim or demand. *Elkan v. Hitchcock*, 36 N. Y. Supp. 788, 789, 15 Misc. Rep. 218.

An "accord" is an agreement, an adjustment, a settlement of former difficulty, and presupposes a difference, a disagreement, as to what is right. *Harrison v. Henderson* (Kan.) 72 Pac. 875, 876, 62 L. R. A. 760.

An "accord" is an agreement to accept, in extension of an obligation; something different from or less than that to which the person agreeing to accept it is entitled. Civ. Code Mont. 1895, § 2060; Rev. Codes N. D. 1899, § 3824; Civ. Code S. D. 1903, § 1177; Civ. Code Cal. 1903, § 1521.

"An acceptance, in satisfaction of a debt, of an accord or agreement, with mutual promises to perform, on which the party has a legal remedy for its nonperformance, is a good satisfaction of such debt, although such promises are not performed. In order that such accord should be a defense to the original debt, it is necessary that the plaintiff should have agreed to accept the agreement itself, and that the performance of it is a satisfaction of his debt, so that if it is not performed his only remedy would be an action for the breach of it, and not a right to recur to the original debt. There must be

a valid agreement, substituting a new cause of action in place of the old. It is not sufficient that there is a mere accord between the same parties as mutual promises, but there must be a new agreement with a new consideration." *Goodrich v. Stanley*, 24 Conn. 613, 621.

An accord executory, without performance accepted, is no bar, and tender of performance is insufficient; and part execution of an accord cannot be pleaded in satisfaction, but it must be completely executed. *Bac. Abr.* It was said in *Peytoe's Case*, 9 Coke, 79, that every accord ought to be full, perfect, and complete, for if divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed. *Ollwill v. Verdenhalven*, 15 N. Y. Supp. 94, 96.

"Accord executed" is satisfaction; accord executory is only substituting one cause of action in the room of another, which might go on to any extent. This has been so often ruled that a decision to the contrary would overthrow all the books. *Russell v. Lytle* (N. Y.) 6 Wend. 390, 391, 22 Am. Dec. 537.

"The accord must be executed, and a mere executory agreement can never be pleaded as an accord and satisfaction. If part of the consideration agreed on be not paid, the whole accord fails." *City of Memphis v. Brown*, 87 U. S. (20 Wall.) 289, 309, 22 L. Ed. 264.

"An accord executory, without performance accepted, is no bar, and tender of performance is insufficient. So, also, accord with part execution cannot be treated as a satisfaction, but the accord must be completely executed;" and hence a proposition in the alternative to accept certain things in full of a judgment, or to accept payment of the account in another fashion, the latter of which was accepted and partly acted on, is merely the case of an accord partly executed, and so far as not executed left the judgment in full force. *Kromer v. Heim*, 75 N. Y. 574, 576, 31 Am. Rep. 491.

Accord, to be good, must be in full satisfaction, and must be executed. Readiness to perform is not enough. In the language of one of our own cases, the legal notion of accord is a new agreement, on a new consideration, to discharge a debtor; and it is not enough that there be a clear agreement or accord, and a sufficient consideration, but the accord must be executed. Mere readiness to perform the accord, or a tender of performance, or even a part performance and readiness to perform the rest, will not do. *Hosler v. Hursh*, 25 Atl. 52, 53, 151 Pa. 415 (citing *Hearn v. Kiehl*, 38 Pa. [2 Wright] 147, 80 Am. Dec. 472).

Where a maker and a holder of a note agreed that the maker should execute a new

note and mortgage in lieu thereof, and the maker tendered to defendant the new note and mortgage, but it was refused, such substituted mortgage and tender constituted but an accord executory. Tender of performance has never been held equivalent to execution for the purpose of a defense. *Brooklyn Bank v. De Grauw* (N. Y.) 23 Wend. 342, 344, 85 Am. Dec. 569.

An agreement or accord which is to operate as a satisfaction of an existing liability must, before it can have that effect, be fully executed, and as long as by the terms of the agreement something remains to be done in the future it will not be sufficient. So where the holder of a note secured by a mortgage promised the maker that, if he would purchase a certain demand against such holder, the note should be paid by an equal amount, to be indorsed on the demand, and the maker, relying on such promise, purchased the demand, but the holder of the note, in violation of his promise, negotiated the same, there was no payment or satisfaction of the note. Both demands remained in full force, and in possession of each party, neither being canceled in whole or in part by the other, the note being transferred before the agreement; for an accord and satisfaction was fully executed, and the transferee was entitled to receive and retain the amount due on it, no notice to him of the agreement being shown. *Bragg v. Pierce*, 53 Me. 65, 67.

### ACCORD AND SATISFACTION.

An "accord and satisfaction" is the substitution of another agreement between the parties in satisfaction of the former one, and an execution of the latter agreement, and forms a complete bar to any further action on the original claim. *Continental National Bank v. McGeoch*, 66 N. W. 606, 614, 92 Wis. 286; *Heath v. Vaughn*, 53 Pac. 229, 230, 11 Colo. App. 384; *Story v. Maclay*, 13 Pac. 198, 201, 6 Mont. 492; *Swofford Bros. Dry Goods Co. v. Goss*, 65 Mo. App. 55, 59. In later times, however, this definition has been modified, or, rather, a broader application of the doctrine has been made, that a new agreement or new plans may in some instances be held to be a satisfaction of a prior one. *Heath v. Vaughn*, 53 Pac. 229, 230, 11 Colo. App. 384.

An "accord and satisfaction" is defined to be an agreement between two persons, one of whom has a right of action against the other, that the latter should do or give and the former accept something, in satisfaction of the right of action, different from, and usually less than, what might be legally enforced. When the agreement is executed, and the satisfaction has been made, it is called an "accord and satisfaction." *Rogers v. City of Spokane*, 37 Pac. 300, 301, 9 Wash. 168; *Davis v. Noaks*, 26 Ky. (3 J. J. Marsh.) 494, 497. There is another and more modern

application of this principle, which has been sustained by the courts. It is that an "accord and satisfaction" is the substitution of another agreement between the parties in satisfaction of a former one; or probably a better definition would be where the promise to do a thing is set up in satisfaction of the prior right or claim. The fact that a person injured through the negligence of a city court agreed to accept a certain sum in satisfaction of his claim does not bar his right of action against the city when the city council afterwards merely authorized the comptroller to pay such sum, and he did not accept it, and no tender was made to him. *Rogers v. City of Spokane*, 37 Pac. 300, 301, 9 Wash. 168.

To constitute an "accord and satisfaction" it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied by such acts and declarations as amount to a condition that if the money be accepted it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition. *Preston v. Grant*, 34 Vt. 201, 203. This definition has been quoted and followed in the following cases: *Fuller v. Kemp*, 83 N. E. 1034, 1035, 138 N. Y. 231, 20 L. R. A. 785; *Strock v. Brigantine Transp. Co.*, 51 N. Y. Supp. 327, 329, 23 Misc. Rep. 358; *Bloomington Min. Co. v. Brooklyn Hygienic Ice Co.*, 68 N. Y. Supp. 699, 703, 58 App. Div. 66; *Boston Rubber Co. v. Peerless Wringer Co.*, 5 Atl. 407, 408, 58 Vt. 551; *Talbott v. English*, 59 N. E. 857, 862, 156 Ind. 299. When the tender or offer is thus made, the party to whom it is made has no alternative but to refuse it, or accept it upon such condition; and hence where defendant stated to plaintiff that he tendered the sum as the balance due on a note there was nothing in the advancement which could fairly convey to the plaintiff the idea that it was offered on condition that if plaintiff took it he did so in satisfaction of the note; and where the amount offered was credited by defendant on the back of the note, and suit was afterwards brought for the balance, the transaction falls short of an accord and satisfaction. *Preston v. Grant*, 34 Vt. 201, 203.

An "accord and satisfaction" is a substitution, by agreement of the parties, of something else in place of the original claim, and when executed its effect is to extinguish the antecedent liability. *Boston Newmarket Gold Min. Co. v. Orme* (Colo.) 71 Pac. 885, 886 (citing *Pulliam v. Taylor*, 50 Miss. 251; *Heavenrich v. Steele*, 57 Minn. 221, 58 N. W. 982).

An "accord and satisfaction" has been defined to be an agreement "in the case of a contract where a creditor agreed to accept some other thing in lieu of that which is contracted or promised to be done. *City of Cincinnati v. Cincinnati St. Ry. Co.*, 9 Ohio Dec. 235, 245.

Accord and satisfaction is the discharge of a contract or cause of action or disputed claim, arising either in contract or tort, by the satisfaction of an agreement between the parties in satisfaction of such contract, cause of action, or disputed claim, and the execution of that agreement. Like any other agreement, there must be a meeting of the minds of both parties. *Hennessy v. St. Paul City Ry. Co.*, 65 Minn. 13, 67 N. W. 635.

An "accord and satisfaction" is an executed agreement whereby one of the parties undertakes to give and the other to accept, in satisfaction of a claim arising either from contract or tort, something other or different from what he is or considers himself entitled to; but no invariable rule can be laid down with any degree of certainty as to what constitutes such an agreement. Each case must be determined largely on its peculiar facts. To constitute a valid accord and satisfaction, not only must it be shown that the debtor gave the amount in satisfaction, but that it was accepted by the creditor as such. The agreement need not be express, but may be implied from circumstances. *Perin v. Cathcart*, 89 N. W. 12, 13, 115 Iowa, 553.

An "accord and satisfaction" is the result of an agreement between the parties, and must be consummated by a meeting of the minds of the parties, accompanied by a sufficient consideration. A simple tender of a balance, as shown by an account tendered by the debtor, does not carry with it an implication that by such tender the debtor paid or the creditor agreed to receive the sum in full of the amount due, where there had been no prior disagreement as to such amount. *Harrison v. Henderson* (Kan.) 72 Pac. 875, 877, 62 L. R. A. 760.

Blackstone, to illustrate what constitutes an accord and satisfaction, says: "As if a man contract to build a house, or deliver a horse, and he fail in it, this is an injury for which the sufferer may have his remedy by action; but if the party injured accepts a sum of money or other thing as a satisfaction, this is a redress of that injury, and entirely takes away the action." *Lindsay v. Gager*, 11 N. Y. App. Div. 93, 96, 42 N. Y. Supp. 851, 853 (citing 3 Bl. Comm. c. 1, pp. 15, 16).

Accord and satisfaction is special matter of defense, and not available to the defendant unless specially pleaded, or unless, when pleading the general issue, the defendant gives notice in writing that he will give it in evidence under the general issue, and rely upon it as a defense to the action. *Seaver v. Wilder*, 35 Atl. 351, 352, 68 Vt. 423.

Accord and satisfaction is where the parties, by a subsequent agreement, have satisfied the former one, and the latter agree-

ment has been executed. Civ. Code Ga. 1895, § 3732.

Accord and satisfaction is something other than strict performance of payment. It is doing that by the covenantor which the covenantee accepts in lieu of a performance of the terms of the covenant. *Franklin Fire Ins. Co. v. Hamill*, 5 Md. 170, 186.

Accord and satisfaction forms a complete bar to any further action on the original claim, but an accord without satisfaction does not bar the action. *Swofford Bros. Dry Goods Co. v. Goss*, 65 Mo. App. 55-59.

A question of "accord and satisfaction" cannot arise in a contract the parties to which have fully performed their agreements under that contract. *Story v. Maclay*, 13 Pac. 198, 201, 6 Mont. 492.

"The rule of accord and satisfaction does not apply to a settlement embracing payment for property sold and delivered, as regards property concerning the delivery of which both parties were ignorant, though a receipt be given in full." *Bloomington Min. Co. v. Brooklyn Hygienic Ice Co.*, 68 N. Y. Supp. 699, 703, 58 App. Div. 66.

Defendant and plaintiff had an unsettled disputed account. Defendant sent plaintiff a statement of the account as it claimed it to be, to which plaintiff made no reply. Defendant then sent the statement, accompanied with its note to cover the admitted balance, and a letter in which it stated that the note covered the balance due, and hoped it would be satisfactory. The plaintiff replied to this letter, giving its version of the disputed items, but kept and used the note, which was paid at maturity. Held that, as there was no condition attached to the acceptance of the note for the admitted balance, it was not an "accord and satisfaction" of the debt. *Boston Rubber Co. v. Peerless Wringer Co.*, 5 Atl. 407, 408, 58 Vt. 551.

### Consideration.

An accord and satisfaction sufficient to constitute a defense to a cause of action requires not only an agreement, which the creditor agrees to accept, but there must be a reasonable satisfaction in addition thereto. *Cumber v. Wane*, 1 Strange, 426; *Davis v. Noaks*, 26 Ky. (3 J. J. Marsh.) 494, 497.

"An accord and satisfaction may be briefly defined as the settlement of a dispute or the satisfaction of a claim by an executed agreement between the party injuring and the party injured; or, to give a definition indicating more definitely its peculiar nature, it is something of legal value to which the creditor before had no right, received in full satisfaction of the debt, without regard to the magnitude of the satisfaction." *Bull v. Bull*, 43 Conn. 455, 462 (quoting *Smith's Leading Cases* [10th Am.

Ed.] 558); Chicago, M. & St. P. R. Co. v. Clark (U. S.) 92 Fed. 968, 975, 35 C. C. A. 120.

An "accord and satisfaction" requires a new agreement and the performance thereof. It must be an executed contract, founded upon a new consideration. If the claim is liquidated, the mere acceptance of a part of the balance to discharge the whole is not enough, for there is no reconsideration. If the claim is unliquidated, the acceptance of a part and an agreement to cancel the entire debt furnishes a new consideration, which is founded on compromise. *Nessoly v. Tomlinson*, 148 N. Y. 326, 331, 42 N. E. 715, 51 Am. St. Rep. 695. The acceptance of a check, which had been sent for the amount of a bill, less deductions, which defendant claimed, though such acceptance was stated to be subject to the settling of the matters now in dispute, was a satisfaction of the claim. *Lestienne v. Ernst*, 39 N. Y. Supp. 199, 200, 5 App. Div. 373.

An accord and satisfaction "is the substitution of another agreement in satisfaction of the former one, and an execution of the latter agreement; but an agreement or promise of the same grade will not be held to be a satisfaction of a prior one, unless it has been expressly accepted as such, and the creditor is not bound by an agreement to accept a smaller sum in lieu of a liquidated ascertained debt of a larger amount, unless it is supported by some new and additional advantage to the creditor." Where the parties intend that performance of a subsequent agreement, and not the promise itself, is to constitute the satisfaction, there will be no satisfaction without performance. — *Pulliam v. Taylor*, 50 Miss. 251, 257.

#### Executed or executory.

The essence of an "accord and satisfaction" is that it should be executed as agreed. It is, of course, competent for the parties, as in the case of any other contract, to vary it by subsequent agreement, or either party may waive stipulation in his favor. — *Prest v. Cole*, 67 N. E. 246, 247, 183 Mass. 283.

An accord is an agreement to accept, in extinction of an obligation; something different from or less than that to which the person agreeing to accept is entitled. Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed. To establish a plea of "accord and satisfaction" under the statutory or common law, it must not only appear that there was an agreement to accept in full settlement of an obligation something different from or less than that to which one of the parties is entitled, but it must be shown that such agreement has been fully executed, and the obligation extinguished by the creditors, actual acceptance of the consideration specified in the agreement constituting an accord. *Arnett v. Smith*, 88 N.

W. 1037, 1041, 11 N. D. 55 (citing *Carpenter v. Chicago, M. & St. P. Ry. Co.*, 64 N. W. 1120, 7 S. D. 584; *Hoxsle v. Empire Lumber Co.*, 43 N. W. 476, 41 Minn. 548).

The accord is the agreement for the reception of the thing in discharge of the debt, and the satisfaction is the actual reception of the thing; and hence the mere agreement on the part of plaintiff to accept a deed from a third party in satisfaction of his claim does not afford a defense of accord and satisfaction in an action on the claim, since such defense could be made out only by proof that the deed was actually received by the plaintiff. *Burgess v. Denison Paper Mfg. Co.*, 9 Atl. 726, 727, 79 Me. 266.

#### Sale distinguished.

See "Sale."

#### Satisfaction of entire debt.

"When a party makes an offer of a certain sum to settle a claim, and the sum in controversy is open and unliquidated, and attaches to his offer the condition that the sum, if taken at all, must be received in full or in satisfaction of the claim in dispute, and the other party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction, even though the party at the time he receives the money declares that he will not receive it in that manner, but only in part satisfaction of his debt so far as it will extend." *Berdell v. Bissell*, 6 Colo. 162, 165; *Towselee v. Healey*, 39 Vt. 522, 523; *Talbott v. English*, 59 N. E. 857, 862, 156 Ind. 299; *Tompkins v. Hill*, 14 N. E. 177, 178, 145 Mass. 379. Thus, where there was a dispute between a landlord and tenant as to the amount of rent due, and the tenant transmitted a check for the amount, which he claimed to be correct according to a statement he had previously submitted, and the remittance was accompanied by a note which merely stated that he inclosed a certain amount for rent, but the landlord acknowledged the receipt of the amount as part payment of the rent for a certain month, such remittance did not amount to an accord and satisfaction. *Talbott v. English*, 59 N. E. 857, 862, 156 Ind. 299.

The mere acceptance of a smaller sum than that which is actually due on a contract, though it purport to be in full, cannot be said to be an "accord and satisfaction." *City of Cincinnati v. Cincinnati St. Ry. Co.*, 6 Ohio N. P. 140, 9 S. & C. P. 235, 245 (citing *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep. 546; *Harriman v. Harriman*, 78 Mass. [12 Gray] 341).

An "accord and satisfaction" must be a satisfaction of the entire debt, so as to completely extinguish it, and where, by agreement, part of the debt remains, there can be no "accord and satisfaction." *Line v. Nelson*, 38 N. J. Law (9 Vroom) 358, 362.



An agreement to accept part of an unliquidated and disputed claim in full satisfaction of the whole demand, executed by the payment of a sum agreed upon, is a good "accord and satisfaction." A part payment of an unliquidated claim is not a discharge of the whole, unless accepted upon an agreement and understanding to that effect. *Burrill v. Crossman* (U. S.) 91 Fed. 543, 544, 33 C. C. A. 663; *Clark v. Dinsmore*, 5 N. H. 136.

The doctrine that the receiving a part of a debt due, under an agreement that the same shall be in full satisfaction, is no bar to an action to recover the balance, does not apply to any cases, except where the plaintiff's claim is for a fixed and liquidated amount, or where the sum due could be ascertained by mere arithmetical calculation. But when a party makes an offer of a certain sum to settle a claim, when the sum in controversy is open and unliquidated, and attaches to his offer the condition that the same, if taken at all, must be received in full, or in satisfaction, of the claim in dispute, and the other party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction, even though the party, at the time of receiving the money, declare that he will not receive it in that manner, but only in part satisfaction of his debt so far as it will extend. *McDaniels v. Lapham*, 21 Vt. 222.

## ACCORDANCE.

See "In Accordance With."

## ACCORDING TO.

In a recognizance reciting that the obligor was recognized in a certain sum as bail "according to" act of assembly, the words "according to" must be construed as making the act of the assembly which fixes the condition of the recognizance by prescribing the duty of the bail part of the recognizance, making the recognizance good in substance, though there was no further recital of conditions, since there was in it substance from which a formal recognizance could be molded. *Harvey v. Beach*, 38 Pa. (2 Wright) 500, 502.

A contract providing that an improvement should be made "according to" such direction as the city engineer may, from time to time, give in superintending the construction, means such directions as he may give looking to the completion of the work according to its plans and specifications. *Burke v. City of Kansas*, 34 Mo. App. 570, 580.

Code, § 469, provides that when any city or town shall have established the grade of any street or alley, and improvements have been erected "according to the established grade" thereof, the property owners shall be

entitled to damages resulting from a change of grade. Held, "that the property is improved according to the established grade of the street, within the statute, whenever it is so improved that it can be comfortably and conveniently used for the purpose to which it is devoted while the street on which it abuts is maintained at that grade." It does not require the property to be erected on the grade of the street. *Conklin v. City of Keokuk*, 35 N. W. 444, 447, 73 Iowa, 343.

Const. art. 4, §§ 3-5, requiring the Legislature to apportion the senate and assembly districts "according to the number of inhabitants," and requiring the assembly districts to be bounded by county, precinct, town, or ward lines, to consist of contiguous territory, and to be in as compact form as practicable, and requiring the senate districts to be of convenient contiguous territory, requires the apportionment of a state into assembly and senate districts "according to the number of inhabitants," as near as can be done consistently with the other provisions. *State v. Cunningham*, 53 N. W. 35, 56, 83 Wis. 90, 17 L. R. A. 145, 35 Am. St. Rep. 27.

An averment in a declaration that the defendants subscribed for certain shares of the capital stock of the plaintiff company, "according to the statute" incorporating the company, will be held on demurrer to mean that he had done everything required by the charter in order to become a subscriber. *Fiser v. Mississippi & T. R. Co.*, 32 Miss. 359, 370.

The words "according to its value," in the constitutional provision providing that all property subject to taxation shall be taxed according to its value, means that property of every character and description must be taxed upon its true value, and upon that basis must contribute to the revenue of the state, and that no portion of any distinct genus or species of property upon which such tax is imposed can ever be exempt therefrom. *Pike v. State*, 5 Ark. (5 Pike) 204, 206.

Where an indictment charges that the overt act was done "according to and in pursuance of said conspiracy," something more is intended by the use of the words than that the overt act was done after the formation of the conspiracy, or that it was simply a result of the conspiracy. It implies that the act was one contemplated by the conspiracy, "according to," and was done in carrying it out "in pursuance of," something which the conspiracy provided should be done, something which when done should tend to accomplish the purpose of the conspiracy. *Dealy v. United States*, 152 U. S. 539, 546, 14 Sup. Ct. 680, 38 L. Ed. 545.

Where a layout of land for a burying place is made "according to pitch," the expression in this connection means according

to a previous selection. *Inhabitants of Easton v. Drake*, 65 N. E. 393, 394, 182 Mass. 283.

**ACCORDING TO COMMON USAGE.**

See "Common Usage."

**ACCORDING TO THE COURSE OF COMMON LAW.**

The various interpretations in effect determine that the phrase "judicial proceedings according to the course of the common law" means that the right of a person to his life, liberty, or property shall not be divested except by a judicial determination, after due notice, in pursuance of a general law. *Mason v. Messenger*, 17 Iowa, 261, 267.

**ACCORDING TO LAW.**

See "Sworn According to Law."

A certificate of a royal Prussian judge, in proceedings to extradite a forger, that the proceeding against the forger which he certifies to is "valid evidence according to the laws existing in Prussia," is to be construed as meaning that the certificate is valid evidence of the crime in Prussia. *In re Behrendt* (U. S.) 22 Fed. 699, 700.

A will by which testator devised property to his son for life, remainder to be divided among the son's children "according to law," meant according to the law as it exists at the time of the division, for, unless it be divided according to existing law, it is not divided according to law in any sense. To perform any act according to law, necessarily refers to the law existing at the time of the performance of the act, since law as it once was is not now law at all. *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. (1 McCart.) 32, 35.

Act July 2, 1822, prohibiting any revocation of any will unless proved by some other will or codicil executed with the like formalities, or by some other writing declaring the same, or by canceling, tearing, obliterating, or otherwise destroying such will, but that nothing in the section shall be construed to control or affect any revocation of a will to be implied "according to law" from any change in the circumstances of the testator, his family, devisees, legatees, or estate, occurring between the time of the making of the will and the death of the testator, will be construed as only intended to except such revocations as are approved by English decisions on an implication not consistent with the English statute of frauds. *Morey v. Sohler*, 3 Atl. 636, 638, 63 N. H. 507, 56 Am. Rep. 538.

Act Cong. July 8, 1886, referring claims to the court of claims for adjudication "according to law," means a formal, regular, and final judgment of the judicial tribunal to which the matter is submitted, acting

on the acknowledged principles of law applicable to the circumstances of the case. *United States v. Irwin*, 8 Sup. Ct. 1033, 1035, 127 U. S. 125, 32 L. Ed. 99.

The phrase "according to law" can have but one meaning as used in the statute for the distribution of land of a decedent, and that is by an action in partition in the court having jurisdiction in cases of that character. *Schick v. Whitcomb* (Neb.) 94 N. W. 1023, 1028.

An administrator's bond provided that he "shall administer according to law." It was held that, the functions of an administrator being *ex vi termini* to administer, to "administer according to law" meant to fulfill the functions of an administrator, or, in other words, to perform all his duties, and hence, as it was an administrator's duty to pay over money on demand, his failure to do so was a breach of the bond. *Balch v. Hooper*, 20 N. W. 124, 126, 32 Minn. 158.

"According to law," as used in Act No. 82 of 1884, § 3, declaring that a tax title executed before a notary shall be conclusive evidence that the property was assessed "according to law," and of other facts, necessarily implies merely that all the essentials have been fulfilled, and that the tax title is conclusive evidence that if they are performed they are performed "according to law," but does not preclude an inquiry as to the fact of performance of such actual essentials at all, the act and phrase being only to conclude inquiry into the nonessential requisites to the exercise of the taxing power. *In re Lake*, 3 South. 479, 483, 40 La. Ann. 142.

**As legal process.**

The expression "according to law," as used in Code Pub. Loc. Laws, art. 7, § 130, providing that where state and county taxes are in arrear, and the collector shall find it necessary to enforce the collection thereof, he shall first leave with the party by whom the taxes are due a notice warning the delinquent that unless paid within 30 days the collector will proceed to collect the same "according to law," means by legal process. *Condon v. Maynard*, 18 Atl. 957, 958, 71 Md. 601.

**As opinion on appeal.**

The phrase "according to law" in the decision on appeal of a case, remanding it for further proceedings according to law, means the opinion of the court filed upon the appeal, for, without regard to the merit or demerit of the opinion, it necessarily becomes the law of the case. *Winner v. Hoyt*, 82 N. W. 128, 180, 68 Wis. 278.

**As statute law.**

In a bond of a county treasurer providing that he will faithfully discharge the duties

of his office and pay over the money which shall come into his hands "according to law," the phrase according to law embraces statute law in force during the term of office, whether enacted before or after the execution of the bond. *Dawson v. State*, 38 Ohio St. 1, 8.

The words "according to law" as used in the Constitution, providing that every person holding any civil office under the state or any municipality therein shall, unless removed "according to law," exercise the duties of such office, can have no other construction than that such officer shall be removed as provided by the Constitution or statutory law. *Trimble v. People*, 34 Pac. 981, 984, 19 Colo. 187, 41 Am. St. Rep. 236.

**As statute of descent or distribution.**

The words "according to law" in a will in which testatrix demised lands in trust for her son for life, and at the time of his death to leave all the property of all kinds to be equally divided among her nephews and nieces on her father's side "according to law," was held not to operate to incorporate as a part of her will, and as a qualification of the devise, the provisions of the statute of descent relating to the division of estates between the children and grandchildren of brothers and sisters of the whole blood; and therefore a grandniece, the daughter of a nephew dead at the time of making the will, was held not entitled to any interest in the lands. *Buzby v. Roberts*, 32 Atl. 9, 11, 53 N. J. Eq. (8 Dick.) 566.

A will by which a plantation, after a life estate in another, was to come to the next male heir nearest in kindred and relation to the testator "according to law," and so on in succession on that line, must be construed to mean that the estate should come to such beneficiary in the same manner as the law would have given it to the heirs of the testator, and not that the testator meant that the law was to be regarded in ascertaining who the next male heir nearest in kindred and relation to him was. *McIntyre v. Ramsey*, 23 Pa. (11 Harris) 817, 819.

Where testator bequeathed to his wife "one third of my whole estate according to law," the phrase referred to the statute of distribution, which gives a widow one-third of all the personal property of the husband after the payment of debts. *Morris v. Morris' Ex'r* (Del.) 4 Houst. 414, 441.

**ACCORDING TO TENOR AND EFFECT.**

In an agreement for the release of a purchase on a condition precedent that they should pay a certain percentage of their original indebtedness "according to the tenor and effect" of certain notes they were to give, the phrase "according to their tenor and effect" is equivalent to "at maturity." Third

*Nat. Bank v. Humphreys* (U. S.) 66 Fed. 872, 876.

**ACCOUNT.**

See "Bank Account"; "Book Account"; "Concerns and Accounts"; "Continuous Account"; "Current Account"; "False Account"; "For Account of"; "Fully Accounted"; "Intermediate Account"; "Just and True Account"; "Long Account"; "Matters of Account"; "Merchants' Accounts"; "Mutual Accounts"; "On Account of"; "Open Account"; "Option Account"; "Outstanding Accounts"; "Partial Account"; "Particular Account"; "Running Account"; "Store Account"; "True Account"; "Unliquidated Account"; "Unsatisfied Accounts."

All Accounts, see "All."

Attested account, see "Attest—Attestation."

Liquidated account, see "Liquidate."

1 Rev. St. p. 685, § 28, providing that no person shall by printing, writing, or in any other way publish an "account" of any lottery, stating when and where the same is to be drawn, or the prizes drawn in any of them, or the price of a ticket or share therein, or where any ticket may be obtained therein, or in any way aiding or assisting in the same, does not mean an editorial or other commentary upon the law or its violation, or one pointing out violators and condemning their conduct, or a mere narrative of such violation as matter of news, but means publications to aid and assist lotteries by publishing accounts to operate as advertisements or notices of illegal lotteries, and to point out in some form when the same are to be drawn, or the prizes therein, or the price of tickets or shares, or where tickets may be obtained, or in some other way to aid or assist them. *Hart v. People* (N. Y.) 28 Hun, 396, 397.

A policy provided that all persons insured and sustaining loss or damage by fire should forthwith give notice thereof, and as soon after as possible deliver "a particular account" of such loss or damage. Held, that the words quoted should be construed to require only a particular account of the articles lost or damaged, and did not include a statement of the cause or manner of loss. *Catlin v. Springfield Fire Ins. Co.* (U. S.) 5 Fed. Cas. 810, 811.

The term "accounts," as used technically in evidence relating to a quarterly meeting of the Society of Friends, is understood to be a written return of a monthly meeting, authenticated by its clerk to the quarterly meeting, stating answers to queries respecting its condition, notice of any business to which the attention of the quarterly meeting is asked, and also the names of the rep-

representatives chosen to attend and form the quarterly meeting. *Earle v. Wood*, 62 Mass. (8 Cush.) 430, 465.

#### ACCOUNT (In Commercial Law).

The word "account" has no clearly defined legal meaning. Ordinarily it is a detailed statement of mutual demands, if they exist in the nature of debit and credit between the parties, arising out of contract or of some fiduciary relation, showing a balance by comparison between receipts and payments. The term "account" includes goods sold and delivered or consigned to be sold, money had and received, and work done and materials furnished. There is no distinction between the word "account" as used in a limitation of actions on account to three years, and in the provisions authorizing the defendant, upon proper notice, to require a list of items composing an account when it is the foundation of a suit, and it is used in its ordinary commercial usage to mean claim or demand grown out of the sale of goods, the performance of services, or the like, and applies to an action of assumpsit brought by a physician to recover for medical services rendered, in the absence of a special contract. *Morrisette v. Wood*, 80 South. 630, 631, 128 Ala. 505.

"The primary idea of account, computation, whether we look to the proceedings of courts of law or of equity, is some matter of debt and credit, or demands in the nature of debt and credit, between parties. It implies that one is responsible to another for moneys or things, either on the score of contract, or some fiduciary relation of a public or private nature, created by law or otherwise." *Whitwell v. Willard*, 42 Mass. (1 Metc.) 218, 217; *Nelson v. Posey County*, 4 N. E. 703, 704, 105 Ind. 287; *Stringham v. Winnebago County*, 24 Wis. 594, 599.

"Anything may enter into an account. The sum due on a bond of several years standing, on which there has been various payments, may be said to rest in account and to be unliquidated. An account is no more than a list or catalogue of items, whether of debits or credits." *Rensselaer Glass Factory v. Reid* (N. Y.) 5 Cow. 587, 593.

An account is a list or statement of monetary transactions, such as payments, losses, sales, debits, credits, etc., in most cases showing a balance or result of comparison between items of an opposite nature, e. g., receipts and payments. *Purvis v. Kroner*, 23 Pac. 260, 261, 18 Or. 414.

An account "is a formal statement in detail of the transactions between two parties, made contemporaneously with the transactions themselves." *Richardson v. Wingate* (Ohio) 10 West. Law J. 145, 146.

An "account" is a detailed statement of items of debt and credit, or of debt arising

out of contracts between parties. *Turgeon v. Cote*, 33 Atl. 787, 88 Me. 108.

A computation or statement of debts and credits arising out of personal property bought or sold, services rendered, material furnished, and the use of property hired and returned. *McMaster v. Booth*, 4 How. Prac. (N. Y.) 427, 428.

"An account is defined to be a detailed statement of mutual demands in the matter of debt and credit between parties, arising out of contracts or some fiduciary relation." *McWilliams v. Allan*, 45 Mo. 573, 574; *Preston Nat. Bank v. George T. Smith Middlings Purifier Co.*, 60 N. W. 981, 982, 102 Mich. 462; *Madison County v. Collier*, 30 South. 610, 611, 79 Miss. 220.

An account is "a sum stated on paper; a registry of a debt or credit; an entry in a book of things bought or sold, of payments, services, etc." "A list or catalogue of items, whether of debts or credits." *Theobald v. Stinson*, 38 Me. 149, 152.

The word "account," as used in N. Y. Code, § 158, declaring that a party may, when an account is alleged in adverse pleading, demand a bill of particulars, means the entry of debts and credits in a book, or upon paper, of things bought and sold, of services performed, with date, and price or value. *Dowdney v. Volkening*, 37 N. Y. Super. Ct. (5 Jones & S.) 313, 318.

An account, under a mechanic's lien statute requiring a just and true account of the demand to be filed and a statement of the lien, is sufficient if it comes within the ordinary meaning of that term, or is one that is a fair and substantial compliance with the law. *Turner v. St. John*, 78 N. W. 340, 344, 8 N. D. 245.

A will devising testator's accounts construed not to include the testator's bank account. "The term 'accounts,' in the ordinary and popular understanding, with which the testator must be understood to have used it, is that statement of mutual demands in the nature of debt and credit which arises out of contracts and dealings between parties, and the items of which are entered from time to time in the books commonly known as the 'account books,' and entered in a book or on paper, of things bought or sold, of payments, services, etc., including the names of the parties of the transaction, date, and price or value of the thing." *Gale v. Drake*, 51 N. H. 78, 84.

In Code Civ. Proc. § 1585, providing that an executor or administrator of a deceased partner is entitled to demand an "account" from the surviving partner of the firm's business, the right to demand an account includes the right to have all that the term imports, viz., a detailed statement of the partnership business, which shall afford full information of the condition of the business

—the assets, the credits, and indebtedness of the firm as such, and the condition of the account as between the partners themselves. *Andrade v. Superior Court*, 17 Pac. 531, 532, 75 Cal. 459.

Code, § 2599, declares that on proof of citation by a distributee to an executor or administrator the ordinary may proceed to "make and account," hear evidence on any contested question, and settle finally between the distributee and administrator. Held, that the term "make an account" should be construed as an ascertainment by figures of what is due after expenses to the complaining heir or the heirs complaining, or requiring its payment by the administrator. *Cook v. Weaver*, 77 Ga. 9, 15.

By "account," as used in Laws 1891, c. 100, § 2, authorizing a reference when the examination of a long account is required, is meant an account in the ordinary acceptance of that term; that is, charges and credits between the parties. *Betcher v. Grant County*, 68 N. W. 163, 9 S. D. 82; *Ewart v. Kass* (S. D.) 95 N. W. 915.

#### Balance or total.

The term "account," used in statutes requiring a claimant of a mechanic's lien to file a just and true account of his demands, means a detailed statement of mutual demands, debit and credit, and hence a statement which does not show the aggregate of the different items or the aggregate of the credits, but simply sets down in a round sum what plaintiffs claim as the balance due them, is insufficient. *McWilliams v. Allan*, 45 Mo. 573, 574; *Graves v. Pierce*, 53 Mo. 423, 428. See, also, *Morrisette v. Wood*, 30 South. 630, 631, 128 Ala. 506.

"An account is a statement of two merchants and others who have dealt together, showing the debits and credits between them, and hence a statement merely showing a balance due one of the parties is not an account, as the term is used in Act 1886, § 171, requiring a statement of the particulars of defendant's indebtedness to be filed with the declaration as condition precedent to the rendition of a default judgment." *Thillman v. Shadrick*, 16 Atl. 138, 140, 69 Md. 528.

Gen. St. tit. 21, c. 2, provides that fence viewers may recover double the expense of making a fence for a delinquent proprietor, if he shall neglect to pay or take an appeal for 10 days "after an account shall be presented and payment demanded." Held, that a statement of the appraisal of the fence at a gross sum was a sufficient "account," in the absence of any objection or request for a more detailed statement by the proprietor at the time. *Hollister v. Hollister*, 35 Conn. 241, 248.

The duty of an agent to "account" for expenses which he is to receive in addition

to salary is not fulfilled "by reporting to his principal that he has spent a round sum of money in prosecuting his employment, and then swearing to the fact in a suit to recover the sum. His duty to keep and preserve true and correct statements of account is a necessary consequence of his duty to account. An account is a detailed statement. It must be something which will furnish to the person having the right thereto information of a character which will enable him to make some reasonable test of its accuracy and honesty, otherwise the obvious design of requiring it must be virtually fruitless." *Fred W. Wolf Co. v. Salem*, 33 Ill. App. 614, 617.

Rev. St. c. 90, § 79, declaring that in an action for the recovery of a money demand plaintiff shall state "a just and true account of the debt or demand," is not satisfied by a statement setting forth that plaintiff held a mortgage to secure the payment of the mortgagor's note to him for a specified sum, there being no statement of the amount due. *Sprague v. Branch*, 57 Mass. (3 Cush.) 575, 577.

An account for balance due on the price of a horse is such an account as may be proven under Code, § 3780, providing that an account on which an action is brought, coming from another county or state, with the affidavit of plaintiff as to the correctness of the account, and certified as required, is conclusive evidence against the party sought to be charged, unless he shall by oath deny the account. *Hunter v. Anderson*, 48 Tenn. (1 Heisk.) 1, 2.

#### As debt or demand.

An account is a mere incorporeal right to a certain sum or to the collection of a debt. It has no tangible entity, and neither the thing itself nor any evidence of it is capable of delivery. It only exists in contemplation of law, and is transferred only by assignment. *Preston Nat. Bank v. George T. Smith Purifier Co.*, 47 N. W. 502, 506, 84 Mich. 364.

The word "accounts," as used in Poor Debtor Act (Rev. St. c. 148, § 29), declaring that whenever from the disclosure it shall appear that he possesses "accounts," if the debtor and creditor cannot agree to apply the same in discharge of the debt, appraisers shall be appointed, etc., shall be construed to apply to such claims as the debtor might have against other persons which were the proper subjects of charge, as book debts, and for the payment of which no written contract or security had been taken. *Robinson v. Barker*, 28 Me. (15 Shep.) 310.

The word "account" has various meanings and shades of meanings, and is used in various ways. Where used alone, without words of limitation, extension, qualification, or explanation, it is almost equivalent to the

word "claim" or "demand," but the word is generally so used that it can be known precisely what is meant by it. We have accounts, mutual accounts, book accounts, bank accounts, long accounts, open accounts, running accounts, accounts current, accounts rendered, and accounts stated, each referring to a claim or demand in a different status. And as used in section 84 of the justices' act it does not mean book accounts or mutual accounts, but includes any claim or demand. *Southern Kan. Ry. Co. v. Gould*, 24 Pac. 352, 44 Kan. 68.

The term "account," when applied to transactions between persons, denotes a claim arising from contract, or from some fiduciary relation in which the parties meet and attempt to settle their pecuniary demands. If the items be agreed upon, it is said to be "stated." If not agreed to, the account is "open." Lexicographers define the word as coming from the Latin "computare," which in the primary sense means to "cleanse," to "prune," and figuratively, to "adjust," "settle," etc. The term carries the idea that it denotes an indebtedness arising from contract or from a trust relation, as bailiff, receiver and guardian, etc. A claim against a county for services as a member of the board of supervisors is not an account. *Madison County v. Collier*, 80 South. 610, 611, 79 Miss. 220.

#### Debits or credits alone.

"The word 'account' is a word of wide and varied signification. An account in its most general meaning is a reckoning or a statement of items or details. It is not necessary that there should be \* \* \* items on both sides, for there may be a long account of sales of merchandise, or of materials furnished, embracing only the items of the merchandise delivered or of the work done." *Van Orden v. Tilden* (N. Y.) 13 Daly, 396, 397.

It is none the less an account that all the items of charge are by one person against another, instead of being a statement of mutual demand of debits and credits, provided the contract arise out of charges express or implied, or from some duty imposed by law. *Nelson v. Posey County*, 4 N. E. 703, 105 Ind. 287.

Rev. St. § 2864, authorizing a reference on the ground that the trial involves an examination of a long "account," requires that the account shall be in reference to the mutual dealings and transactions between the parties, and does not authorize a reference for the purpose of determining accounts with third persons for the purpose of showing plaintiff's damages. *Andrus v. Home Ins. Co.*, 41 N. W. 956, 957, 73 Wis. 642.

An account may be a statement of debits by one person to another without credits, especially when there are no mutual de-

mands. *Morrisette v. Wood*, 30 South. 630, 631, 128 Ala. 505.

As the term "account" is used to define one branch of equity jurisdiction, it means a series of transactions constituting mutual demands between both parties. A single matter, therefore, cannot be the subject-matter of an account as thus used, but there must be a series of transactions on one side and payments on the other. No mutual demands exist where on the one hand the claim is for work and labor, and on the other payment and set-offs alone. *Smith v. Marks* (Va.) 2 Rand. 449, 452.

An executrix's account, where there is an estate, and allowances are expected, must show both debits and expected credits, and therefore a paper filed by an executrix which only showed the money expended by her was not a compliance with an order of the probate court requiring rendition by her of the account. *Maxwell v. McCreery*, 41 Atl. 498, 499, 57 N. J. Eq. 287.

#### Manner of keeping.

The word "account" has no inflexible technical meaning, being defined by Webster to mean "a registry of pecuniary transactions; a written or printed statement of business dealings of debts and credits, and also of other things subjected to a reckoning or review." *Preston Nat. Bank v. Emerson*, 60 N. W. 981, 982, 102 Mich. 462.

The term "account" involves the idea of debit and credit. The particular mode of keeping the account, whether on books or loose scraps of paper, or without any written charges, or whether it is all kept in one shape or in different forms, is unimportant. *Millet v. Bradbury*, 41 Pac. 865, 866, 109 Cal. 170.

Within the meaning of Rev. St. § 2864, authorizing the court to refer a case requiring examination of an "account," the term "account" means an account in fact kept by one of the parties. *Druse v. Horter*, 16 N. W. 14, 16, 57 Wis. 644.

#### Number of items.

The word "account," as used in Code Civ. Proc. § 551, providing that it is not necessary for a party to set forth in the pleadings the items of "account" therein alleged, but in such case he must deliver to the adverse party, after a written demand therefor, a copy of the account, is said to apply to almost every claim or contract which consists of several items. *Badger v. Gilroy*, 47 N. Y. Supp. 669, 671, 21 Misc. Rep. 466 (citing *Barkley v. Rensselaer & S. R. Co.* [N. Y.] 27 Hun, 515).

The term "accounts," as used in the expression that a reference may be ordered where the action involves long accounts, may be properly held to include a schedule

or schedules attached to a complaint of a railroad company against the operators of an elevator to recover demurrage, which schedules contained 88 items as to cars, dates, hours of detention of each, and charge for demurrage, aggregating over \$1,000, which was attached to the complaint, defendant's duty to dispose of the cars after delivery within a reasonable time being admitted, and the only issue being on the defendant's denial of the detention. *Chicago & N. W. Ry. Co. v. Faist*, 58 N. W. 744, 745, 87 Wis. 360.

The stating of a single demand, the amount and validity of which has become unalterably fixed, is not an account within the meaning of Comp. St. 1897, c. 18, § 23, requiring the board of county commissioners to examine and settle all "accounts." *Perkins County v. Keith County*, 78 N. W. 630, 631, 58 Neb. 323.

The term "account," as used in a statute providing that all actions in which matters of "account" are in controversy may by rule of court be referred to a referee, does not mean every affair that could be called an "account" in common parlance, for that would bring within its compass almost the entire field of commercial transactions. It embraces only that fraction of such transactions as is comprised within the term "account" in its legal signification, which denotes items and not a single fact. *First Nat. Bank v. American Saw Co. of New Jersey*, 34 Atl. 1, 2, 58 N. J. Law (29 Vroom) 438.

An account, within Code, § 158, declaring that a party may demand a bill of particulars when an account is alleged in an adverse pleading, may be of a single entry or of a great number, and for a short or long period. *Dowdney v. Volkening*, 87 N. Y. Super. Ct. (5 Jones & S.) 313, 318.

The word "account," as used in Code Civ. Proc. § 531, providing that it is not necessary for a party to set forth in a pleading the items of an account therein alleged, but in that case he must deliver to the adverse party within 10 days after a written demand a copy of the account, is used in its ordinary language, and applies to almost every claim on contract consisting of several items. *Barkley v. Rensselaer & S. R. Co.* (N. Y.) 27 Hun, 515, 516.

#### **As paper containing statement.**

The term "account," as used with reference to the use of an account stated, as evidence of the items thereof, means the paper upon which the items composing the account are stated. *Nelms v. Steiner*, 22 South. 435, 437, 113 Ala. 562.

#### **As written instrument.**

See "Written Instrument."

#### **Bank account.**

A contract of dissolution of a partnership by which one partner sold to the other all his interest in the store, with all the "accounts due," was construed to include the balance standing to the credit of the firm in the firm's bank account. *Burress v. Blair*, 61 Mo. 133, 140.

A bequest "of all my accounts" could not be construed to pass a deposit in the savings bank. *Gale v. Drake*, 51 N. H. 78, 84.

#### **Claims not founded on contract.**

Claim distinguished, see "Claim."

The term "account" will be construed not to include an examination of numerous articles of damage between the parties in an action for tort. *Dewey v. Field* (N. Y.) 13 How. Prac. 437, 439.

The words "claim or account," used in speaking of statutory requirement that claims or accounts be presented to a city before suit is brought thereon, was said in *Harrigan v. City of Brooklyn*, 23 N. E. 741, 119 N. Y. 156, affirming *Id.*, 5 N. Y. Supp. 673, 52 Hun, 615, to naturally indicate claims on contracts which can in ordinary course be adjusted by the comptroller or chief financial officers or officer of the city. In *Calvin v. City of Brooklyn*, 23 N. E. 741, 119 N. Y. 156, affirming *Cavan v. Same*, 2 N. Y. Supp. 21, 22, 5 N. Y. Supp. 758, 760, the court, in passing on the same question, stated that the construction adopted was controlled by the fact that the word "account" was used as well as "claim," and it was said that when they are associated together the latter is restricted to the genus of demands to which the former belongs—those on contracts. *Pulitzer v. City of New York*, 62 N. Y. Supp. 587, 588, 48 App. Div. 6.

The words "account or claim," as used in statute providing that no "account or claim" or contract shall be received by a city for audit or allowance unless it shall be accompanied by an affidavit of the person rendering it, are not enough to cover unliquidated claims for personal injuries in an action *ex delicto*. *Griswold v. City of Ludington*, 74 N. W. 663, 667, 116 Mich. 401 (citing *Lay v. City of Adrian*, 75 Mich. 443, 42 N. W. 959).

Code Civ. Proc. § 531, providing that it is not necessary for a party to set forth in a pleading the items of an "account" therein alleged, but he must deliver a copy thereof to the adverse party on demand, which shall be verified by affidavit, construed not to include part of a claim for damages arising from the breach of a contract. *Blake v. Harrigan*, 11 N. Y. Supp. 209, 210.

"Accounts or demands," as used in a city charter requiring all accounts or demands against the city to be verified by affidavit before the comptroller before the same shall be acted on or paid, construed only to include

claims arising from contract, and not claims sounding in tort. *Hill v. City of Fond du Lac*, 14 N. W. 25, 26, 56 Wis. 242.

The term "account," as used in Rev. St. c. 13, § 27, cl. 2, authorizing the county board to examine and settle all "accounts" of the receipts and expenses of the county, and to settle all "accounts" chargeable against the county, implies that one is accountable to another for money or other things, either by contract or by virtue of some fiduciary relation of a public or private nature, and does not include a petition to the board of supervisors to have certain taxes paid by the petitioner refunded to him on the ground of illegality in the assessment. *Stringham v. Winnebago County Sup'rs*, 24 Wis. 594, 599.

Under Code Civ. Proc. § 1013, providing that in a compulsory reference, where the trial will involve the examination of a long account on either side, there can be no reference unless there is an account between the parties in the ordinary acceptance of the term, although there may be many items of damage. *Untermeyer v. Belhauer*, 105 N. Y. 121, 11 N. E. 847. In order to justify the application of the statute, the cause of action must arise upon contract. *Townsend v. Hendricks*, 40 How. Prac. 143. Under these principles an account to recover money lost on stock gambling under the guise of the purchase and sale of shares of stock in oil certificates, though covering many transactions and numerous items, is not an action involving the examination of accounts, so as to justify a compulsory reference. *Willard v. Doran & Wright Co.*, 1 N. Y. Supp. 345, 48 Hun. 402 (citing *Camp v. Ingersoll*, 86 N. Y. 433; *Silmser v. Redfield*, 19 Wend. 21).

#### As merchants' accounts.

In *Sayles' Civ. St. art. 2323*, providing that verified open accounts shall be prima facie evidence of the existence of the debt, the term "account" applies to transactions between persons in which, by sale on the one side and purchase on the other, the title to personal property is passed from one to another, and the relation of debtor and creditor is thereby created by a general course of dealing, and does not apply to a verified account of a physician for his services. *Garwood v. Schlichenmaier*, 60 S. W. 573, 574, 25 Tex. Civ. App. 176.

#### Rents.

A testator bequeathed to a legatee all accounts "which might be owing" to the testator at the time of his death. Held that, while the term "accounts" had no very clearly defined legal meaning, the primary idea conveyed by it is some matter of debt, or a demand in the nature of a debt arising out of a contract, which could not include rents accruing to the testator from real estate, such rents being chattels real, and not accurately described as "accounts" until they have accru-

ed and become due. Until then they will be annexed to the real estate, and an incident of the reversion. *Watson v. Penn*, 8 N. E. 636, 638, 108 Ind. 21, 58 Am. Rep. 26.

#### Sum due on bond.

Anything may enter into an account. The sum due on a bond of several years' standing on which there have been various payments may be said to rest in account and to be unliquidated. An account is no more than a list or catalogue of items, whether of debts or credits. *Rensselaer Glass Factory v. Reid* (N. Y.) 5 Cow. 587, 593.

#### ACCOUNT (Action of).

"Account," sometimes called "account render," was a form of action at common law against a person who, by reason of some fiduciary relation, was bound to render an account to another, but refused to do so. In England, the action early fell into disuse. And, as it is one of the most dilatory and expensive actions known to the law, and the parties are held to the ancient rules of pleading, and no discovery can be obtained, it never was adopted to any great extent in the United States. But the action of account was adopted in several states principally because there were no courts of chancery, in which a bill for an accounting lay. *Field v. Brown*, 45 N. E. 464, 466, 146 Ind. 293.

The action of account is a writ brought against one who, by means of his office or by some business he has undertaken, or some money he has received for another, is obligated to render an account to him, and refuses so to do. *Griffith v. Willing* (Pa.) 8 Bin. 317.

An action of account is somewhat peculiar in its proceedings, and in such an action there are two judgments—one that the defendant do account with the plaintiff, the other after the accounting for the balance found due. *Travers v. Dyer* (U. S.) 24 Fed. Cas. 142.

"Actions of account" are of a civil nature. An action of account at common law cannot be maintained to settle partnership matters between three or more partners having separate and distinct interests, for the reason that no separate judgments can be rendered in such an action. In such case the remedy is in equity. *Stevens v. Coburn*, 44 Atl. 354, 71 Vt. 261.

#### ACCOUNT BOOK.

See "Book of Account."

#### ACCOUNT CLOSED.

An "account closed" is an account to which no further additions can be made on either side, but which still remains open for adjustment and set-off; which distinguishes it from an "account stated." *Bass v. Bass*,



25 Mass. (8 Pick.) 187, 193; *Volkening v. De Graaf*, 81 N. Y. 268, 270.

An account closed is an account ended by a cessation of dealings between the parties or some other cause, but does not constitute an account stated. *Mandeville v. Wilson*, 9 U. S. (5 Cranch) 15, 18, 3 L. Ed. 23.

### ACCOUNT FOR.

The rule of law to the effect that it is a bailee's duty to restore the property to the bailor or to "account for," means to show some lawful reason why he has parted with the possession other than by a delivery to the bailor, and he so properly accounts where he shows that he has yielded the property to one having a right paramount to the bailor. *The Idaho*, 93 U. S. 575, 579, 23 L. Ed. 978.

"Accounted for," as used in Rev. St. c. 3, § 70, permitting a creditor not presenting his claim within two years to subject property not "accounted for" to the payment thereof, means that the property in question has been devoted by the executors to the purposes of the proper and due administration of the estate in pursuance of the will of the deceased, where a decedent's property is disposed of by will, and hence, where certain executors affixed an appraised value to an insufficient description which they intended to represent certain land which testator had owned, and subsequently they conveyed the land to the parties entitled to take under the will and reported to the court, they had "accounted for" the land within the meaning of the statute. *Auburn State Bank v. Brown*, 50 N. E. 144, 172 Ill. 284.

"Account," within the meaning of Laws 1872, c. 688, requiring every person receiving any property of a corporation by means of prohibited acts or deeds to "account" therefor, merely means that such person shall be required to account in a proper action, and does not limit the remedy to a suit in equity for an accounting. *McQueen v. New*, 61 N. Y. Supp. 464, 466, 45 App. Div. 579.

### As pay.

A guardian's bond requiring the guardian to "account for" certain money means that he must pay over such money to the person entitled thereto, and is not satisfied by the act of the guardian in charging himself with such money in his annual settlements. *State v. Williams*, 77 Mo. 463, 471.

The phrase "account for and pay over" in an officer's bond rendering him liable to account for and pay over moneys do not create two distinct grounds of liability, one to account and the other to pay over, the accounting being merely preliminary to the payment. *Town of Franklin Sup'rs v. Kirby*, 25 Wis. 498, 502.

A contract providing that defendant, in consideration of having purchased of plaintiff certain shares of stock in a bank, and having received plaintiff's obligation therefor and power of attorney to transfer the same, promised and agreed to "account" to plaintiff "for" one-half the proceeds or avails of a certain mortgage held by the bank on certain real estate, must be construed as importing an obligation to pay plaintiff one-half the proceeds or avails of the mortgage which came to defendants. *Cushman v. Richards*, 100 Mass. 232, 233.

### As be responsible for.

The expression "holden to account for" means not only to "render an account of," but "to be responsible for," and stands in opposition to the right of appropriation for one's own use and benefit. *Thomas v. Mahan*, 4 Me. (4 Greenl.) 513, 520.

### ACCOUNT OF WHOM IT MAY CONCERN.

See "Whom It May Concern."

### ACCOUNT RENDER (Action of).

As civil suit, see "Civil Action—Case—Suit—etc."

The "action of account render" is founded upon contract, and the engagement between partners is that each partner shall account to every other for himself, and not for his copartner. It is a several liability, and no two partners are responsible to another jointly. Each partner contracts with the other for himself alone, and hence where defendants, who were partners of plaintiff in a nursery, removed trees, from a lot in which they have first been planted, during the continuance of the partnership, against the remonstrance of plaintiff, the removal was in law the act of all the partners, for which they were liable to account severally and not jointly, and for which the "action of account render" will not lie against defendants jointly. *Portsmouth v. Donaldson*, 32 Pa. (8 Casey) 202, 204, 72 Am. Dec. 782.

### ACCOUNT RENDERED.

An account of mercantile dealings or financial statement made out and transmitted by the creditor to the debtor, showing a statement of debits and credits, which, not being objected to by the debtor for a reasonable time, is regarded as admitted by the party to be charged as being *prima facie* correct. *Wiggins v. Burkham*, 77 U. S. (10 Wall.) 129, 131, 19 L. Ed. 884; *Lockwood v. Thorne*, 18 N. Y. 285, 289.

An account is "rendered" when it is presented. Rendering an account and proving an account are separate and distinct transactions under Act Feb. 22, 1875, c. 95,

18 Stat. 333 [U. S. Comp. St. 1901, p. 648], requiring a marshal to "render" his accounts to the court, and to "prove" them by his own affidavit. The former does not include the latter. *Butler v. United States* (U. S.) 87 Fed. 655, 668.

An "account rendered" becomes an account stated from the presumed approbation or acquiescence of the parties, unless objection is made thereto within reasonable time. *Stebbins v. Niles*, 25 Miss. (3 Cushm.) 267, 268.

The phrases "bill for account" and "account rendered" were formerly employed in common-law practice to denote the procedure by which the account was secured, and the frequent inadequacy of the remedy at law or by jury trial gave rise to the equitable remedy of account. *Field v. Brown*, 45 N. E. 464, 465, 146 Ind. 293.

#### ACCOUNT SETTLED.

An account "stated" or "settled" is a mere admission that the account is correct. It is not an estoppel. The action is still open to impeachment for errors or mistakes. Its effect is to establish prima facie the accuracy of the items without other proof, and the party seeking to impeach it is bound to show affirmatively the mistake or error alleged. An account stated, which is shown to have been examined by both parties and expressly assented to or assigned by them, would afford stronger evidence of the correctness of the items than if it merely appeared that it had been delivered to the party or sent by mail and accepted for a sufficient length of time to entitle it to be considered an account stated. So, too, an account settled—that is, when the balance it exhibits has been paid or adjusted between the parties—is stronger evidence and requires more proof to overcome it than a mere account stated; but the party is never precluded from giving evidence to impeach the action, unless the case is brought within the principles of an estoppel in pais, or of an obligatory agreement between the parties, as, for instance, where upon a settlement mutual compromises are made. *First Nat. Bank v. Honeyman*, 42 N. W. 771, 772, 6 Dak. 275 (citing *Lockwood v. Thorne*, 18 N. Y. 292).

Where the parties have reckoned and settled their back accounts correctly and mutually agreed on the balance due, and the books are balanced accordingly, it is a settled account. *Gibson v. Sumner*, 6 Vt. 163, 164.

An account settled is stronger evidence than an account stated that the party with whom it is settled was satisfied with the account, and requires more proof to overcome it. *Chicago M. & St. P. Ry. Co. v. Clark* (U. S.) 92 Fed. 968, 986, 35 C. C. A. 120.

As between a bank and a depositor, the entry of debts in the depositor's passbook and striking a balance thereon constitute a statement of the account, and the delivery of the book to the depositor and his retention of it without objection make it a stated account; and, where the book has been retained many months without objection, and the precise balance it exhibits has been drawn out, these facts afford clear evidence of a "settled" as well as a "stated" account, which establishes prima facie the accuracy of the items. *Clark v. Mechanics' Nat. Bank* (N. Y.) 11 Daly, 239.

#### ACCOUNT STATED.

An account stated is an agreement between persons, who have had previous transactions, fixing the amount due in respect to such transactions, and promising payment. *Zacarino v. Pallotti*, 49 Conn. 38, 88 (citing *Ohit. Cont. p. 562*); *Gerding v. Funk*, 64 N. Y. Supp. 423, 428, 48 App. Div. 603; *Bradley Fertilizer Co. v. South Pub. Co.*, 17 N. Y. Supp. 587, 588; *McDowell v. North*, 55 N. E. 789, 791, 24 Ind. App. 435.

An "account stated" exists only when the accounts of both parties have been examined and the balance found admitted as the true amount between the parties remains unpaid. *Stebbins v. Niles*, 25 Miss. (3 Cushm.) 267, 268.

Stated or liquidated accounts are such as have been examined and adjusted by the parties and a balance due from one of them has been ascertained and agreed on as correct. *McLellan v. Crofton*, 6 Me. (6 Greenl.) 307, 337.

A settlement of an account between parties by which a balance is struck in favor of one of them. *James v. Fellowes & Co.*, 20 La. Ann. 116, 118.

An account stated is an agreement between both parties to an account that all the articles thereof are true and the balances just. *Fox v. Fisk*, 7 Miss. (6 How.) 328, 348; *Davis v. Tiernan*, 3 Miss. (2 How.) 786; *Claire v. Claire*, 4 N. W. 411, 412, 10 Neb. 54.

A stated account is an agreement, after an examination of the accounts between the parties, that the items are true and the balance correct; and such an account, which shows itself satisfied, is evidence of payment. *Anding v. Levy*, 57 Miss. 51, 62, 34 Am. Rep. 435.

To constitute an account stated, two things are necessary: First, that there be a mutual examination of the claims of each other by the parties, and, second, that there be a mutual agreement between them as to the correctness of the allowance and disallowance of their respective claims, and of the balance as it is struck on the final adjustment of the whole account and demands

on both sides. The minds of the parties must meet on the allowance of each item or claim allowed, and on a disallowance of each item or claim rejected. They must mutually concur on the final adjustment, and nothing short of this in substance will fix and adjust their respective demands as an account stated. *Lockwood v. Thorne*, 18 N. Y. 285, 288; *Williams v. Glenney*, 16 N. Y. 389, 391; *Hatch v. Von Taube*, 62 N. Y. Supp. 1031, 1032, 31 Misc. Rep. 30; *Reinhardt v. Hines*, 51 Miss. 344, 346; *Clark v. Marbourg*, 6 Pac. 548, 551, 33 Kan. 471.

To make an account stated there must be a mutual agreement between the parties as to the allowance or disallowance of their respective claims, and, to establish such an account so as to preclude a party from impeaching it, he must assent to the account as rendered, either expressly, or by implication by reason of his failure to object within a reasonable time after presentation. *Stenton v. Jerome*, 54 N. Y. 480.

It is essential to an account stated that the party to be charged should either expressly or by implication admit the correctness of the account as a claim against him. An account presented by plaintiff against the estate of a decedent showed that the principal item in it originated in a contract between plaintiff and one P. There was evidence that when the account was presented to decedent he showed surprise at the amount of it, said that P. ought to have paid it, and suggested a counterclaim, but afterwards said that he would pay it and have no trouble about it. Held insufficient to show an account stated between plaintiff and decedent. *Stephens v. Ayers*, 57 Hun, 51, 53, 10 N. Y. Supp. 502.

An account stated arose where plaintiff went over the account in the defendant's presence and found a certain sum due to the plaintiff, which result was not objected to by the defendant. *Kock v. Bonitz* (N. Y.) 4 Daly, 117.

It must appear that at the time of the accounting there existed some demand between the parties respecting which the account was stated, and that a balance was then struck and agreed on, and that the defendant expressly admitted that a certain sum was then due from him as a debt. *Zacchino v. Pallotti*, 49 Conn. 36, 38 (citing 2 Greenl. Ev. § 126).

An account stated is an account rendered by the creditor which has been assented to by the debtor as correct, either expressly, or by implication of law from failure to object thereto. *Holmes v. Page*, 23 Pac. 961, 962, 19 Or. 232; *Lockwood v. Thorne*, 11 N. Y. (1 Kern.) 170, 174, 62 Am. Dec. 81.

To make an "account stated," it is sufficient that the account has been examined and assented to as correct by both parties. *City*

of Cincinnati v. Cincinnati St. Ry. Co., 6 Ohio N. P. 235, 245.

The expression "account stated" has in law a well-understood meaning, and an allegation in a complaint that the defendant and plaintiff had a settlement, and defendant made and rendered to plaintiff an account stated of the balance of net profits due plaintiff, and which said defendant then and there agreed to pay, sufficiently alleges the existence of the account stated. *Hale v. Hale*, 86 N. W. 650, 651, 14 S. D. 644.

An "account stated" is where the account is closed by the assent to its correctness by the party charged, and where there are mutual dealings between the parties involving items of debit and credit on each side or debts on one side and credits on the other, and an agreement as to the balance due on the account is made, the account becomes a stated account, and the term "stated account" is used in opposition to "open account." *McCamant v. Batsell*, 59 Tex. 363, 369.

A letter containing a statement of an amount due plaintiff for withdrawing a suit and for help in various ways which he has rendered or may render, and providing that the agreement is subject to the ratification of other persons, is not strictly an account stated, because it refers to future services and is subject to ratification. *Gerding v. Funk*, 64 N. Y. Supp. 423, 428, 48 App. Div. 603.

When two persons, having had monetary transactions together, close the account by agreeing to the balance appearing to be due from one of them, this is called an "account stated." It is of importance from the fact that it operates as an admission of liability by the person against whom the balance appears; or, in the language of the common law, "the law implies that he against whom the balance appears has engaged to pay it to the other, and on this implied promise or admission an action may be brought. But if one of the parties does not agree to the balance, an action upon an account stated cannot be maintained." To make an account stated there must be a mutual agreement between the parties as to the allowance of their respective claims, and to establish such an account there must be proof of assent to the account as rendered. Where a merchant renders a statement of goods sold which is assented to by the debtor, and payments are made on account at different times thereafter, he cannot recover the balance due in an action on a stated account without proof that a new account showing the balance claimed has been rendered and assented to. *Loventhal v. Morris*, 15 South. 672, 673, 103 Ala. 332.

An "account stated" grows out of commercial transactions, being the rendition of a running account by one party to the other, and his acceptance or acquiescence in its

accuracy or amount. It is therefore, in legal effect, but the liquidation of fractional items into a single amount by the agreement of parties, express or implied. In the official report of an executive officer there is no single element of an account stated. *Nutt v. United States (U. S.)* 23 Ct. Cl. 68, 73.

#### **Acquiescence or silence as implying.**

In proving an account stated, it is not necessary to show an express examination of the respective demands or claims of the parties or an express agreement to the final adjustment. All this may be implied from circumstances. If the account be rendered by one party, and the other party on examining it makes no objection, an inference might legitimately be drawn that he was satisfied with it as rendered; so, also, if the account should be made out by one party and transmitted to the other party by mail, and the latter should omit to communicate objections to the party rendering the account within a reasonable time, an inference might be drawn that he was satisfied with it. *Lockwood v. Thorne*, 18 N. Y. 285, 288; *Williams v. Glenney*, 16 N. Y. 389, 391; *Reinhardt v. Hines*, 51 Miss. 344, 346; *Clark v. Marbourg*, 6 Pac. 548, 551, 33 Kan. 471.

An account stated is where an account is made up and rendered and examined by the party receiving it and admitted by him to be correct, and, if the party receiving it keeps it without objecting to its correctness within a reasonable time, his silence will be construed into an acquiescence in the justness of the account, and he will be bound by it as if it were a stated account. *Phillips v. Belden (N. Y.)* 2 Edw. Ch. 1, 23; *Freeland v. Heroh*, 11 U. S. (7 Cranch) 147, 3 L. Ed. 297; *Langdon v. Roane's Adm'r*, 6 Ala. 518, 527, 41 Am. Dec. 60-62; *Standard Oil Co. v. Van Etten*, 1 Sup. Ct. 178, 185, 107 U. S. 325, 27 L. Ed. 319.

The assent to an "account stated" may be express, or implied from circumstances. As a general rule, where an account showing a balance is duly rendered, the one to whom it is rendered is bound within a reasonable time to examine it, and object if he dispute its correctness. *City of Cincinnati v. Cincinnati St. Ry. Co.*, 6 Ohio N. P. 235, 245.

An "account stated" is an admission of the correctness of an account. The weight of this kind of admission depends upon circumstances. If both parties personally examine an account and assent to its correctness, it furnishes very clear evidence of the fact. If an account is delivered to a party, and he makes no objection to it for a period sufficient to enable him to do so, it may be inferred that he assented to its correctness, and it would prima facie prove the account. *Quincey v. White*, 63 N. Y. 370, 377.

If an account has been transmitted from one person to another, and no objections

made after several opportunities of writing have occurred, it is treated as an acquiescence of the correctness of the account transmitted, and therefore it is deemed a stated account. Thus, in *Terry v. Sickles*, 13 Cal. 427, it is said, if an account be presented to the debtor and he does not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated; hence, where it appears that an account against defendant has been presented and examined by him, and no objections made thereto for several months, it is an account stated. *Hendy v. March*, 17 Pac. 702, 75 Cal. 566.

An account stated is an account which has been examined and assented to as correct by both parties. The assent may be either express or implied. It is not necessary, in order to make an account stated, that it should be signed by the parties. It is sufficient that it is examined and accepted by them. "It is said to be a general rule that, when an account is made up and rendered, he who receives it is bound to examine it or procure some one to examine it for him." If he admits it to be correct it becomes an "account stated," and is binding on both parties, the balance being the debt which may be sued for and recovered by law on the basis of an insimul computassent; so if, instead of an express admission of the correctness of the account, the party receiving it keeps the same and makes no objection within a reasonable time, his silence will be construed into an acquiescence in its justness, and he will be bound as if it were a "stated account." In fact, the rule as laid down by authorities would seem to be that if one does not object to a stated account, which has been furnished him, within a reasonable time, he shall be bound by it, unless he can show its incorrectness. *Lockwood v. Thorne*, 11 N. Y. (1 Kern.) 170, 174, 62 Am. Dec. 81.

That one party had sent to another an account current in which he admitted a balance against himself, and that the other had made a draft at sight on the party rendering the account for the amount to be admitted to be due, directing the payment to be charged to the drawer's account, did not establish an account stated between the parties, there being no evidence of acquiescence in the correctness of the account so entered, as to preclude the one receiving it from disputing it, or preventing him from suing for the amount claimed to be due. *Lockwood v. Thorne (N. Y.)* 12 Barb. 487, 490.

A stated account is an agreement between both parties that all the items are true, but this agreement may be implied from circumstances, as where merchants reside in different states and one sends an account to the other, who makes no objection to it within a reasonable time. *Auzerais v. Naglee*, 15 Pac. 371, 372, 74 Cal. 60.

An account stated is an admission that the amount is correct, and, if the party to whom it is rendered omits to communicate objections to the other party within a reasonable time, the inference may be drawn that he was satisfied with it; but there is no arbitrary rule of law which renders the omission to object in a given time equivalent to an actual agreement or a consent to the correctness of the account. *Chicago, M. & St. P. Ry. Co. v. Clark* (U. S.) 92 Fed. 968, 986, 35 C. C. A. 120; *Burrill v. Crossman* (U. S.) 91 Fed. 543, 544, 33 C. C. A. 663.

When the passbook of a depositor is written up and delivered to him, or the bank renders an itemized statement of his account, and he retains the same without objecting thereto within a reasonable time, it constitutes an "account stated." *Nodine v. First Nat. Bank*, 68 Pac. 1109, 1111, 41 Or. 386; *Clark v. Mechanics' Nat. Bank* (N. Y.) 11 Daly, 239.

Merely rendering an account does not make it an account stated, but an account rendered to the debtor exhibiting in detail the demand of the creditor, unless objected to within a reasonable time, becomes an account stated. *Truman v. Owens*, 21 Pac. 665, 667, 17 Or. 523.

An account made by one of the parties against the other is not an account stated between the parties, and the mere retention by the plaintiff of such an account without objection is but slight evidence of its correctness in charging him with money paid for his account by defendant, or with a balance of money due to the defendant by another. *Spangler v. Stringer*, 22 Pa. (10 Harris) 454.

#### **Balances.**

Mere presentment of an itemized account for a balance due, and a payment on account, does not constitute an account stated. *Hatch v. Von Taube*, 62 N. Y. Supp. 1031, 1032, 31 Misc. Rep. 30.

A balance struck in a broker's passbook is an "account stated." *Marye v. Strouse* (U. S.) 5 Fed. 483, 489.

#### **Cessation of dealings as creating.**

An account stated does not include an account closed by the cessation of dealings between the parties. *Mandeville v. Wilson*, 9 U. S. (5 Cranch) 15, 18, 3 L. Ed. 23; *Whitelsey v. Spofford*, 47 Tex. 13, 17.

Death closes accounts in one sense; that is, there can be no further additions to them on either side, but they remain open for adjustment and set-off, and therefore do not become accounts stated by such death. *Bass v. Bass*, 25 Mass. (8 Pick.) 187, 193.

#### **Conclusiveness.**

An "account stated" is a mere admission that it is correct. It is not an estoppel.

Its effect is simply to establish prima facie accuracy of items without other proof, and the party seizing, to impeach it, is bound to show affirmatively the mistake or error alleged. *Sedgwick v. Macy*, 49 N. Y. Supp. 154, 156, 24 App. Div. 1; *Bradley Fertilizer Co. v. South Pub. Co.*, 17 N. Y. Supp. 587, 588; *First Nat. Bank of Grand Haven v. Honeyman*, 42 N. W. 771, 772, 6 Dak. 275; *Green v. Thornton*, 30 Pac. 965, 966, 96 Cal. 87.

An "account stated" is conclusive on the parties, unless impeached for fraud or mistake. *City of Cincinnati v. Cincinnati St. Ry. Co.*, 6 Ohio N. P. 235, 245.

An "account stated or settled" is an admission that the amount is correct. It is not an estoppel. The act is still open to impeachment for mistakes or errors. Its effect is to establish prima facie the accuracy of the items without other proof, and the party seeking to impeach it is bound to show affirmatively the mistake or error alleged. *Donald v. Gardner*, 60 N. Y. Supp. 668, 671, 44 App. Div. 235 (citing *Lockwood v. Thorne*, 18 N. Y. 285).

An account stated which is shown to have been examined by both parties and expressly assented to or assigned by them would afford stronger evidence of the correctness of the items than if it merely appeared that it had been delivered to the party or sent by mail and accepted for a sufficient length of time to entitle it to be considered an account stated. The party is never precluded from giving evidence to impeach the action unless the case is brought within the principles of an estoppel in pais or of an obligatory agreement between the parties, as, for instance, where upon a settlement mutual compromises are made. *First Nat. Bank v. Honeyman*, 42 N. W. 771, 772, 6 Dak. 275 (citing *Lockwood v. Thorne*, 18 N. Y. 292).

The original account becomes the consideration for the agreement, and it is not necessary to prove the items of such account, nor can they be inquired into or surcharged except for some fraud, error, or mistake, and such grounds must be according to the want of authority set forth in the pleading. *Auzerais v. Naglee*, 15 Pac. 371, 372, 74 Cal. 60.

Though an account rendered becomes an account stated, exempting the creditor from proving the items, in an action of the account on the debtor's failure to object within a reasonable time that fact does not preclude the debtor from setting up fraud as a defense to the action on such account, whether he obtains knowledge of the fraud at the time the account was rendered or did not acquire such knowledge until some time after the account became the "account stated." *Baxter v. Lockett*, 6 Pac. 429, 431, 2 Wash. T. 228.

An "account stated" is an admission made by one party to another that the accounts between them, consisting of the various items which enter into that account, are as therein stated; and from the necessities of the law merchant it has become a part of the law that after a lapse of time such an account and such an admission shall be conclusive between the parties, unless impeached because of fraud or mistake in reference to some of the items contained in the account; and by the statute of limitations such an admission becomes absolute between the parties after the lapse of 10 years unless tainted by fraud, and even then it becomes conclusive unless attacked within a certain period after the discovery of the fraud. *Kingsley v. Melcher*, 10 N. Y. Supp. 63, 65, 56 Hun, 547; *Kingsley v. Melcher*, 10 N. Y. Supp. 63, 65, 56 Hun, 547.

#### Mutual demands required.

An "account stated" may be defined in general terms to be where an account is rendered and a debt in a specified sum is acknowledged as due from one party to another, or where parties who have had previous transactions agree upon a definite balance as due. It is not essential that there should be cross or mutual demands, but when there are mutual demands there must be an adjustment, a balance struck, and an assent to its correctness. *Ware v. Manning*, 5 South. 682, 684, 86 Ala. 238.

An "account stated," in its proper meaning, implies a mutual account, and striking the balance acknowledged on one side and accepted by the other. *Schmidt's Ex'rs v. Leiby* (S. C.) 11 Rich. Eq. 329, 341 (citing *Story*, Eq. Pl. § 798).

An account stated does not necessarily consist of an account containing charges on each side besides money, and may consist of and be applied to a single bill of goods sent by the seller to the buyer, and retained by him without judgment. *Cobb v. Arundell*, 28 Wis. 553, 559.

An "account stated" is defined as an agreed balance of accounts; an account which has been examined and accepted by the parties. It is said that it must appear that at the time of the accounting certain claims existed of and concerning which an account was stated, that a balance was then struck and agreed upon, and that defendant expressly admitted that a certain sum was then due from him as a debt. Hence it follows that an account cannot be stated with reference to a debt payable on a contingency, but that it is not essential that there should be cross or reciprocal demands between the parties, or that the defendant's acknowledgment that a certain sum was due from him to the plaintiff should relate to more than a single debt or transaction. An account stated is none the less such because the debtor

agrees to pay the amount which he concedes to be due at a future day after he has done other acts. *Baird v. Crank*, 33 Pac. 63, 65, 98 Cal. 293.

#### New promise or obligation implied.

The term "stated account" is but an expression to convey the idea of a contract having an account for its consideration, and is no more an account than is a promissory note or contract having a like consideration for its support. *Auzerais v. Naglee*, 15 Pac. 371, 372, 74 Cal. 60.

An "account stated" is the mutual adjusting, settling, and balancing of accounts between the parties thereto, in which the law implies a promise to pay the balance found due. *Watkins v. Ford*, 37 N. W. 300, 69 Mich. 357.

Where the parties to an account have examined it and have expressly agreed on a certain sum of money as the balance justly due from one to the other, such an account thereby becomes an "account stated," and an action thereon is not founded on the original item, but on the balance ascertained by the mutual accounting of the parties. *Benites v. Bicknell*, 3 Pac. 206, 208, 8 Utah, 369.

"An account stated is an account balanced and rendered with an assent to the balance, express or implied, so that the demand is essentially the same as if a promissory note had been given for the balance." *Volkening v. De Graaf*, 81 N. Y. 268, 270; *Hatch v. Von Taube*, 62 N. Y. Supp. 1031, 1032, 31 Misc. Rep. 30; *Bass v. Bass*, 25 Mass. (8 Pick.) 187, 193.

"An account stated is an acknowledgment of the existing condition of liability between the parties. From it the law implies a promise to pay whatever balance is thus acknowledged to be due. It thereby becomes a new and independent cause of action, so far as that a recovery may be had upon it without setting forth or proving the separate items of liability from which the balance results." *Chace v. Trafford*, 116 Mass. 529, 532, 17 Am. Rep. 171.

An "account stated" is an agreement between persons who have had previous transactions, fixing the amount due in respect to such transactions, as distinguished from a mere admission or acknowledgment. It is a new cause of action. It is not a contract on a new consideration, and does not create an estoppel, but establishes prima facie the accuracy of the items charged without further proof. *McKinster v. Hitchcock*, 28 N. W. 705, 706, 19 Neb. 100.

An "account stated" is an agreement, express or implied, wherein parties who have had previous transactions with each other fix and determine the amounts due in respect to such transactions, and when made becomes a new agreement, and takes the place of the

obligations resting upon either party by reason of the prior account. *Harrison v. Henderson* (Kan.) 72 Pac. 878, 879.

An account stated is an agreement between parties who have had previous transactions of a monetary character that all the items of the account representing such transactions, and the balance struck, are correct, together with a promise, express or implied, for the payment of such balance. An account stated is in the nature of a new promise or undertaking, and raises a new cause of action between the parties. An account for which a note has been given for the amount due becomes an account stated. *Morse v. Minton*, 70 N. W. 691, 692, 101 Iowa, 603.

"An account stated alters the nature of the original indebtedness, and is itself in the nature of a new bond or undertaking. An action upon an account stated is not founded upon the original item, but upon the balance ascertained by the consent of the parties." *Hendy v. March*, 17 Pac. 702, 75 Cal. 566 (citing *Foster v. Allanson* [Eng.] 2 Term R. 479; *Holmes v. De Camp* [N. Y.] 1 Johns. 34, 36, 3 Am. Dec. 296; *Carey v. Philadelphia & C. Petroleum Co.*, 33 Cal. 694, 697).

#### Rendering as creating.

An account rendered becomes an account stated unless objected to within a reasonable time, and after the lapse of that time cannot be impeached except for fraud or mistake. *Standard Oil Co. v. Van Etten*, 1 Sup. Ct. 178, 185, 107 U. S. 325, 27 L. Ed. 819.

An "account stated" is one where an account is rendered by one party to another, which is received by such other, who admits the correctness of the items, and claims the balance or offers to pay it, as it may be in his favor or against him; but the mere rendering an account does not make it a stated one. To constitute a "stated account" it is not important that the account was not made out as between plaintiff and defendant, plaintiff having received it, made no complaint as to the items or the balance, but on the contrary claimed such balance, for he thereby adopted it, and by his own act treated it as a stated account, and the statute of limitations began to run on such account when the balance was demanded. *Toland v. Sprague*, 87 U. S. (12 Pet.) 300, 335, 9 L. Ed. 1093.

An account stated is an agreement between parties to an account that all the items thereof are correct. The simple rendering of an account between the parties and agreeing upon the amount due are sufficient facts on which to maintain an action. *Claire v. Claire*, 10 Neb. 54, 57, 4 N. W. 411, 412. Where parties to a written contract, requiring installments to be paid at various times and the payment of interest on install-

ments not so paid, had an attorney calculate the amount of principal and interest due on such contract, and agreed that the amount arrived at was correct, there was an account stated. *Krueger v. Dodge*, 87 N. W. 965, 967, 15 S. D. 159.

#### Signature not required.

It is not necessary that an account should be signed by the parties to make it a stated account; it is enough that it has been examined and accepted by the parties; and such acceptance need not be express, but may be implied from the circumstances. *Bruen v. Hone* (N. Y.) 2 Barb. 586, 594; *Ruffner v. Hewitt*, 7 W. Va. 585, 607.

#### ACCOUNTABILITY.

A provision in a contract by which defendant assumed control of plaintiff's business declared that defendant should act as plaintiff's representative "without accountability" of the matter in the manner of conducting the same, or for any errors of judgment in the conduct thereof. Held, that the words "without accountability," as they stood alone, would not justify defendant's claim of nonliability for losses caused by his neglect of plaintiff's interest and the mode of conducting the business; also could not be construed to mean a neglect of it, either partial or entire; and hence the term only covered losses from errors of judgment made in good faith.—*Gelisse v. Franklin*, 13 Atl. 148, 152, 56 Conn. 83.

#### ACCOUNTABLE.

See "Eventually Accountable."

Dig. 1844, c. 138, requires that guardians appointed by will, before proceeding to act, shall give bond with sufficient sureties, and be "accountable in the same manner as if appointed by the court." Held, that the word "accountable" as there used, making testamentary guardians subject to the jurisdiction of the probate court, gave ample jurisdiction to such court to remove such officers of their offices to the same extent as guardians appointed by the court. *McPhillips v. McPhillips*, 9 R. I. 536, 537.

"Accountable," when written on the back of a note after an indorser's name, means "subject to pay," "responsible," or "liable for," and that the indorser would make good the amount of the note when it became due and payable, without subjecting the payee to a previous demand on the maker. *Furber v. Caverly*, 42 N. H. 74, 76.

#### ACCOUNTABLE RECEIPT.

An accountable receipt is a receipt for money to be accounted for; for property in store, or ship receipt, etc. *People v. Bradley* (N. Y.) 4 Parker, Cr. R. 245, 247.

A writing which does not acknowledge that anything has been received which is to be accounted for is not an accountable receipt. *Commonwealth v. Lawless*, 101 Mass. 32.

An "accountable receipt," within Gen. St. 1878, c. 69, § 1, authorizing the punishment of forgery thereof, is a written acknowledgment of the receipt by the maker of it of money or other personal property, coupled with a promise or obligation to account for or pay to some person the whole or some part thereof. *State v. Riebe*, 7 N. W. 262, 263, 27 Minn. 315.

### ACCOUNTING.

An "accounting" means a statement of an acknowledgment of an existing debt from which a promise to pay is implied sufficient to maintain an action. It does not imply the creation of any new debt. *Buxton v. Edwards*, 134 Mass. 567, 578.

"The accounting to which a guardian may be subjected by proceedings before a surrogate is not only a statement of his receipts and disbursements with the amount of the trust fund still remaining in his hands, but it is, in addition to such account stated, a rendering and giving up to the party entitled the moneys and property in respect to which the accounting party is liable. The payment is a part of the accounting." *Pyatt v. Pyatt*, 18 Atl. 1048, 1050, 48 N. J. Eq. (1 Dick.) 285.

An act directing the proceedings in causes in chancery involving an accounting does not extend to a suit to foreclose a mortgage, in which a reference to compute the amount due becomes needful, but only to suits where the bill is filed for an accounting. *People v. Randall*, 37 Mich. 473.

### ACCOUNTING OFFICER.

The term "accounting officer," as used in Rev. St. § 7075, which provides that whoever knowingly presents a false and fraudulent claim to the auditor or other accounting officer of any municipal corporation for the purpose of procuring the allowance of the same is guilty of a crime, construed to mean "such an officer as may lawfully pass upon or allow a claim or account against a municipal corporation, upon the authority of which allowance the comptroller may issue his warrant upon the treasury." *Hauck v. State*, 14 N. E. 92, 45 Ohio St. 439.

### ACCRETION.

Alluvial accretions, see "Alluvial."

#### To land.

Accretion is the right of one owning land on the border of a stream to the additions imperceptibly made to his land by the

action of the water. *Jefferies v. East Omaha Land Co.*, 10 Sup. Ct. 518, 521, 134 U. S. 178, 33 L. Ed. 872.

Accretion "is the increase of real estate by the addition of portions of soil by gradual deposit, through the operation of natural causes, to that already in the possession of the owner." *St. Louis, I. M. & S. Ry. Co. v. Ramsey*, 13 S. W. 931, 933, 53 Ark. 314, 8 L. R. A. 559, 22 Am. St. Rep. 195; *Benne v. Miller*, 50 S. W. 824, 149 Mo. 228.

Accretion is the imperceptible accumulation of land by natural causes, and the owner of the property to which the addition is made becomes the owner of such ground, as, where land is bounded by a stream of water which changes its course gradually by alluvial formation, the owner of the land still holds the same boundary, including the accumulated soil. *Inhabitants of New Orleans v. United States*, 35 U. S. (10 Pet.) 662, 717, 9 L. Ed. 573.

"It seems to be a settled doctrine of common law that an accretion to land is an imperceptible increase thereto on the bank of a river by alluvial formations occasioned by the washing up of sand or earth, or by dereliction, as when the river shrinks back below the usual water mark, and when this is done it should be so gradual that no one can judge how much is added each moment of time; and, when the formation of land is thus imperceptibly made at the shore of a stream by the force of water, it belongs to the owner of the land immediately behind it, in accordance with the maxim, "De minimis non curat lex." *Lammars v. Nissen*, 4 Neb. 245, 250.

Accretion is an increase by imperceptible degrees. "The lord of the manor claims when there is a gradual accession to land adjacent." A test of what is gradual, as distinguished from what is sudden, seems to be that, though witnesses are able to perceive from time to time that the land has encroached on the sea line, it is enough if it was done so that they could not perceive the progress at the time it was made. It is said in *Emans v. Turnbull* (N. Y.) 2 Johns. 313, 314, 3 Am. Dec. 427, that if the marine increase be by small and almost imperceptible degrees it goes to the owner of land, but if it be sudden and considerable it belongs to the sovereign. *Mulry v. Norton*, 3 N. E. 581, 583, 100 N. Y. 424, 53 Am. Rep. 206.

"Accretion" signifies an addition of land to a shore line so gradually and imperceptibly that the amount added in each moment of time cannot be perceived, and excludes the idea of the sudden disruption of ground from one man's land to another, which may be followed and identified. The length of time during which the formation takes place is, however, not material, if the increment resulting is such as to be beyond the power



of identification. *Coulthard v. Stevens*, 50 N. W. 983, 984, 84 Iowa, 241, 35 Am. St. Rep. 304.

"Accretion" is the changing of the banks of a stream by a gradual process, and when such stream is a boundary the boundary line still remains the stream, although during the years by such accretion the actual area of the possession of the owner of the land bordering thereon may vary. "Accretion," no matter to which side it adds ground, leaves the boundary the center of the channel. *Nebraska v. Iowa*, 12 Sup. Ct. 396, 397, 143 U. S. 359, 36 L. Ed. 186.

"An accretion becomes a part of the land to which it is built, and follows whatever title covers the mainland, whether it be title by deed or title by possession. In its nature it is not susceptible, during its forming, of that kind of possession which distinguishes the occupation of dry land. But it attached to the dry land even while it is under water, and belongs to the owner of the land, and is in the actual possession of him who holds the actual possession of the mainland. If the mainland is in fact unoccupied, it is in the constructive possession of the owner of the true title, and that gives constructive possession of the forming accretion. But if the mainland is held in adverse possession to the true owner, he is not in constructive possession of the accretion; and, since the accretion in its formative state is not susceptible of actual occupancy in the sense of a *pedis possessio*, the indicia of the actual possession of him who held on the mainland are extended over the forming accretion, and bring it within his actual possession." *Ewing v. Burnet*, 36 U. S. (11 Pet.) 41, 53, 9 L. Ed. 624; *Bellefontaine Imp. Co. v. Niedringhaus*, 55 N. E. 184, 186, 181 Ill. 426, 72 Am. St. Rep. 269.

"Accretion," as used in 1 Code, art. 54, providing that the proprietor of land bounding on any of the navigable waters of this state shall be entitled to all "accretions" to said land, does not include new land formed by the waters of a stream until such land emerges and becomes visible. *Hess v. Muir*, 5 Atl. 540, 541, 65 Md. 586.

Accretion is soil which is gradually deposited in the water opposite upland, whereby the water line is carried further out into the ocean or other public water. Such addition belongs to the upland owner, so that he will not be shut off from the water and thus converted into an inland rather than a littoral owner. *Steers v. City of Brooklyn*, 4 N. E. 7, 8, 101 N. Y. 51.

The reasons usually given for the rule that a riparian owner is entitled to "accretions" in front of his land are, either that it falls within the maxim, "*De minimis lex non curat*," or that, because the riparian owner is liable to lose soil by the action or encroachment of the water, he should also

have the benefit of any land gained by the same action. But it seems to us that the rule rests upon a much broader principle and has a much more important purpose in view, viz., to preserve the fundamental riparian right on which all others depend, and which often constitute the principal value of the land—of access to the water. The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts. These considerations certainly apply to riparian ownership on lakes as well as on streams. *Lamprey v. Metcalf*, 53 N. W. 1139, 1142, 52 Minn. 181, 18 L. R. A. 670, 38 Am. St. Rep. 541.

"Accretion is an increase of real estate by the addition of portions of soil by gradual deposition through the operation of natural causes," and differs from alluvion in that the latter term is applied to the deposit itself, while accretion rather denotes the process by which it is deposited. *St. Louis, I. M. & S. Ry. Co. v. Ramsey*, 13 S. W. 931, 933, 53 Ark. 314, 8 L. R. A. 559, 22 Am. St. Rep. 195.

A meteor falling on real estate construed to be an accretion, and to belong to the owner of the land. *Maas v. Amana Soc. (N. Y.)* 16 Alb. Law J. 76.

#### In law of successions.

The right of "accretion" is the right to unite or aggregate with his portion the portion of him who refuses it and cannot acquire it, or the right which the coheirs or colegatees have over those portions which remain vacant by reason of renunciation, or by reason that some of them have not the capacity to take. The right of accretion takes place among legitimate heirs, i. e., among the heirs called to succession by law by reason of relationship in the collateral as in the direct line, so that the portion which remains vacant is added to the mass of inherited property, and is divided with it. And, further, it is understood that there is a failure of one of the coheirs or colegatees if he is not living at the time the will is made; if he rejects the inheritance or legacy; if he dies before the testator; if he omits to comply with the condition; or becomes incapable in any other way. *Escrive's Dictionary*. *Emerie v. Alvarado*, 2 Pac. 418, 440, 64 Cal. 529.

The right of accretion, as used in the civil law, "is based upon the theory that the title to the thing bequeathed is conveyed in its entirety to each and every one of the legatees, and hence that, when one or more of these legatees happen to die before the legacy vests, this fact leaves the title intact

with each of the survivors in its entirety, but with simply fewer persons to share it." *Succession of Hunter*, 12 South. 312, 313, 45 La. Ann. 262.

## ACCRUE.

Webster defines the word "accrue" as (1) "to increase; to augment. (2) To come to by way of increase; to arise or spring as a growth or result; to be added as increase, profit, or damage, especially as the produce of money lent." "Interest accrues to principal." *Anderson v. Richards' Ex'rs*, 37 S. W. 62, 99 Ky. 661.

"Accrue weekly," as used in the by-laws of a mutual benefit insurance association, providing that the dues of members shall "accrue weekly," means that the dues are to be established or measured weekly, and does not mean payable weekly. *Strasser v. Staats*, 18 N. Y. Supp. 167, 168, 59 Hun, 143.

In a statute providing that the executor of a tenant for life who leases real estate so held, and dies on or before the day on which the rent is payable, may recover the proportion of rent which had "accrued" at the time of his death, the word "accrued" must be construed to mean an apportionment of the rent between the executor and reversioner pro rata as to time, because, if accrued is held to mean "due," then the statute is deprived of all vitality. *Gudgel v. Southerland*, 90 N. W. 623, 624, 117 Iowa, 306.

"Accrued claims," as used in St. 1890, c. 421, § 14, providing that a receiver of an assessment insurance company shall use its emergency fund in the payment of "accrued claims," means claims which have accrued through the death of the persons insured. *Knowlton v. Massachusetts Ben. Life Ass'n*, 50 N. E. 520, 171 Mass. 193.

### As become absolute or vested.

The word "accrued" as used in the wills act, § 79, repealing all prior laws on the subject, saving all rights that had "accrued" under them, was equivalent in meaning to the word "vested," and implied that something had been imparted to or conferred on a third person over which he might have the immediate control by possession, or the present right to future possession, of which he cannot be deprived without his assent. It must be a right he cannot legally assert independent of any future condition of things as well as any subsequent change of the existing law. *Hartshorne v. Ross*, 13 Ohio Dec. 10, 14, 2 Disn. 15.

One meaning of the word "accrue" is to vest, and a claim accrues to a party when it ceases to be the property of another and becomes the property of such party. *Napa State Hospital v. Yuba County*, 71 Pac. 450, 451, 138 Cal. 378.

### As arise or become enforceable.

A cause of action accrues from the time the right to sue for the breach attaches. *Amy v. Dubuque*, 98 U. S. 470, 476, 25 L. Ed. 228.

One of the definitions of "accrue" in the Century Dictionary is "arise in due course," and another is "in law, to become a present and enforceable demand." A cause of action may properly be said to accrue when the liability arises so far as to become enforceable. *McGuigan v. Rolfe*, 80 Ill. App. 256, 259.

Applied to a cause of action, the term "to accrue" means to arrive; to commence; to come into existence; to become a present enforceable demand. *Eising v. Andrews*, 33 Atl. 585, 586, 66 Conn. 58, 50 Am. St. Rep. 75.

It is held that a right of action for a personal injury accrues upon the infliction of the injury. *Fowlkes v. Nashville & D. R. Co.*, 56 Tenn. (9 Heisk.) 829, 830.

Where a right of action is given for causing the death of a person in favor of his representative, such action cannot accrue until the appointment of the representative, so as to set in motion the statute of limitation. *Barnes v. City of Brooklyn*, 48 N. Y. Supp. 36, 37, 22 App. Div. 520.

As used in R. S. 1855, p. 647, providing that an action for a wrongful death must be commenced within one year after the cause of action "accrued," the term means the time when the defendant's liability became perfect and complete, and whenever the defendant had done the act which made him liable in damages, and there was a person in being to whom the damages ought to be paid and who might sue for and recover the same, the cause of action had accrued. *Kennedy v. Burrier*, 36 Mo. 128, 130.

"Accrues," as used in Rev. St. § 1069, providing that claims against the United States shall be barred unless a petition for payment is presented within a certain period after the claim "accrues," means the time at which an enforceable legal right arises, so that a suit might be brought thereon. *Rice v. United States*, 7 Sup. Ct. 1377, 122 U. S. 611, 30 L. Ed. 793.

### As become due and payable.

"Accrue," as used in a stipulation authorizing the appointment of a receiver to pay taxes thereafter "accruing," means the same as to become due and payable. *Moyer v. Badger Lumber Co.*, 62 Pac. 434, 435, 10 Kan. App. 142.

In the mechanic's lien law of 1876, requiring every original contractor to file his demand within six months after the indebtedness had "accrued," accrued means "having come to maturity, or to be due and payable; or, in other words, it indicates the time

when the work contracted for is completed, or the materials furnished, one or both, as the case may be, and the account for the sale is past due." *Cutcliff v. McAnally*, 7 South. 331, 332, 88 Ala. 507.

In 2 Rev. St. p. 82, § 6, providing that rent reserved to the deceased, which had "accrued" at the time of his death, shall be deemed assets and shall go to the executors and administrators, "accrued" is synonymous with "due and payable," and signifies rents that had become due and payable at the time of the testator's death. *Fay v. Holloran* (N. Y.) 35 Barb. 295, 297.

"Accrues," as used in a statute providing that no action shall be commenced to foreclose any mortgage except within 10 years after the right of action "accrues," means the time when a debt secured by the mortgage becomes due and collectible, and a payment on the debt will revive the right to foreclose the mortgage. *Schifferstein v. Allison*, 15 N. E. 275, 276, 123 Ill. 662.

Under a statute requiring a notice to be given within 30 days after a claim shall "accrue," where it was customary for laborers to receive payment on a certain day of each month for the whole of the previous month's work, the claim did not accrue until the usual day of payment. *Mundt v. Sheboygan & F. du L. R. Co.*, 81 Wis. 451, 464.

The technical meaning of the word "accrue," as defined in the dictionary, is the possession of a present enforceable right. A note is said to accrue when it becomes due and payable. Profits have accrued when they are paid, or when the right to enforce them presently exists. Profits may not be said to have accrued until they have become fixed and payable, and therefore a contract requiring the payment of a certain sum when profits "have accrued" means when they have become fixed or payable. *Allen v. Armstrong*, 68 N. Y. Supp. 1079, 1081, 58 App. Div. 427.

Within the common-law procedure act, enabling a judge, on it being made to appear that any person is indebted to the judgment debtor, to order that all debts "owing or accruing" from such third person to the judgment debtor shall be attached to answer the judgment debt owing, applies only to a debt perfected. When the words "owing or accruing" are used to designate two classes of debts, they can each receive a distinct meaning only by taking one as denoting debts which are not yet payable and the other as denoting those which are. There is no existing debt until judgment, and, where orders were obtained to attach moneys in the hands of the company which were to become payable to the debtor on a verdict recovered by him in his action against the company, there was no debt owing or accruing from the company, the judgment not then having been en-

tered. *Dresser v. Johns*, 6 C. B. (N. S.) 429, 434.

The phrase "debts owing or accruing" in Common-Law Procedure Act 1854, § 61, authorizing an attachment of all debts owing or accruing from the garnishee to the judgment debtor, includes all debts, though not presently payable. *Jones v. Thompson*, 1 El. Bl. & El. 63, 64.

The right of action or the liability on a note accrues, within the Georgia statute of limitations, not at its date, but at its maturity. *Black v. Swanson*, 49 Ga. 424, 425.

#### As exist.

"Accrue," as used in Code, § 2529, providing that certain actions may be brought within the time therein limited after their causes "accrue," and not afterward, means the time when the right to bring an action on the cause exists. *Weiser v. McDowell*, 61 N. W. 1094, 1095, 93 Iowa, 772.

In a statute of limitation providing that the state would not sue any person for or in respect of any real estate, or the issues or profits thereof, by reason of the right or title of the people to the same, unless such right or title "shall have accrued" within 10 years before any action or other proceeding for the same shall be commenced, "shall have accrued" are used in the sense of "shall have existed" within the period designated, and hence an action by the state to recover for an encroachment upon soil in the tide waters of a bay, the title to which accrued to the state on her admission to the Union 23 years before commencement of the action, is not barred if the right to sue for such encroachment has existed within 10 years. *Weber v. State Harbor Com'rs*, 85 U. S. (18 Wall.) 57, 68, 21 L. Ed. 798.

#### As become a fixed demand.

The word "accrue," as used in a fire policy, relative to the accruing of a loss, is not to be taken literally, as meaning when the property is destroyed, but means when the loss has become a fixed demand. *Steen v. Niagara Fire Ins. Co.* (N. Y.) 61 How. Prac. 144, 146.

#### As synonymous with occur.

"Accrue" is not synonymous with "occur" as used in a policy of fire insurance providing that no action can be maintained on such policy unless commenced within 12 months next after the loss shall occur. The word "accrue" in its generally received sense is to be "added to" or "attached to" something else, while the word "occur" means "to happen" in its general and most popular sense, and refers to the time when fire destroyed the property. *Johnson v. Humboldt Ins. Co.*, 81 Ill. 92, 95, 33 Am. Rep. 47.

"Accrue" is synonymous with the term "occur" as used in a policy of fire insurance

providing that no action can be maintained on a policy unless it shall be commenced within the term of 12 months next after such loss or damage shall "occur," meaning that the limitation commences when the loss was due and payable, and not from the time of the physical burning of the property. *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315, 324, 42 Am. Rep. 297; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 243, 33 Am. Rep. 607.

#### ACCRUED COSTS.

"Accrued costs," as used in an offer for judgment in favor of plaintiff for a specified sum, is a sufficient compliance with Gen. St. 1878, c. 66, § 259, requiring an offer for judgment for the sum named "with costs." *Petrosky v. Flanagan*, 35 N. W. 665, 666, 38 Minn. 26.

The expression "costs that have accrued," as used in a compromise of a pending suit, or in a private statute providing for such compromise, means costs that would follow the judgment, and do not include attorney's fees. *Tallassee Mfg. Co. v. Glenn*, 50 Ala. 489, 491.

An offer to confess judgment for a definite sum with "accrued costs" includes costs as up to the time of the offer, and the costs of carrying the offer into effect, if accepted. *Holland v. Pugh*, 16 Ind. 21, 23.

The word "accrue," as used in a bond given to pay all costs and damages that may accrue in consequence of an injunction, implies an account or inquisition, and only such as were decreed to a party could be said with propriety to have accrued to him in consequence of an injunction, and only those damages which were adjudged to him by the decree of the court on the dissolution of an injunction can with any propriety be said to have accrued. *Adams v. Brown*, 14 Ky. (4 Litt.) 7, 8.

#### ACCRUED PENSIONS.

The term "accrued pensions," as used in Act March 3, 1873, providing that accrued pensions shall not be considered a part of the assets of the decedent, but shall inure to the sole benefit of his widow or children, is synonymous with "arrear of pensions," as used in Act Jan. 25, 1875, wherein the pensions thereby granted are called "arrear of pensions." *Donnelly v. United States*, 17 Ct. Cl. 105, 110.

#### ACCRUED RIGHT.

An accrued or established right is one which cannot be wholly taken away by statute. *Richards v. Bellingham Bay Land Co.* (U. S.) 54 Fed. 209, 213, 4 C. C. A. 290.

"Accrued right" or title, as used in a statute providing that no person at any time thereafter shall make entry into any lands or

tenements except within 15 years next after his right or title shall first accrue, means that the title against which the statute runs is a present right of entry—that is, a new right or title first accruing to the party, and not a transfer of an old title—and cannot be limited solely to the commencement of the original title under which the party claims, but includes his own accession to the title. *Ricard v. Williams*, 20 U. S. (7 Wheat.) 59, 117, 5 L. Ed. 398.

#### ACCRUING INTEREST.

An agreement whereby plaintiff, purchasing a lot, agreed to assume a mortgage thereon and to pay the "accruing interest," does not refer to nor in any manner embrace any part of the six months' interest overdue and unpaid. As generally understood, "accruing interest" means running or accumulating interest, as distinguished from accrued or matured interest. When we speak of interest which is from day to day accumulating on the principal debt, but which is not yet due and payable, we call it "accruing interest." *Gross v. Partenhelmer*, 28 Atl. 370, 371, 159 Pa. 556.

#### ACCRUING RIGHT.

An accruing right is one that is increasing, enlarging, or augmenting. *Richards v. Bellingham Bay Land Co.* (U. S.) 54 Fed. 209, 213, 4 C. C. A. 290.

#### ACCT.

The abbreviation "acct." stands for account, and has been in common use in commercial transactions for so long that the memory of man runneth not to the contrary, and its meaning is as well understood as though the word had been written out; and the courts will certainly take notice of that which every one else knows. *Heaton v. Ainley*, 78 N. W. 798, 108 Iowa, 112.

#### ACCUMULATE—ACCUMULATION.

"Accumulated is simply amassed, collected, heaped up." *People's Fire Ins. Co. v. Parker*, 35 N. J. Law (6 Vroom) 575, 577.

##### Of corporations.

The "accumulations" of a corporation are its yearly earnings and profits, in whatever form they may exist, which have not been distributed in dividends among the owners of stock at the time it goes into liquidation. *Equitable Guarantee & Trust Co. v. Rogers*, 44 Atl. 789, 792, 7 Del. Ch. 398.

##### Of estates or funds.

Accumulation is the adding of the interest or income of a fund to the principal pursuant to the provision of a will or deed, preventing its being expended. Cent. Dict.

Thorn v. De Breteuil, 83 N. Y. Supp. 849, 853, 86 App. Div. 405.

The law imposes restrictions on the power of a testator or creator of a trust to prohibit thus the present beneficial enjoyment of a fund to increase it for a future generation, and will not allow part of the income of an estate to be set aside to pay a mortgage. *Hascall v. King*, 56 N. E. 515, 517, 162 N. Y. 134, 76 Am. St. Rep. 302.

"Accumulation," as used in a statute prohibiting the direction of "accumulation" by a testator, implies a withholding of the income of the property for the purpose of creating an increased and constantly increasing fund for distribution at a future time. A present beneficial gift of income until a certain sum shall have been received by the donee is not within the prohibition of the statute. A direction to apply rents or income in payment of a specified sum to a designated person is no more a direction to accumulate than a gift of the estate until all of the rents the donee has received an equivalent amount would be. In *re Rogers' Estate*, 36 Atl. 340, 342, 179 Pa. 609.

When an executor or other trustee masses the rents, dividends, or other income which he receives, treats it as capital, invests it, makes a new capital of the income derived therefrom, invests that, and so on, he is said to accumulate the fund; and the capital and accrued income thus procured constitute accumulations. *Hussey v. Sargent*, 75 S. W. 211, 215, 25 Ky. Law Rep. 315.

#### Of interest.

A deed of trust of a mortgage belonging to a testator provided for the payment to the testator's widow of all the interest on the mortgage, or so much thereof as she might desire, and the balance to testator's two children, and on the widow's death the mortgage, with "all accumulations of interest," should be assigned equally to the children. It was held that at least the interest at the death of the tenant for life was included in the accumulation, and it could not be limited solely to the interest which had accumulated in the trustee's hands as interest already paid to them, but held by them as interest not desired by the life tenant. *Lewis v. Towar* (N. J.) 45 Atl. 999, 1000.

A testator provided by will that after the decease of his daughter, in case she should marry and have children living at her death or descendants of such children, then it was his will that, of what remained undisposed of of the last-mentioned fourth part of the residue of his personal estate, its "accumulated interest" should belong to and vest in the children of such daughter. Held, that the term "that its accumulated interest" as so used did not mean the interest accrued and unpaid, but such interest only as at the death of the legatee had not become due and

payable to her, which remained undisposed of. *Lippincott v. Ridgway*, 11 N. J. Eq. (3 Stockt.) 526, 534; *Lippincott v. Stokes*, 6 N. J. Eq. (2 Halst. Ch.) 122, 152.

#### ACCUMULATED EARNINGS.

As capital stock, see "Capital Stock."

#### ACCUMULATED PROFITS.

As capital, see "Capital."

#### ACCUMULATED SURPLUS.

"Accumulated surplus," as used in Tax Act 1866 (Rev. p. 1156, pl. 74), providing "that all private corporations except banking institutions, etc., shall be assessed and taxed at the full amount of their capital stock paid in, and accumulated surplus," includes the property and funds which the corporation has in excess of its capital stock and above all debts and liabilities. *Trenton Iron Co. v. Yard*, 42 N. J. Law (13 Vroom) 357, 359.

"Accumulated surplus," as used in Laws 1862, p. 349, providing that all private corporations are to be assessed at the full amount of their capital stock paid in, and their "accumulated surplus," must be construed to refer to the fund stock companies have in excess of their capital and liabilities, and hence it includes all the assets of a mutual life insurance company over and above all liabilities; and, where such company had no liabilities except their liabilities to themselves, it cannot in the true sense of the word be said to be indebted at all. As they owe themselves these liabilities, they may be well considered an "accumulated surplus" within the meaning of the statute. *Mutual Ben. Life Ins. Co. v. Utter*, 34 N. J. Law (5 Vroom) 489, 491.

"Accumulated surplus," as applied to an insurance company whose "accumulated surplus" is subject to taxation at its full amount, must be construed to mean the fund which it has in excess of its capital stock after payment of its debts. Such fund is the accumulation of interest received and premiums for insurance, and is not limited to only such moneys as the company has received for interest on investments and earned premiums on expired risks, though it may be liable to the contingency of loss upon the policies issued, for it is as much the property of the company and as fully under its control as the capital stock paid in. *People's Fire Ins. Co. v. Parker*, 34 N. J. Law (5 Vroom) 479, 482.

The accumulated surplus of a bank is such portion of its earnings as is reserved by the directors "as a fund to increase the capital employed in conducting the business of the company and to provide against contingent losses." *People's Fire Ins. Co. v. Parker*, 35 N. J. Law (6 Vroom) 575, 577.

"Accumulated surplus," as applied to an insurance company, means the assets of the company not represented by the capital stock, but which stand distinct from it and beyond it. The word "surplus" is synonymous with "overplus"; that which remains when use is satisfied; excess; beyond what was prescribed or wanted; in law, the residue of an estate after debts and legacies are paid; while "accumulated" means simply "amassed, collected, heaped up." *People's Fire Ins. Co. v. Parker*, 35 N. J. Law (6 Vroom) 575, 577.

"Accumulated surplus," so long as it is retained by a corporation, either as surplus or increased stock, can in no proper sense be called "income." *Mills v. Britton*, 29 Atl. 231, 236, 64 Conn. 4, 24 L. R. A. 536; *Equitable Guarantee & Trust Co. v. Rogers*, 44 Atl. 789, 793, 7 Del. Ch. 398.

## ACCURATELY ADDRESSED.

A letter or envelope containing a notice of protest cannot be said to have not been "accurately addressed" where it was addressed to both members of a firm instead of being addressed in their firm name. It is not every change or mistake in the direction of a notice that vitiates it; if the error is merely nominal, and is not calculated to mislead or does not mislead the party, the mistake will not be fatal. The word "accurately," as applied to direction and address of notice of dishonor, has not been so defined that a court can in each case say as matter of law just what alteration constitutes an inaccuracy. A change may be so violent as to exclude the idea of accuracy, or so slight as to exclude the idea of inaccuracy. *United States Nat. Bank v. Burton*, 3 Atl. 756, 760, 58 Vt. 426.

## ACCUSE—ACCUSED—ACCUSATION.

Prosecution, criminal prosecution, criminal accusation, and criminal action synonymous, see "Criminal Action."

Though frequently used in the sense of imputing a charge of crime by judicial procedure, "accuse" in its popular sense is used to express a charge or imputation merely, and in this sense one may be accused of that which is no legal offense, viz., he may be charged with immoral or disgraceful conduct or official delinquency. It is certainly not synonymous with "arrested under criminal process." A slave is accused, within the meaning of an act making it an offense for a master to conceal or convey away his slave accused of a capital felony, when the felony is charged or imputed to him. *State v. South* (S. C.) 5 Rich. Law, 489, 492.

There are many authorities that hold that the term "accuse" means, in the law,

to charge with an offense, judicially or by a public process. The word, in an information alleging that defendant did threaten to accuse complainant of a crime, is sufficient to charge a threat to prosecute for a crime. *People v. Frey*, 70 N. W. 548, 112 Mich. 251.

An indictment alleged that defendants falsely and maliciously conspired "to charge and accuse" one F. that he had committed the crime of adultery with the defendant A., etc. Held, that the words "to charge and accuse" in the indictment did not mean to make a complaint before a magistrate, but to impute to F., and accuse him of, the crime, as a means of inducing him to pay money to avoid prosecution or exposure. *Commonwealth v. Andrews*, 132 Mass. 263, 264; *Commonwealth v. O'Brien*, 68 Mass. (12 Cush.) 84, 90.

"Accuse," as used in Comp. Laws Mich. § 7528, providing that, if any person shall maliciously threaten to accuse another of any crime with intent to extort money, he shall be punished, etc., is not restricted in its meaning to an accusation in court, but includes any public accusation. The fear excited and the attempted profit from it constituted the ingredients of the offense, and in many cases of peculiar possessions of trust or employment, where even a well-grounded suspicion might be ruinous, the probability of a judicial investigation in which the truth might be sifted would not be likely to add to the contrary of the charge, and might even tend to mitigate it. "Accused" only implies a formal complaint where it is used in its restricted technical sense, and ordinarily refers to any charge publicly made. *People v. Braman*, 30 Mich. 460, 468.

A person is said to be accused of an offense from the time that any criminal action shall have been commenced against him. *Pen. Code Tex.* 1895, art. 240.

The word "accused," as used in Kan. Bill of Rights, § 11, providing that the liberty of the press shall be inviolate; and all persons may freely speak, write, or publish their sentiments, being responsible for the abuse of such right; in all civil or criminal actions for libel the truth may be given in evidence, and, if it appear that the libelous matters were published for justifiable ends, the accused party shall be acquitted—means one who is charged with the crime, and cannot apply to a defendant in a civil action. *Castle v. Houston*, 19 Kan. 417, 426, 27 Am. Rep. 127.

The word "accused" is intended to refer to any person who in a legal manner is held to answer for any offense at any stage of the proceeding, or against whom complaint in a lawful manner is made charging the commission of an offense, including all proceedings from the order for arrest to the final execution of the law; and the word

"defendant" is used in the same sense. Pen. Code Tex. 1895, art. 25.

The term "accusation" is a broad term; it includes indictment, presentment, information, and any other form in which a charge of a crime or an offense can be made against an individual. As used in reference to trials in courts having jurisdiction of misdemeanor cases, it is but the equivalent of an information in common law, so that in some cases accused is not guaranteed the right to demand an indictment by the grand jury. *Gordon v. State*, 29 S. E. 444, 446, 102 Ga. 673.

Code Civ. Proc. § 2060, providing that a person who stands charged upon a criminal "accusation" with a ballable offense is entitled to bail upon an appeal, cannot be construed to apply to a person who had been convicted. The word "accusation" implies that the person is alleged to be guilty, not proved or adjudged to be so. "The complaint of a prosecutor or an indictment by a grand jury is an accusation, but, when the person has been tried and adjudged to be guilty, the charge is determined and he stands convicted. The judgment has taken the place of the accusation." *People v. Bauman*, 3 N. Y. Cr. R. 454, 457.

"Accusation," though commonly used with reference to all accusations, whether oral, by newspaper, or otherwise, is limited in legal phraseology to such accusations as have taken shape in a prosecution. *United States v. Patterson*, 14 Sup. Ct. 20, 21, 150 U. S. 65, 37 L. Ed. 999.

The word "accusation," as used in the Penal Code, means a charge made in a lawful manner against any person that he has been guilty of some offense which subjects him to prosecution in the name of the state. Pen. Code 1895, art. 240. An accusation under the statute applies to a pending prosecution, and when that prosecution has been terminated in conviction it ceases to be an accusation. *Brannan v. State (Tex.)* 72 S. W. 184, 185.

## ACCUSTOMED.

The use of the word "accustomed," in a definition of ordinary care, as that degree of care and caution that a person of ordinary prudence is accustomed to use under like or similar circumstances, in place of the word "ordinarily," does not render the definition objectionable. *St. Louis S. W. R. Co. of Texas v. Brown*, 69 S. W. 1010, 30 Tex. Civ. App. 57.

One of the primary meanings of the word "accustomed" is "usual," and the word is so used in a charge defining ordinary care as that which a person of ordinary prudence is accustomed to exercise. *St. Louis S. W.*

*R. Co. of Texas v. Smith*, 70 S. W. 789, 790, 30 Tex. Civ. App. 336.

"Accustomed to navigate," as used in a count in a declaration in an action against owners of a dam and lock in a river, alleging that plaintiffs were the owners of boats and crafts for the navigating of said river, and "accustomed to navigate" the same, etc., is synonymous with "usually navigating," as used in Act Feb. 12, 1818, authorizing certain persons to erect and maintain a dam and lock across a certain river; section 3 directing them, so long as they make use of the same for the purpose aforesaid, to maintain the said dam, lock, etc., in good and sufficient repair, fit, safe, and convenient for the passage of boats and crafts "usually navigating" the said river, freely, without toll or any expense of any kind or nature whatsoever. *Farwell v. Smith*, 16 N. J. Law (1 Har.) 133, 137.

The formula used in text-books and in forms given for pleadings in actions for injuries by "ferocious dogs, accustomed to bite," does not mean that the keeper of such a dog is exempt from all duty of restraint until the dog has effectually mangled or killed at least one person, but, as he is held to be a man of common vigilance and care, if he had good reason to believe, from his knowledge of the ferocious nature and propensity of the dog, that there was ground to apprehend that he would under some circumstances bite a person, then the duty to restrain attached, and to omit it was negligence. *Godeau v. Blood*, 52 Vt. 251, 252, 36 Am. Rep. 751.

## ACCUSTOMED RANGE.

See "Range."

## ACCUSTOMED USE.

The phrase "accustomed use," when employed or dwelt upon as indicative of the circumstances under which the owner or occupier of land is liable for injuries to persons coming thereon as by his implied invitation, in its broad sense is apt to be misleading, for it would apply to the case of the owner who suffers his land to lie waste over which the public by his passive acquiescence is permitted to pass and repass at pleasure—a condition under which it is well settled that no liability is imposed on the owner for the safety of the premises. *Phillips v. Library Co. of Burlington*, 27 Atl. 478, 481, 55 N. J. Law (26 Vroom) 307.

## ACETANILID.

"Acetanilid" is a chemical compound prepared from aniline oil, a product of coal tar, by treatment with carbolic acid, and derives its characteristics purely from coal tar, the acetic acid being merely a medium for its manufacture. It contains no alcohol.

United States v. Roessler & Hasslacher Chemical Co. (U. S.) 79 Fed. 313, 24 C. C. A. 604.

## ACID.

The phrase "acids used for manufacturing purposes" in Tariff Act Oct. 1, 1890, par. 473, does not include sulphotoluic acid, a remote derivative of coal tar by combination with sulphuric acid, its dominant element being derived from coal tar, the chief use of the article being in the construction of coal-tar dyes by combining with a base. *William J. Matheson & Co. v. United States* (U. S.) 65 Fed. 422, 423.

In *Lutz v. Magone*, 153 U. S. 105, 14 Sup. Ct. 777, 38 L. Ed. 651, it was held that saccharine, a substance 300 times as sweet as sugar, although scientifically an acid, was not an acid for revenue purposes. *United States v. Buffalo Natural Gas Fuel Co.* (U. S.) 78 Fed. 110, 112, 24 C. C. A. 4.

## ACKNOWLEDGE — ACKNOWLEDGMENT.

See "Public Acknowledgment."

The word "acknowledge," besides the legal sense in which it has for centuries been used, has also a common meaning, understood by every one, which uniformly relates to something past; it is a confession or admission of some prior act. *Roanes v. Archer* (Va.) 4 Leigh, 550, 557.

"Stated" signifies told, recited; whereas the word "acknowledged" means received with approbation, owned before authority. The use of the word "stated" in a certificate of acknowledgment of a deed by the grantor, which states that the grantor stated before the officer, etc., cannot be used as a substitute for the word "acknowledge." *Dewey v. Campau*, 4 Mich. 565, 567.

One of the conditions of a fire policy issued by the Ontario & Livingston Mutual Insurance Company was that, in case the assured should make any other insurance on the same property, and should not with all reasonable diligence give notice thereof to the company, and have the same indorsed on the policy, or otherwise "acknowledged" and "approved" by them in writing, the policy should cease and be of no further effect. Within a few months afterwards the insured effected a further insurance in another company on the property, at the same time forwarding a written notice of the fact to the secretary of the Ontario & Livingston Mutual Insurance Company; and on the next day the insured received a letter from the secretary in these words, "I have received your notice of additional insurance." Held, in an action on the

policy, that the letter imported both an acknowledgment and an approval in writing, within the meaning of the condition as to further insurance, and that the plaintiff was therefore entitled to recover. *Potter v. Ontario & L. Mut. Ins. Co.* (N. Y.) 5 Hill, 147.

### As action or proceeding.

See "Action"; "Civil Action—Case—Suit—etc."; "Proceeding."

### Of assignment for benefit of creditors.

In Laws 1860, p. 594, c. 348, § 1, providing that every assignment for the benefit of creditors shall be in writing, duly acknowledged before an officer authorized to take the "acknowledgment" of deeds, and the certificates of such "acknowledgment" shall be duly indorsed on the instrument before the delivery thereof to the assignee, the word "acknowledgment" has a well-known legal signification, and means the act by which a party who has executed an instrument declares or acknowledges it before a competent officer to be his act and deed, and hence proving the execution of the assignment by subscribing witnesses is so totally different from an "acknowledgment" by a party that it cannot be held to be equivalent to "acknowledgment," for it cannot be presumed that the expression "acknowledgment" was used without intending it to be understood in its plain and obvious sense. *Cook v. Kelley* (N. Y.) 12 Abb. Prac. 35, 38.

### Of contract by corporation.

The word "acknowledge" in Pub. Laws, p. 158, 2 Gen. St. p. 2706, requiring contracts by a corporation to be acknowledged, included a case where there was an affidavit proving the signature of the president of the corporation, and the corporate seal was affixed. *General Electric Co. v. Transit Equipment Co.*, 42 Atl. 101, 103, 57 N. J. Eq. 460.

### Of debt.

An acknowledgment of a debt sufficient to take a claim out of the operation of the statute of limitations implies a meeting of minds, and must amount to a new promise to pay the debt. An acknowledgment cannot be regarded as an admission of indebtedness if the accompanying circumstances are such as to leave it in doubt whether the party intended to prolong the time of legal limitation. The acknowledgment must in general be in writing, and must be of an existing liability with respect to the contract on which a recovery is sought. *City of Ft. Scott v. Hickman*, 5 Sup. Ct. 58, 64, 112 U. S. 150, 163, 28 L. Ed. 636. Such acknowledgment must be an unqualified and unconditional one, and must show positively that the debt is due in whole or in part. *Wetzell v. Bussard*, 24 U. S. (11 Wheat.) 309, 311, 6 L. Ed. 481;



*Bell v. Morrison*, 26 U. S. (1 Pet.) 351, 361, 7 L. Ed. 174.

The "acknowledgment of pre-existing debt," to take such debt out of the bar of the statute of limitations, must be a direct, unqualified, and unconditional admission of a debt which a party is liable and is willing to pay. The most positive acknowledgment of a pre-existing debt is insufficient if accompanied by a declaration which is inconsistent with an intention to pay. *Curtis v. City of Sacramento*, 11 Pac. 748, 749, 70 Cal. 412, 414, 415; *McCormick v. Brown*, 38 Cal. 180, 184, 95 Am. Dec. 170; *Howes v. Lynde*, 19 Pac. 249, 250, 7 Mont. 545. An arbitration agreement reciting that whereas the city was indebted to a certain firm, and whereas the board of trustees of the city and such firm differed as to the amount of indebtedness, etc., is not such an "acknowledgment of pre-existing debt" as will operate to prevent the running of the statute of limitations, for the acknowledgment is not direct and general, but qualified and conditional. *Curtis v. City of Sacramento*, 11 Pac. 748, 749, 70 Cal. 412.

Where a debtor, in answer to letters requesting payment of his debt, states that he regrets that he let the debt run so long, that he might have paid it but for carelessness, that he will get around to it as soon as he can, that the security is ample, and that he is obliged to ask time, it is an "acknowledgment" of a subsisting debt, from which the law will imply promise of payment on his part, so as to take the case out of the operation of the bar of the statute of limitations. *Acers v. Acers*, 58 S. W. 196, 198, 22 Tex. Civ. App. 584.

At common law, and in the absence of a statute, a part payment was held to toll the statute of limitations, on the principle that it was an "acknowledgment" of an existing liability at the time the payment was made. Indeed, this court has recognized that principle, and held that a part payment, to so operate, must rise to the dignity of such an acknowledgment. *Steele v. Souder*, 20 Kan. 42. In *United States v. Wilder*, 80 U. S. (13 Wall.) 254, 20 L. Ed. 681, it was held that the principle on which part payment takes a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due. *Good v. Ehrlich* (Kan.) 72 Pac. 545, 546.

The mere reference to the indebtedness, although consistent with its existing validity, and implying no disposition to question its binding obligation or a suggestion of some action in reference to it, is not such an "acknowledgment" as is contemplated by the statute of limitations. There must be an unqualified and direct admission of a present subsisting debt on which the party is liable. *Cook v. Farley* (Neb.) 95 N. W. 683 (citing *Nelson v. Becker*, 32 Neb. 99, 49 N. W. 962).

#### Of deed or mortgage.

"Acknowledge," as used when speaking of the acknowledgment of a deed, means "to approve; to own the validity of." *Blair v. Sayre*, 2 S. E. 97, 103, 29 W. Va. 604.

"Acknowledge," as used with reference to an execution of a deed, means that the parties affirmed the signing and sealing to be their act before witnesses. *Hogans v. Caruth*, 19 Fla. 84, 90.

"Acknowledgment," as commonly used by the Legislature, the courts, and the bar, means both the act and the written evidence thereof made by the officer. *Bouvier's, Burrill's, Black's, and Anderson's Law Dicts.* tit. "Acknowledgment"; *Statutory Construction Act* (Laws 1892, c. 677, § 15). An instrument is not "duly acknowledged" unless there is not only the oral acknowledgment but the written certificate also, as required by the statutes regulating the subjects. 1 Rev. St. p. 759; *Laws 1848*, c. 195; *Laws 1863*, c. 246; *Laws 1865*, c. 421; *Laws 1870*, c. 208; *Laws 1896*, c. 547, §§ 255, 258. *Rogers v. Pell*, 49 N. E. 75, 78, 154 N. Y. 518.

An "acknowledgment" of a deed is a declaration or admission made by the party executing the deed to a public officer, having authority to take such acknowledgments, that it is his deed and executed by him. *Steers v. Kinsey*, 58 S. W. 1050, 1052, 68 Ark. 360.

An acknowledgment is an act of the grantor in a deed in going before a competent officer and declaring the instrument to be his act and deed and a certificate of the officer on the instrument that such declaration has been made him is also properly termed an "acknowledgment." *Strong v. United States* (U. S.) 34 Fed. 17, 21; *White v. Magarahan*, 13 S. E. 509, 510, 87 Ga. 217; *Short v. Conlee*, 28 Ill. (18 Peck) 219, 225; *Cook v. Kelley*, 12 Abb. Prac. 35, 37. The mere fact that the grantor appeared before the officer, and that the officer personally knew him as the identical person who executed and whose name is subscribed to the deed as having executed the same, does not amount to a declaration that the grantor in fact executed the deed. *Short v. Conlee*, 28 Ill. (18 Peck) 219, 228.

An acknowledgment is the declaration of one who has executed a deed, made before some competent court or officer, to the effect that the execution is his act or deed. The function of an acknowledgment is twofold—to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded. The acknowledgment is no part of the deed itself, and the certificate is sufficient if it shows that the requirements of the statute have been in substance complied with. *Burbank v. Elms*, 7 Neb. 156, 164; *Linderman v. Axford*, 38 App. Div. 488, 56 N. Y. Supp. 456, 457. The failure of a notary to make a proper certificate

of acknowledgment will not invalidate it. *Linderman v. Axford*, 38 App. Div. 488, 56 N. Y. Supp. 456, 457.

The authentication of the notary's seal is as essential to a perfect acknowledgment as is his signature, and when the deed lacks this it cannot properly be recorded. *Koch v. West*, 92 N. W. 663, 664, 118 Iowa, 468, 96 Am. St. Rep. 394.

The duty of an officer in taking and certifying to the acknowledgment of a deed by the party executing it is to examine such party touching his signature, and to certify, not that he did or could sign the instrument of his own free will and accord, but simply that he "acknowledged," meaning thereby that he stated or admitted the signature to have been so made. The officer is not required to pass on the mental capacity of the party to give his voluntary assent, and his certificate cannot be conclusive of the question. *Thompson v. New England Mortg. Sec. Co.*, 18 South. 315, 317, 110 Ala. 400, 55 Am. St. Rep. 29.

The "acknowledgment," while not necessarily a part of the deed, was a necessary ingredient in order to admit it of record, and to admit it in evidence without further proof. It has reference to the proof of execution, not to the force of the deed itself, especially where third parties were not concerned. *Murray v. Beal*, 65 Pac. 726, 728, 23 Utah, 548.

The acknowledgment, by one who signed a deed by making her mark, that the same was her free act and deed, includes an acknowledgment of her signature, and, though the signature is not witnessed, the certificate of such acknowledgment is evidence of the fact that she signed the instrument. *Meazels v. Martin*, 18 S. W. 1028, 1029, 93 Ky. 50.

Comp. St. c. 86, § 4, providing that the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and "acknowledged" by both the husband and wife, requires that both the husband and wife shall execute and acknowledge a deed or mortgage of the homestead, and as between the parties this requirement is essential to the validity of the instrument, in the absence of countervailing equities, and requires that the grantors must acknowledge the instrument to be their voluntary act and deed, since acknowledgment has been defined to be the act of one who has executed a deed in going before some competent officer or the court and declaring it to be his free act and deed. *Aultman & Taylor Co. v. Jenkins*, 27 N. W. 117, 118, 19 Neb. 209.

In Pennsylvania the reception of an "acknowledgment" of a sheriff's deed is a judi-

cial act in the nature of a judgment of confirmation of all the acts preceding the sale, curing all defects in process or its execution, which the court has the power to act upon. *Thompson v. Phillips* (U. S.) 23 Fed. Cas. 1070, 1082.

Comp. Laws, § 3238, requiring an acknowledgment to be in the following form: "(Venue.) On this — day of —, in the year —, before me personally appeared —, known to me, or proved to me on oath of —, to be the person described in and who executed the within instrument, and acknowledged to me that he (or they) executed the same"—requires at least four essential facts to appear in the certificate of acknowledgment: (1) That the person making the acknowledgment personally appear before the officer who makes the certificate; (2) that there was an acknowledgment; (3) that the person who made the acknowledgment was identified as the one who executed the instrument; (4) that such identity was either personally known or proved to the officer taking the acknowledgment. Hence the identity of the party making the acknowledgment must appear in the certificate. *Cannon v. Deming*, 53 N. W. 863, 864, 8 S. D. 421.

The acknowledgment of a mortgage is not part of its execution, but only evidence of it. *Benninghoff v. Stephenson*, 29 Atl. 87, 88, 161 Pa. 440.

#### Of note.

To make a copy of a note is not an "acknowledgment" of such note nor a promise to pay the same, and this is so whether the copy is made by the maker or a stranger, and, where a note in the hands of the payee has become much worn, and the maker at request makes and delivers a true copy, it is not an acknowledgment thereof. The acknowledgment or promise which takes a note out of the statute of limitations is an acknowledgment or promise outside of the note itself or a mere copy thereof. *Goodrich v. Case*, 67 N. E. 295, 297, 68 Ohio St. 187.

#### Of relation of parent and child.

"Acknowledged," as used in Laws 1885, c. 483, which imposes a tax on legacies to certain collateral kindred, unless the legatee is a person to whom testator had for 10 years before his death stood in the mutually "acknowledged" relation of a parent, means admitted or recognized the existence of parental relations, either by agreements in writing or by verbal declarations and statements in public or to each other, or by the life, acts, and conduct of the parties, or in any manner which will satisfy the court that the parties admitted such relation. In re *Spencer*, 4 N. Y. Supp. 395, 400, 1 Con. Sur. 208; In re *Birdsall's Estate*, 49 N. Y. Supp. 450, 455, 22 Misc. Rep. 180.

"Acknowledged" is defined as to own or admit the knowledge of, to recognize as a fact or truth, to give recognition to, and is not always used in the sense of admitting some secret truth or fact, so that, as used in Laws 1892, c. 399, § 2, exempting from taxation a transfer to a person standing in the mutually acknowledged relation of parent, it includes a person who, though not formally adopted, has been recognized and treated as a child by the grantor. In *re Stilwell's Estate*, 34 N. Y. Supp. 1123, 1125. It is never applied to the admission of a fiction, but only in relation to a fact; so that, when a fact is spoken of as being acknowledged, it means that the fact exists, and its existence is acknowledged. Thus a statute exempting from taxation and transfer to the transferor's child, the person to whom he has stood in the mutually acknowledged relation of parent, refers only to his legitimate children. In *re Hunt's Estate*, 33 N. Y. Supp. 256, 257, 86 Hun, 232.

"Acknowledging," as used in Civ. Code, § 280, providing that the father of an illegitimate child, by publicly "acknowledging" it as his own, receiving it as such into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, has no technical meaning, and in its ordinary acceptation is defined by Webster as "owning or admitting the knowledge of." *Blythe v. Ayres*, 31 Pac. 915, 96 Cal. 532, 19 L. R. A. 40.

Within 1 Ind. Rev. St. 1876, p. 410, § 9, providing that "if a man shall marry the mother of an illegitimate child, and acknowledge it as his own, such child shall be deemed legitimate," the act of marrying and afterwards living and cohabiting with the woman is an acknowledgment, although at the marriage the man denies that the child with which she is pregnant is his own. *Bailey v. Boyd*, 59 Ind. 292, 297.

#### Of signature or will.

Any act, sign, or gesture of the testator will suffice as an "acknowledgment" of the will which indicates an acknowledgment with unmistakable certainty, and such acknowledgment need not be in language. *Gould v. Chicago Theological Seminary*, 59 N. E. 536, 539, 189 Ill. 282.

### ACQUAINTED.

See "Well Acquainted."

"Acquainted," as used in *Wagner's St.* 275, §§ 13, 14, providing that no acknowledgment of a married woman shall be taken unless she shall be first "made acquainted" with the contents of the instrument, means that it is the duty of the officer to see that the woman understands the nature and effect of the instrument, but it does not require him to explain its contents to her,

when from her own statements made at the time it plainly appears that she understands the nature and effect. *Bohan v. Casey*, 5 Mo. App. 101, 107.

"Acquainted," as used in a certificate that a married woman was made acquainted with the contents of the deed, means familiar, known, and is a sufficient compliance with a provision that the contents should be made known and explained to her. *Chauvin v. Wagner*, 18 Mo. 531, 544.

### ACQUAINTANCE.

See "Intimate Acquaintance."

An "acquaintance" with a person means a familiar knowledge of the person; more than slight or superficial knowledge. A mere introduction would not make one acquainted with the person introduced. *Wyllis v. Haun*, 47 Iowa, 614, 621.

### ACQUEST.

"Acquest property," as used in the chapter relating to the distribution of estates of decedents, comprises all property, both real and personal, acquired by either the husband or wife during the existence of the marriage community, except such property as is declared to constitute the separate estate, and is declared to be liable for the common debts. *Comp. Laws N. M.* § 2030.

### ACQUIESCE—ACQUIESCENCE.

Webster gives the principal definition of "to acquiesce" as to accept or consent by silence, or by omitting to object. Where the master found that at a certain interview a married woman acquiesced in all that her husband said, and said that a certain sum should be paid, the word "acquiesce" used in such connection is quite equivocal; it may mean that she made some response, or acquiesced by her silence. *Pierce's Adm'r v. Pierce*, 29 Atl. 364, 366, 66 Vt. 369.

"Acquiescence is where a person, who knows he is entitled to impeach a transaction or enforce a right, neglects to do so for such a length of time that, under the circumstances of the case, the other party may fairly infer that he has waived his right." *Scott v. Jackson*, 26 Pac. 898, 899, 89 Cal. 258 (citing *Rap. & L. Law Dict.*).

A patent which is not molested simply because it is for no one's interest to infringe is not "acquiesced" in within the legal acceptation of that term. *Consolidated Fastener Co. v. American Fastener Co. (U. S.)* 94 Fed. 523.

A charge that if an insurance agent took the whole responsibility of fixing the value of the property upon himself, and was not induced to fix the amount of insurance by rep-

representations or "acquiescence" of the assured, the company were bound to pay the amount stated in the policy, and defining "acquiescence" in this connection to be "a refusal to answer a question, or in any other way deceiving or misleading the agent," and refusing to rule that "acquiescence" might also be if in any way the assured allowed the agent to be deceived as to the value of the property, or if he knew that the agent was putting on an amount of insurance substantially greater than the value of the property, was sound. *Perry v. Mechanics' Mut. Ins. Co. (U. S.)* 11 Fed. 485, 486.

#### As acceptance or approval.

That the board of trustees of a college "acquiesced" in an act passed by the Legislature, legislating the president out of office, shows mere submission to the legislative will, and not approbation; a course which might naturally be adopted to avoid a direct collision with the Legislature, and as a respective appeal for a future revision of the act by the Legislature itself. *Allen v. McKean (U. S.)* 1 Fed. Cas. 489, 502.

In an instruction that where a master allowed an independent contractor to erect appliances on his premises for the use of the contractor, and the master adopted and used such appliances himself, or "acquiesced in their use by his servants while engaged in his work," he was as responsible for his servants' safety as if he had erected the appliances himself, the term "acquiesces" means in the sense of being satisfied with, involving the assent of the will, and such acquiescence would amount to an adoption of such appliance and structures. *Rinake v. Victor Mfg. Co.,* 36 S. E. 700, 701, 58 S. C. 360.

The use of the term "acquiescence" in an instruction on the question of the acquiescence of a bank in the illegal act of its cashier so as to bind the bank and render it liable for the cashier's act, without expressly defining the term "acquiescence," was not objectionable, since the word was not a word of rare use, nor was it also a technical term applicable to any branch of learning or science, but was a word in common use and commonly understood, and is applicable to the case, and, as used in the instruction, it was used in its usual and ordinary acceptance to mean "acceptance," etc. *Iowa State Sav. Bank v. Block,* 59 N. W. 283, 284, 91 Iowa, 490.

#### As assent or consent.

Acquiescence—that is, "assent"—is tantamount to an agreement. It is an implied contract, and it requires for its validity the power to contract. *Matthews v. Murchison (U. S.)* 17 Fed. 760, 766.

Acquiescence means "a resting satisfied with or submission to an existing state of

things, and implies active assent." *Lux v. Haggin,* 10 Pac. 674, 678, 69 Cal. 255.

Acquiescence is a silent permission to do the thing done. *Cass County Com'rs v. Plotner,* 48 N. E. 635, 637, 149 Ind. 116; *Thomson v. Thomson,* 53 Pac. 403, 121 Cal. 11.

Acquiescence implies active consent, and is not to be spelled out from doubtful or ambiguous acts. *New York Life Ins. & Trust Co. v. Kane,* 45 N. Y. Supp. 543, 547, 17 App. Div. 542.

Acquiescence is a consent inferred from silence; a tacit encouragement. *Scott v. Jackson,* 26 Pac. 898, 899, 89 Cal. 258.

"Acquiescence" has been well defined as quiescence under such circumstances that assent may be reasonably inferred from it. Assent thus given is as irrevocable as if expressly stated in words. Assent is a necessary inference from acquiescence, and estoppel is generally the necessary consequence of assent. *Lowndes v. Wicks,* 36 Atl. 1072, 1079, 69 Conn. 15.

If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by, and in such manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This is the proper sense of the term "acquiescence," and in that sense it may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. *Norfolk & W. R. Co. v. Perdue,* 21 S. E. 755, 758, 40 W. Va. 442.

#### Delay.

Acquiescence is mere silence—a refusal to speak when one ought to speak for the protection of others, or to act in time to prevent others from doing acts of which the dilatory one afterwards complains. Delay in pursuing a remedy is not acquiescence, though it often is strong evidence of acquiescence. *De Hereu v. Hereu (Ariz.)* 56 Pac. 871, 876.

Acquiescence is where a principal, with knowledge of all the facts, adopts the acts of his agent, though his acts were contrary to his duty and instructions; and if the principal, after being informed of what his agent has done, does not dissent or give notice of disapproval within a reasonable time, he will be presumed to have acquiesced in what the agent has done. *Cairnes v. Bleecker (N. Y.)* 12 Johns. 300, 304.

"Acquiescence," such as raises an equitable estoppel preventing one from being heard as against an act in which he acquies-

ced, means neglect to promptly and actively condemn the act. *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 187.

"Acquiescence," as used in the statement of the principle that, in order that the enjoyment of an easement in another's land may be conclusive of the right, it must have been under claim of title, with knowledge and "acquiescence" of the owners, means conduct recognizing the existence of a transaction, and intended, in some extent at least, to carry the transaction or permit it to be carried into effect. Acquiescence must necessarily exist while the transaction is going on for which a right of action would otherwise arise, and its operation necessarily is to prevent a right of action from thus arising, and not to defeat the right after it has arisen. Mere delay therefore—merely suffering time to elapse—without doing anything, is not acquiescence, although it may be evidence, and sometimes strong evidence, of acquiescence. *Woodruff v. North Bloomfield Gravel Min. Co.* (U. S.) 18 Fed. 753, 790.

#### As estoppel.

"Acquiescence" is not always treated as an estoppel, but as a quasi estoppel, as it was called in *City of Logansport v. Uhl*, 99 Ind. 531, 49 Am. Rep. 109. It is a release or abandonment of one's rights, if, having rights, he stands by and sees another dealing with his property in a manner inconsistent with such rights, and makes no objection while the act is in progress. *Duke of Leeds v. Earl of Amherst*, 2 Phil. Ch. 117. Acquiescence is like permission to do the thing done, and equity will treat as unconscionable the denial of that to which one has assented or acquiesced. *Cass County Com'rs v. Plotner*, 48 N. E. 635, 637, 149 Ind. 116.

"Acquiescence" is a breach of the law of estoppel, and is used to defeat a party's action on the principle of equitable estoppel; that is, it must appear that because of something that was done, or because nothing was done, the party invoking the estoppel will sustain loss unless it is allowed. Mere silence or inaction short of the limitation period will not bar relief. *St. Louis Safe Deposit & Savings Bank v. Kennett's Estate*, 74 S. W. 474, 483, 101 Mo. App. 370; *Purdy v. Bankers' Life Ass'n*, 74 S. W. 486, 492, 101 Mo. App. 91.

#### Knowledge implied.

Acquiescence means a tacit consent to acts or conditions, and implies a knowledge of those things which are acquiesced in. One cannot acquiesce in a wrong while ignorant that it has been committed, and the knowledge must be of facts. Current suspicion and rumor are not sufficient. *Pence v. Langdon*, 99 U. S. 573, 581, 25 L. Ed. 420.

A mistake in a note for which another signer was responsible cannot be held to have been acquiesced in by the signer by merely signing the note, she being in ignorance of the fact, for "acquiescence" implies a knowledge of such facts. *Union Cent. Life Ins. Co. v. Caldwell*, 58 S. W. 355, 360, 68 Ark. 505.

#### Laches distinguished.

Acquiescence implies active assent, and is distinguishable from laches, which imports a merely passive assent. *Kenyon v. National Life Ass'n*, 57 N. Y. Supp. 60, 74, 39 App. Div. 276.

Acquiescence is a resting satisfied with, or submission to, the existing state of things, and differs from "laches," in that the latter term implies neglect to do that which ought to be done, so that laches may be evidence of acquiescence. Laches imports a merely passive, while acquiescence implies active, assent. *Lux v. Haggin* (Cal.) 10 Pac. 674, 678.

"Acquiescence" is akin to the doctrine of laches, but implies a more definite assent to the acts complained of than the latter. It is one phase of the law of estoppel, and, in order for a party's action to be defeated by estoppel, his behavior, either by silence, words, or actions, must have been such as to induce his adversary to pursue a line of conduct which will redound to the latter's loss unless the inducing party is denied relief. *Johnson-Brinkman Commission Co. v. Missouri Pac. R. R.*, 126 Mo. 345, 28 S. W. 870, 871, 26 L. R. A. 840, 47 Am. St. Rep. 675; *Purdy v. Bankers' Life Ass'n* (Mo. App.) 74 S. W. 486, 492.

"Acquiescence," properly speaking, relates to inaction during the performance of an act. The defenses of laches and acquiescence are cognate, but not correlative. *Lord Cottenham, in Duke of Leeds v. Amherst*, 2 Phil. Ch. 117, says of the use of the term "acquiescence": "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterward complain. That is the proper sense of the word 'acquiescence.'" *Hall v. Otterson*, 28 Atl. 907, 912, 52 N. J. Eq. (7 Dick.) 522.

## ACQUIRE.

See "Hereafter Acquired."  
Otherwise acquired, see "Otherwise."

Where the articles of incorporation of a manufacturing corporation authorizes it to "acquire," own, etc., electric plants, the word "acquire" is broad enough to cover the definition given by Webster that it is "to gain by any means." *Anchor Inv. Co. v. Columbia Electric Co.*, 63 N. W. 1109, 61 Minn. 510.

The word "acquired," as found in Code 1880, § 1193, providing that a quitclaim and release "shall estop the grantor and his heirs from asserting a subsequently acquired adverse title to the lands conveyed," is used in the sense of "obtained." We cannot yield to the extreme technical meaning, urged upon us by counsel, that acquirement can be had only by the act of the party. Mr. Blackstone in his Commentaries, book 2, pp. 200, 201, speaks of where an heir "acquires" by descent, and gives two methods of acquiring, one of which is by descent; and again he uses this language: "Descent is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his heir at law." The Legislature used the word in this general sense. *Leflore County v. Allen*, 31 South. 815, 816, 80 Miss. 298.

To "acquire" is, in the law of contracts and descents, to become the owner of property; to make property one's own. *Wulzen v. Board of Sup'r of City & County of San Francisco*, 35 Pac. 353, 356, 10 Cal. 15, 40 Am. St. Rep. 17.

"Acquired," as used in a statute providing the manner in which the lands of an intestate shall be inherited, is used in a broad sense so as to cover lands which may come to the testator in any other way than by gift, devise, or descent from a parent or the ancestor of a parent. In *re Miller's Will*, 70 Tenn. (2 Lea) 54, 60.

The expression "acquired jurisdiction," as used in the act of Congress dividing Indian Territory into judicial districts and fixing their jurisdiction, and providing that in all criminal cases where courts outside of the Indian Territory shall have "acquired jurisdiction" they shall retain it, implies more than the mere filing of an indictment. Two things are essential to the jurisdiction: (1) The criminal case; that is, the finding of an indictment. (2) The acquiring by the court of jurisdiction in the case; and, since there is no property involved in a criminal case, the only jurisdiction which could be acquired after the finding of an indictment is jurisdiction of the defendant's person. And, as thus stated, the only other element of jurisdiction is the service of process upon the defendant, or, more accurately, his arrest under *capias*. *United States v. Lee* (U. S.) 84 Fed. 626, 630.

The word "acquire," as used in the statute authorizing certain park commissioners to acquire rights of fishing common to all, is used in a broad sense, involving the permanent vesting in trustees, for the public benefit, of common rights of fishing; meaning, not such rights as are already given to all, but such rights as shall be, after acquisition, common to all. *Albright v. Sussex County Lake & Park Commission*, 53 Atl. 612, 614, 68 N. J. Law, 523.

1 Wds. & P.—8

#### As obtain by adverse possession.

A statute providing that property acquired by either husband or wife during marriage shall be deemed community property does not apply to property held by adverse possession until the limitation period has run. *Bishop v. Lusk*, 27 S. W. 306, 307, 8 Tex. Civ. App. 80.

#### As obtain actual possession.

"Acquire," as used in the statute securing to a woman the property acquired during marriage as her separate estate, refers to the actual possession and control of the property, rather than to the acquisition of mere title. Such seems to have been the construction of a somewhat similar statute by the Supreme Court of New York. In that case the court held that all personal property and rights of personal action acquired by any woman which by statute would be her own property applies to a distributive share to which she was previously entitled but which subsequently came into her actual possession, on the ground that the particular property did not absolutely vest in her until the decree of the proper court making distribution of the estate absolute. *Alexander v. Alexander*, 7 S. E. 335, 341, 85 Va. 353, 1 L. R. A. 125.

#### As obtain by descent or devise.

Personal property of a married woman obtained by a decree of distribution in an estate is "acquired" by her within an act providing that property acquired by a married woman shall be her own separate estate. *White v. Waite*, 47 Vt. 502, 507.

A charter of an academy, authorizing the corporation to "acquire," hold, and convey real and personal property, entitles the corporation to take by will, since the word "acquire" is broad enough to include taking by devise, though the word implies some element of effort on the part of one who acquires. In judicial opinions and by law-writers the term is not unfrequently used to describe the taking of property by devise or descent, and in 2 Bl. Comm. 201, descent or hereditary succession is defined as the title whereby a man, on the death of his ancestor, "acquires" his estate by right of representation as his heir at law. *Santa Clara Female Academy v. Sullivan*, 6 N. E. 183, 190, 116 Ill. 375, 56 Am. Rep. 778.

#### As obtain new interest.

"Acquire," as used in Act Cong. March 3, 1887, providing for the forfeiture of lands thereafter acquired by aliens, construed to mean the acquisition of a new interest in lands, and not the addition of a legal to an already existing equitable title. *Potter v. Rio Arriba Land & Cattle Co.*, 17 Pac. 609, 613, 4 N. M. (Johns.) 322.

**As obtain by purchase.**

"Acquire," as used in Acts 22d Gen. Assem. c. 85, § 2, providing that any nonresident alien may "acquire" and hold real property to a certain extent, provided that within five years from the date of purchase of such property the same be placed in the actual possession of a relative of such purchaser, will not bear such limited definition as meaning only obtaining property under sale. *Bennett v. Hibbert*, 55 N. W. 93, 95, 88 Iowa, 154.

Where a married woman purchases from creditors of her husband their claims against him, she "acquires" such debts as property within an act providing that all the estate acquired by a married woman shall continue her sole and separate property. *Williams v. Lord*, 75 Va. 390, 398.

A sheriff's certificate of sale operating under Code Civ. Proc. § 700, to transfer to the purchaser all the right, title, and interest of a judgment debtor, subject to redemption, is an instrument whereby a title is acquired, within the meaning of Civ. Code, § 1107, providing that a person who acquires a title by an instrument which is first duly recorded may contest a prior unrecorded deed. *Foorman v. Wallace*, 17 Pac. 680, 681, 75 Cal. 552.

In Rev. St. tit. 34, c. 3, § 18, providing that all property "acquired" by either husband or wife during marriage, except that "acquired" by gift, devise, or descent, shall be deemed common property acquired, will not be construed not to mean property purchased by the wife with her separate estate. *Liebes v. Steffy* (Ariz.) 32 Pac. 261, 262.

**ACQUIRED RIGHTS.**

Acquired rights are those which a man does not naturally enjoy, but are owing to his own procurement, such as sovereignty, or the right of commanding, or the right of property. *Borden v. State*, 11 Ark. 519, 527, 44 Am. Dec. 217.

**ACQUIT—ACQUITTAL****See "Former Acquittal."**

The word "acquittal" is said to be verbum equivocum. It is generally said that a party is "acquitted" by the jury, when in fact the acquittal is the judgment of the court. *Burgess v. Boetefeur*, 7 Man. & G. 481, 504; *People v. Lyman*, 53 App. Div. 470, 473, 65 N. Y. Supp. 1062, 1065.

"Acquitted" is defined by Webster as set free, or judicially discharged from an accusation, released from a debt, duty, obligation, charge, or suspicion of guilt. *Dolloway*

*v. Turrill* (N. Y.) 26 Wend. 383, 400; *Morgan County Com'rs v. Johnson*, 31 Ind. 463, 466.

"The word 'acquitted' is a word of technical import, and must be understood in its technical sense, to wit, an acquittal on trial by a jury." *Thomas v. De Graffenreid* (S. C.) 2 Nott & McC. 143, 144.

The word "acquittal" is not confined in its meaning to a judgment in favor of defendant after a trial on the merits and facts of the case, but may also have the broader signification of a discharge by judgment rendered for other reasons. *City of Junction City v. Keefe*, 19 Pac. 735, 737, 40 Kan. 275.

The word "acquitted" means "set free or judicially discharged from an accusation; released from a charge or suspicion of guilt." A discharge of a defendant accused of selling liquor in violation of law, by the magistrate, because of the insufficiency of the evidence, was construed to be an acquittal. *People v. Lyman*, 65 N. Y. Supp. 1062, 1065, 53 App. Div. 470.

Where an indictment is sufficient in form and substance, and the defendant is arraigned and pleads, and the jury is impaneled and sworn to try the issue, it is presumed that the defendant is demanding a speedy trial and a dismissal of the indictment by the court without the consent of the defendant, and holding him to answer another indictment for the same offense operates as an acquittal. *Lee v. State*, 26 Ark. 260, 265, 7 Am. Rep. 611.

Where an indictment is dismissed by the prosecuting attorney with the presumed consent of the court, even after a jury is sworn to try the case, the accused is not in a constitutional sense either "acquitted" or put in jeopardy, and hence the first indictment is not a bar to a second. *Wilson v. Commonwealth*, 66 Ky. (3 Bush) 105, 106.

When a nolle prosequi is entered and the defendant discharged, he is acquitted. *Morgan County Com'rs v. Johnson*, 31 Ind. 463, 466.

To be a bar to a prosecution, an acquittal of the offense charged must be an acquittal in law and in fact by a verdict of a jury on a valid indictment, or by some competent tribunal that has jurisdiction of the offense. A nol. pros. does not amount to an acquittal, but the defendant may be again prosecuted for the same offense. *State v. Champeau*, 52 Vt. 313, 315, 36 Am. Rep. 754.

The word "acquitted" means an acquittal on a trial by a jury. Proof showing that the grand jury rejected a bill of indictment will not support the allegation that the party had been acquitted. *Thomas v. De Graffenreid* (S. C.) 2 Nott & McC. 143, 144.

**As discharge.**

Discharge distinguished, see "Discharge."

The word "acquitted," as used in a declaration for malicious prosecution which alleges that plaintiff was acquitted by the grand jury finding no bill, was construed as meaning discharged. "In common parlance, 'acquitted' is as clearly expressive of the idea intended to be conveyed as 'discharged.'" *Teague v. Wilks* (S. C.) 3 McCord, 461, 465.

**As relating to civil proceedings.**

In Const. art. 7, § 8, providing that in all prosecutions or indictments for libel the truth may be given in evidence to the jury, and that if it shall appear that the matter charged as libelous is true the party shall be "acquitted," the word "acquitted" means a release from a debt, duty, or charge, as well as set free or cleared of an accusation, and hence the statute has reference to both civil and criminal prosecutions. *Dolloway v. Turill* (N. Y.) 26 Wend. 883, 400.

**ACQUITTANCE.**

The word "acquittance," as used in Gen. St. c. 114, § 1, providing for the punishment of those who alter, forge, or counterfeit acquittances, includes a receipt for money paid as part of the purchase money of a farm. *State v. Shelters*, 51 Vt. 102, 104, 31 Am. Rep. 679.

Act 11 Geo. IV, 1 Will. IV, c. 66, § 10, prohibits the forgery of "an acquittance or receipt" for money. Held, that a scrip certificate in a railroad company for £2 2s. per pair, entitling the holder to 50 shares in railroad stock, was not an accountable receipt nor an "acquittance or receipt" within the statute. *Clark v. Newsam*, 1 Exch. 131, 132.

**ACROSS.**

Laws 1890, c. 565, § 4, permitting a railroad company to construct its road "across, along or upon" any highway, means only a casual or incidental occupation and use of the highway, and does not authorize a company to build its entire railway along the highway. *Burt v. Lima & H. F. R. Co.*, 21 N. Y. Supp. 482, 483.

**As denoting direction.**

Where a deed conveying a lot of land reserved the right to the grantor of passing and repassing with teams in the most convenient place "across" the land conveyed, the term "across" did not necessarily confine the grantor to a right of way transversely over the lot, but the lot being nearly in the form of a parallelogram, and the grant being of one-half thereof divided longitudinally, and it appearing that the rear end of the grantor's land not conveyed was separated from the front where the grantor's buildings were by

an impassable barrier, the reservation should be construed to mean the right of passing in the most convenient route over the field to the grantor's buildings, though in so doing it was necessary to pass over the lot transversely and lengthwise. *Brown v. Meady*, 10 Me. (1 Fairf.) 391, 395, 25 Am. Dec. 248.

"Across," as used in *Sayles' Ann. Civ. St. Tex.* 1897, art. 721, authorizing a channel and dock company to construct a channel "across, through or upon" the waters of any bay, warrants a channel in any direction. *Davis v. Port Arthur Channel & Dock Co.* (U. S.) 87 Fed. 512, 515, 31 C. C. A. 99.

"Across," as used in Act Cong. July 25, 1886 (14 Stat. 244), granting permission for the construction of a bridge "across" the Missouri river at Kansas City, and requiring that the piers of said bridge shall be parallel with the current of the river, means an opposite direction to length; that is, at right angles to the piers. *Hannibal & St. J. Ry. Co. v. Missouri River Packet Co.*, 8 Sup. Ct. 874, 880, 125 U. S. 260, 31 L. Ed. 731.

**As synonymous with over.**

The words "over" and "across" may be used interchangeably, and as having the same meaning. Webster thus defines the word "across": From side to side; athwart; crosswise; quite over. He defines the word "over" as follows: Above or higher than, in place or position, with the idea of covering; across, from side to side of, upon the surface of. "Across," as used in Rev. St. 1874, c. 24, art. 5, § 1, declaring that a city council shall have power to extend any street over or "across" any railroad track, right of way, or line of any railroad company, designates a crossing at grade, or on the same level as the railroad right of way, while the word "over" is broad enough to confer power of extending the street above and over the track or right of way by means of a viaduct or bridge. *Illinois Cent. R. Co. v. City of Chicago*, 30 N. E. 1044, 1046, 141 Ill. 586, 17 L. R. A. 530.

To say of a railway that it is built upon, over, or in the street, when, following the course of another street, it runs simply across the street, is not according to common usage. *State v. Newport St. Ry. Co.*, 18 Atl. 161, 162, 16 R. I. 533.

**As from side to side.**

A deed reserving to the grantee the privilege of a road "across" a certain land did not entitle such grantee to enter at one place, "go partly across" the land, and then come out at another place on the same side of the lot, nor to drag timber from the grantee's wood lot on plaintiff's land for the purpose of turning it around, such use constituting a misuser of the right granted. *Comstock v. Van Deusen*, 22 Mass. (5 Pick.) 162, 166.



Where a deed reserves the right to maintain a drain "across" the land conveyed, the word "across" will not be construed so strictly and technically as to nullify the easement because the drain, in fact, ended in a cesspool on the land conveyed. *Jones v. Adams*, 38 N. E. 437, 438, 162 Mass. 224.

Under an act authorizing a company to improve the navigation of a stream, with power to take toll for timber floated "across" its waters, the word "across" will not be held to mean "floating" or "crossing over" from side to side of the stream, as the word imports a thing not needed, nor within the purport of the act. *Appeal of Bennett's Branch Imp. Co.*, 65 Pa. (15 P. F. Smith) 242, 251.

### ACROSS COUNTRY.

*Tindal, C. J.*, said that the words "across a country," as used in an agreement for a steeple chase four miles "across a country," was not an expression of which the court could take a judicial notice, but that the evidence showed that it meant that the riders were to go over all obstructions and not avail themselves of open gates. *Evans v. Pratt*, 3 Man. & G. 759, 763.

### ACT.

See "Die by His Own Hand or Act"; "Ministerial Act"; "Official Act"; "Overt Act"; "Taken in the Act."  
All other acts, see "All Other."  
Other acts, see "Other."

An act signifies something done voluntarily by a person. An act is the result of the exercise of the will. *Black* says: "In a more technical sense it means something done voluntarily by the person, and of such a nature that certain legal consequences attach to it." *Duncan v. Landis* (U. S.) 106 Fed. 839, 848, 45 C. C. A. 666.

An act is that which is done or doing; the exercise of power, or the effect of which power exerted is the cause; a performance; a deed; something done or established. Thus, an indictment alleging that defendants did, in a violent and tumultuous manner, prevent the sheriff from removing a prisoner, charges the commission of an act. *Green v. State*, 35 S. E. 97, 99, 109 Ga. 538.

Under Gen. St. c. 193, § 21, providing that in all cases in which the death of any person ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law had death not ensued, the person inflicting such injury shall be liable to an action, etc., it is held that the word "act" does not include mere passive neglect or omission of duty. *Bradbury v. Furlong*, 13 R. I. 15, 43 Am. Rep. 1.

A statute providing that no justice of the peace shall "act" in any cause in which he is an attorney means as has been decided in *Town of New Hartford v. Town of Canaan*, 52 Conn. 166, where the court says: "This language is so exceedingly broad, embracing in terms any act and proceeding, that we do not feel at liberty to accept the ideas of plaintiff's counsel and restrict its application exclusively to an actual trial in court before an interested magistrate." The object of such statute is to secure the utmost fairness and impartiality, and the construction which is in furtherance of that object should be most liberal. *Yudkin v. Gates*, 60 Conn. 426, 428, 22 Atl. 776.

"Acts," as used in a covenant in a lease that the lessee shall hold the premises without any lawful let, suit, interruption, eviction by the lessor, or by or through the lessor's "acts," construed to mean "something done by the person against whose acts the covenant is made." *Spencer v. Marriott*, 1 Barn. & C. 457, 459.

A cause of action for personal injuries against a railroad in the hands of receivers constitutes "an act or transaction" of receivers, within the meaning of the act of Congress authorizing suits against a receiver without leave of the court in which the receivership may be pending. *Fordyce v. Withers*, 20 S. W. 766, 767, 1 Tex. Civ. App. 540.

A deed wherein grantor covenants that he will, at the cost and request of the vendee, perform all "acts, deeds, conveyances and assurances" which may be wanting to the consummation of the vendee's title, embraces only such incumbrances as the vendor has control of. Where the defect in the title is one that cannot be supplied by him, as where there is an outstanding mortgage created by his grantor, vendor cannot be made liable upon such covenant. *Armstrong v. Darby*, 26 Mo. 517, 520.

The payment of an antecedent debt by a check, when the debtor knew he was unable to pay his debts, was an "act" constituting a preference, within a statute providing that any "act" in contemplation of insolvency should constitute an assignment. *Taylor's Adm'r v. Taylor's Assignee*, 78 Ky. 470, 472.

### Intention implied.

"Act," as used in an insurance policy restricting liability in case of death of insured by his own "act," implies intention, and the words "by his own act or intention," whether "sane or insane," mean the same thing. *Chapman v. Republic Life Ins. Co.* (U. S.) 5 Fed. 481, 482.

### Offense distinguished.

The word "act" is not identical in meaning with the term "offense," as used in Const.

U. S. art. 1, § 7, providing that no person for the same offense shall be put twice in jeopardy of punishment, "for the same offense," which imports, in legal sense, an infraction or transgression of a law—the willful doing of an act which is forbidden by a law, or omitting to do what it commands. *State v. Oleson*, 5 N. W. 959, 969, 26 Minn. 507.

#### As representation in drama.

Act Aug. 18, 1856 (11 Stat. 138), confers on the author or proprietor of a copyrighted dramatic composition, suited for public representation, the sole right to "act, perform or represent" it on the stage. Held, that the words "act, perform or represent" mean representation in dialogue, and actions by persons who represent the composition as real by performing or going through the various parts or characters severally assigned to them. *Daly v. Palmer* (U. S.) 6 Fed. Cas. 1182, 1185.

#### ACT (In Legislation).

See "Curative Act"; "Municipal Act"; "Organic Act"; "Private Act"; "Public Act or Statute"; "Supplemental Act"; "This Act."

General act, see "General Law."

Local act, see "Local Law."

Special act, see "Special Law."

"In legislation an act is a statute or law made by a legislative body, as 'an act of Congress is a law by the Congress of the United States, and an act of an assembly is a law made by the legislative assembly.' *Bouv. Law Dict.* Acts are general or special, public or private. All legislative acts are laws, and if not laws then they are not acts of legislation." *People v. Tiphaine*, 3 Parker, Cr. R. 241, 244.

The word "act" is equivalent to "statute." *United States v. Smith* (U. S.) 27 Fed. Cas. 1167, 1170.

The word "act" is used as synonymous with "article." *Deposit Bank v. Davless County*, 39 S. W. 1030, 1037, 102 Ky. 174, 44 L. R. A. 825.

In the Constitution of New York the words "bill," "law," and "act" are used somewhat indefinitely, but it seems that there is little difference between the terms. *People v. Lawrence* (N. Y.) 36 Barb. 177, 187.

#### Bill or law distinguished.

The language of the constitutional provision that no bill shall contain more than one subject, which shall be clearly expressed in its title, differs in some respects in the different states. In some the word "act" is used, while in others the word "bill" or "law" is used. However, each of these provisions as presented to the courts means the

final determination of the Legislature upon the particular subject embraced in such "bill," "act," or "law." The word "act" is probably the best word to use, for it includes no action of the Legislature or of any person prior to the final act of the Legislature, and it includes the whole of the act, nothing more and nothing less. The word "law" is probably the worst word to use, for a portion of any act may be law as well as the whole of the act. The word, however, as used in such connection, is intended to be synonymous with "act." The word "bill" means the bill as it is first introduced, and as it may be at any time or in any of its stages until it is finally passed, signed by the necessary officers, and filed away as the highest evidence of what the law is. And when it is thus filed it is called the "enrolled bill." Where the constitutional provision uses the word "bill," it means that if any bill should in any stage be in conflict with the provision it should be amended by the Legislature, and, if the Legislature should fail to correct it, the bill itself, or some portion of it, would be void. *Sedgwick County Com'rs v. Bailey*, 13 Kan. 600, 608.

A "bill" is the draft or form of an act presented to the Legislature, but not enacted. An "act" is the appropriate term for it after it has been acted on and passed by the Legislature. It is then something more than a draft or form. It has a legal existence as an act of the legislative body, because it becomes a law without further action from any other branch of the government, if the executive take no measures to prevent it. *Southwark Bank v. Commonwealth*, 26 Pa. (2 Casey) 446, 450.

#### Code.

The Code itself is but one act of the Legislature, no part of which, less than the whole, is properly designated by and as an "act." *Chesapeake & O. R. Co. v. Pack*, 4 W. Va. 397, 403.

#### As section of statute.

In its ordinary acceptance, this word includes the entire statute, but it is not so definite in its meaning that it may not be applied to a complete and independent section of the statute, if found in connection with it; and in the proviso of an act it may be used as a synonym of "section," so as to repeal or affect a section only of the act to which it refers. *Rawls v. Kennedy*, 23 Ala. 240, 249, 48 Am. Dec. 289.

The word "act" as used in the first section of Act March 3, 1851 (9 Stat. 635), provided that nothing in this "act" shall prevent the parties from making such contract as they please extending or limiting the liability of shipowners, refers to the whole act, and not merely to the provisions of such first section. *Wright v. Norwich & N. Y. Transp. Co.* (U. S.) 30 Fed. Cas. 685, 688.

**As valid and existing act.**

As used in Acts Called Sess. 1863, p. 13, providing that all overseers who are or shall be exempted or detained under "acts" of the Confederate Congress shall be exempt from militia duty in the state, the word "acts" is a noun, substantive, and does not signify any acts or laws yet to be made or passed, but acts now in force; existing acts. In re Strawbridge, 39 Ala. 367, 375.

As applied to the doings of legislative bodies, the term "act" means a statute which is constitutional and valid, and hence, where a statute repeals all acts inconsistent with itself, and it is itself unconstitutional, it is not an act, and hence there is no repeal of prior inconsistent legislation. *People v. Tiphaine* (N. Y.) 13 How. Prac. 74, 77.

**ACT FORFEITING CONFIDENCE.**

The phrase "act forfeiting the confidence of the community," as used in a contract transferring the practice of one physician to another, in which the vendor agreed not to practice his profession in the community unless the vendee should commit some "act forfeiting the confidence of the community," means incompetency, immorality, or acts of such a nature as to induce reasonable persons to forbear employing the vendee in the practice of his profession. *Gilman v. Dwight*, 79 Mass. (18 Gray) 356, 359, 74 Am. Dec. 634.

**ACT MALA IN SE.**

See "Mala In Se."

**ACT MALA PROHIBITA.**

See "Mala Prohibita."

**ACT OF BANKING.**

See "Banking."

**ACT OF BANKRUPTCY.**

The word "act," as used in the expression "acts of bankruptcy," implies some act of the will on the part of the debtor, whether by way of active procurement or voluntary acquiescence. *Duncan v. Landis* (U. S.) 106 Fed. 839, 848, 45 C. C. A. 666.

A transfer of property by an insolvent debtor to a creditor is not an "act of bankruptcy," as being made with intent to prefer such creditor over his other creditors, unless there was at the time of the transfer some other creditor holding a claim or demand against the insolvent, such as would be provable in bankruptcy. *Beers v. Hanlin* (U. S.) 99 Fed. 695.

As a general proposition it cannot be disputed that a conveyance by deed by a trader of all his property to a particular creditor in prejudice to the rest is an "act of bankrupt-

cy." The principle of all cases is that, if the conveyance of a particular creditor necessarily prevents the property of the trader from being distributed as the law requires in cases of bankruptcy, that is itself an act of bankruptcy within the meaning of the statutes relating thereto. *Newton v. Chantler*, 7 East, 137, 145.

The term "act of bankruptcy" embraces the act of a trader in buying goods and on the same day selling them at a loss of more than 30 per cent. *Cook v. Caldecot*, 4 Car. & P. 315, 316.

To constitute an "act of bankruptcy," under Bankr. Act 1898, § 3a, cl. 3, providing that it shall be an act of bankruptcy if an insolvent debtor shall suffer a creditor to obtain a preference through legal proceedings and not vacate or discharge the same at least five days before sale of the property affected, it is necessary that the debtor should suffer or permit, while insolvent, a judgment to go against him, which judgment would of itself be a preference under the act, and that he would then allow execution to be issued and proceedings to sell to be instituted by the necessary advertisement, and fail within five days of the time of the sale to vacate or discharge the judgment, and does not apply to the recovery of a judgment against the debtor for the foreclosure of the lien created by a deed in the nature of a mortgage, securing the payment of a promissory note and a levy on the land conveyed, where the note and security were given before the enactment of the bankruptcy law, and for a valid debt. In re Chapman (U. S.) 99 Fed. 895, 897.

**ACT OF CONGRESS.**

The words "act of Congress" are as strong and unequivocal as the statutes of Congress, and hence an allegation in an indictment that the act alleged was contrary to an act of Congress is equivalent to an allegation that they are contrary to a statute of Congress. *United States v. Smith* (U. S.) 27 Fed. Cas. 1167, 1170.

**ACT OF GOD.**

"The term has received a variety of definitions, differing rather in their mode than in the subject of their signification. It is said to be that which is occasioned exclusively by the violence of nature; by that kind of force of the elements which human ability could not have foreseen or prevented, such as lightning, tornado, sudden squall of wind, and the like. Again, it is said to be, at least, an act of nature which implies entire exclusion of all human agency, whether of the carrier himself or of third persons. It is called a disaster with which the agency of man has nothing to do. It is defined to be a natural necessity, which could not have been occasioned by the interference of man, but proceeds from physical causes alone." New

Brunswick Steamboat & Canal Transp. Co. v. Tiers, 24 N. J. Law (4 Zab.) 697, 714, 64 Am. Dec. 394; Mershon v. Hobensack, 22 N. J. Law (2 Zab.) 372, 377; Fergusson v. Brent, 12 Md. 9, 31, 71 Am. Dec. 582; Sprowl v. Kellar (Ala.) 4 Stew. & P. 382, 386; McClary v. Sioux City & P. R. Co., 3 Neb. 44, 53, 19 Am. Rep. 631; Black v. Chicago, B. & Q. R. Co., 46 N. W. 428, 430, 30 Neb. 197; Chicago, B. & Q. R. Co. v. Manning, 37 N. W. 462, 464, 23 Neb. 552; McHenry v. Philadelphia, W. & B. R. Co. (Del.) 4 Har. 448, 449; Pennewill v. Cullen (Del.) 5 Har. 238, 241; Brosseau v. The Hudson, 11 La. Ann. 427, 428; Bason v. Charleston & C. Steamboat Co. (S. C.) Harp. 262, 265; Ryan v. Rogers, 31 Pac. 244, 245, 96 Cal. 349; Chidester v. Consolidated Ditch Co., 59 Cal. 197, 202; Bell v. Reed (Pa.) 4 Bin. 126, 128, 5 Am. Dec. 398; Hays v. Kennedy, 41 Pa. (5 Wright) 378, 379, 80 Am. Dec. 627; Thomas v. Boston & P. R. Corporation, 51 Mass. (10 Metc.) 472, 476, 43 Am. Dec. 444; Williams v. Grant, 1 Conn. 487, 491, 7 Am. Dec. 235; Wolf v. American Exp. Co., 48 Mo. 421, 425, 97 Am. Dec. 406; The Majestic, 17 Sup. Ct. 597, 602, 166 U. S. 375, 41 L. Ed. 1039; Klauber v. American Exp. Co., 21 Wis. 21, 24, 91 Am. Dec. 452; Parmelee v. Lowitz, 74 Ill. 118, 117, 24 Am. Rep. 276; Wald v. Pittsburgh, C., C. & St. L. R. Co. (Ill.) 44 N. E. 888, 889, 35 L. R. A. 356, 53 Am. St. Rep. 332; Chevallier v. Straham, 2 Tex. 115, 124, 47 Am. Dec. 639; McArthur v. Sears, 21 Wend. 190, 197; Elliott v. Rossell, 10 Johns. (N. Y.) 1, 11, 6 Am. Dec. 306; Clay County v. Simonson, 46 N. W. 592, 596, 1 Dak. 403; Dorman v. Ames, 12 Minn. 451 (Gil. 347, 362).

An act of God signifies any inevitable accident, and is construed to mean in law something in opposition to the act of man, as "storms, tempests, and lightning." "Everything, indeed, as Lord Mansfield says in *Forward v. Pittard*, 1 Term R. 31, is an act of God that happens by His permission and by His knowledge;" but in legal acceptance the act of God is such an act as could not happen by the intervention of man. Every other kind of impossibility the law requires of every man to guard against in his contract, or to perform his contract or work notwithstanding the casualty. *Niblo v. Binsse* (N. Y.) 44 Barb. 54, 62.

By "act of God" is meant some inevitable accident which cannot be prevented by human care, skill, or foresight, but results from natural causes, such as lightning, tempests, floods, and inundations. *McHenry v. Philadelphia, W. & B. R. Co.* (Del.) 4 Har. 448. The act of God denotes such causes as are beyond the control of carriers, and produce loss without the interference of human agencies. *Klair v. Wilmington Steamboat Co.* (Del.) 54 Atl. 694, 695.

"Act of God" means something superhuman, or something in opposition to the act

of man. *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 544, 39 Am. Dec. 398.

The term "act of God" means something overwhelming, and not merely an incidental circumstance. *Oakley v. Portsmouth & Ryde Steam Packet Co.*, 11 Exch. 618, 623.

"The earliest use of the term act of God that we can find in our law books is by Sir Edward Coke, 1 Co. 97b, in 1581, in *Shelley's Case*, speaking of the death of a man, and he seems to have been fond of it, for he uses it often afterwards (5 Co. 87a, 22a, 1 Inst. 206a), also meaning death; and 10 Co. 139b, where it is applied to a sudden tempest breaking down sea-walls, and refers to the statute, where the term is 'inevitable danger or necessity,' without any fault of him who is bound to repair. Moreover, Coke used the phrase, 'the act of God excuses,' as equivalent to 'impotentia excusat legem,' and also as equivalent to an accident which is 'so inevitable that by no providence or industry of him who is bound it can be prevented,' or, as in *Shelley's Case*, 'which no industry could avoid nor policy prevent.' Again, he uses the phrase, in 1601, as applicable to a sudden storm (1 Bulst. 280, 1 Roll. Rep. 79); and certainly that is one of the many kinds of inevitable accidents that may be so described. After our separation from England, in 1875, Lord Mansfield, in *Forward v. Pittard*, 1 Term R. 27, introduced a somewhat different view, holding that to be an act of God it must be such a one as could not happen by the intervention of man, as storms, lightning, and tempests." *Hays v. Kennedy*, 41 Pa. (9 Jones & S.) 378, 380, 80 Am. Dec. 627.

An act of God involves some notion of an accident from natural causes impossible to be foreseen and impossible to be guarded against, such as storms, lightning, and tempest; such as a bank or shoal unknown to navigators, or suddenly formed in the ocean. *Ewart v. Street* (S. C.) 2 Bailey, 157, 162, 23 Am. Dec. 181.

An act of God, to relieve from performance of a contract, must be such as a person of reasonable prudence and foresight could not have guarded against. Where a steamship company contracted to carry a passenger to a certain port, an ice block preventing the port being reached was an act of God excusing the breach. *Bullock v. White Star Steamship Co.*, 70 Pac. 1106, 1108, 80 Wash. 448.

The "act of God" which excuses a common carrier from liability must be the immediate and distinct result of providential events, sudden or overwhelming in their character, which human foresight could not foresee. *Tompkins v. The Dutchess of Ulster* (U. S.) 24 Fed. Cas. 32, 35.

An act of God which excuses a common carrier must be the immediate, and not the remote, cause of the loss. *Steele v. McTyer's Adm'r*, 31 Ala. 667, 675, 70 Am. Dec. 516.

The mere failure of a common carrier to forward goods promptly will not render him liable for loss occasioned proximately by the act of God, if guilty of no wrongful detention of them at place of shipment or of negligence or want of care and diligence. *Lamont v. Nashville & C. R. Co.*, 56 Tenn. (9 Helsk.) 58, 60.

**Inevitable or unavoidable accident.**

Act of God "is natural necessity," as winds and storms which arise from natural causes, and is distinct from inevitable accident. *Trent & Mersey Nav. Co. v. Wood*, 4 Doug. 287, 290.

"The expressions 'act of God,' and 'unavoidable accident' have sometimes been used in a similar sense, and as equivalent terms, but there is a distinction. That may be an unavoidable or inevitable accident which no foresight or protection of the carrier could prevent; but the phrase 'act of God' denotes natural accidents which could not happen by the intervention of man, as storms, lightning, and tempests." *Merritt v. Earle*, 29 N. Y. 115, 116, 86 Am. Dec. 292; *Redpath v. Vaughan*, 52 Barb. 489, 499.

The term "inevitable accident," as used to represent one of the contingencies which will excuse a carrier for loss of goods, has been criticised as a relaxation of the stringent rule of the common law, and as embracing cases of accident which must be regarded as inevitable, though not happening from causes that fall under the legal definition of an act of God or of the public enemy. Such would be the irresistible force of robbers, or a fire commencing elsewhere and spreading to the place in which the goods were kept by the carrier. *Angell on Carriers*, §§ 154-156. And so, where the jury were instructed that the carrier was liable for every injury except such as human care and foresight could not prevent, the instruction was, if anything, too favorable to the carrier, since inevitable accidents, unless such as can be classed under the legal head of acts of God or the public enemy, will not excuse them. *Hall v. Cheney*, 36 N. H. 26, 30.

"Act of God" not only denotes natural accidents, such as lightning, earthquakes, and tempests, but it embraces all other unavoidable or inevitable accidents; and hence a bill of lading for the carriage of goods by a common carrier, which excepts the carrier from liability for "unavoidable dangers and accidents of the road," does not restrict the general liability of a common carrier, who is always excepted from liability for losses caused by "act of God." *Walpole v. Bridges* (Ind.) 5 Blackf. 222, 223.

The words "inevitable accident," which are preferred by some to "acts of God," because more reverent, are not adequate to express the ground of a common carrier's ex-

cuse; for accidents arising from human force or fraud are sometimes inevitable. But "the act of God" denotes natural accidents, such as lightning, earthquakes, and tempests, and not accidents arising from the fault or negligence of man. *McArthur v. Sears* (N. Y.) 21 Wend. 190, 197.

"Act of God" is not absolutely synonymous with "inevitable accident," but the latter term properly refers to an immediate result, springing from a general cause, which is properly an "act of God." *Blythe v. Denver & R. G. R. Co.*, 25 Pac. 702, 704, 15 Colo. 333, 11 L. R. A. 615, 22 Am. St. Rep. 403.

**As irresistible, superhuman cause.**

The phrase, "irresistible and superhuman cause," as used in section 1611, Civ. Code, providing that performance of obligations shall be excused when it is prevented or delayed by such cause, is equivalent to the phrase "act of God," and refers to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence, or care, and the use of those appliances which the situation of the party renders it reasonable that he should employ. *Fay v. Pacific Imp. Co.*, 26 Pac. 1099, 1100, 23 Pac. 943, 93 Cal. 253, 19 L. R. A. 188, 27 Am. St. Rep. 198; *Ryan v. Rogers*, 31 Pac. 244, 245, 96 Cal. 349.

**As without negligence.**

The expression "act of God" denotes natural accidents, and not accidents arising from the negligence of man—"something in opposition to the act of man." *Polack v. Ploche*, 35 Cal. 416, 423, 95 Am. Dec. 115; *Central Line of Boats v. Lowe*, 50 Ga. 509, 511.

Precisely what is meant by the expression "act of God," as used in the case of carriers, has undergone discussion, but it is agreed that the notion of exception is those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill, and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of the injury or loss. If the loss happened in any way through the agency of man, it cannot be considered the "act of God"; nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work their injury is he excused. In short, to excuse the carrier the "act of God" must be the sole and immediate cause of injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the "act of God." *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 571, 86 Am. Dec. 415.

"A common carrier, in order to claim exemption from liability for damage to goods in transportation, though injured by what is deemed an 'act of God,' must be without fault

himself. His act or neglect must not contribute to the injury. If he departs from the line of duty, and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by the act of God, which would not otherwise have caused damage, he is not protected." Read v. Spaulding, 18 N. Y. Super. Ct. (5 Bosw.) 395, 408.

The term "act of God," as used with reference to the liability of a common carrier for loss of goods, means a loss from a cause which could not have been prevented by any human prudence or foresight, or loss occurring notwithstanding the fact that the carrier had provided a safe carriage or vessel adequate for the purpose, with a conductor or crew of competent skill and ability. But, if the carrier fails to provide such vessel, conductor, or crew, though the loss be occasioned by the act of God, he will not be permitted to set up such providential calamity to protect himself against what may have arisen from his own folly. Hart v. Allen (Pa.) 2 Watts, 114, 115.

#### Climatic conditions.

A heavy dew delaying a railway train is not an "act of God," relieving the railway company from liability. Missouri, K. & T. Ry. Co. v. Truskett, 58 S. W. 444, 448, 2 Ind. T. 633.

The inclement weather, such as is frequently experienced in this climate, is not to be regarded as the "act of God," in the sense in which that phrase is to be judicially understood in determining whether a party to a contract should be excused from noncompliance therewith simply because he was prevented from performing his obligation in the premises by rains or freezes which were natural and to be expected. Cannon v. Hunt, 42 S. E. 734, 736, 116 Ga. 452.

#### Collision.

A collision between two steamboats on a river, by which one of them was sunk without any carelessness on its part, and by reason of carelessness on the part of the other, is not an act of God, within the meaning of the rule that a carrier is excused from liability for an accident resulting from an act of God, but is an act resulting from human agency. Hays v. Kennedy, 41 Pa. 378, 380, 80 Am. Dec. 627.

A collision of vessels which may accrue through natural causes alone, as by the violence of the wind, may be called an "act of God," and excuse the carrier from liability; but when it occurs through the negligence of either party it can by no sound reasoning be brought within the meaning of that expression. If negligence is imputable to either party, the carrier is not excused. Mershon v. Hobensack, 22 N. J. Law (2 Zab.) 372, 377.

A steamer having in tow a boat loaded with goods stopped to avoid another vessel, when the waves lifted and threw the tow-boat on the rudder of the steamer, staving in the side of the boat, whereby the goods were injured. In this case the proximate cause of the injury was the stopping of the steamer. Oakley v. Portsmouth & Ryde Steam Packet Co., 11 Exch. 618, 623.

#### Contagious disease.

The performance of a contract will only be excused as being prevented by the "act of God" when there are intervening circumstances which render performance impossible, and not when they only make it difficult or undesirable; and hence the suspension of a school by reason of an epidemic of a contagious disease does not defeat the right of the teacher to compensation under his contract. Dewey v. Alpena School Dist., 5 N. W. 646, 647, 43 Mich. 480, 38 Am. Rep. 206; Gear v. Gray, 37 N. E. 1059, 1061, 10 Ind. App. 428.

#### Defective appliances, material, etc.

The loss of a bale of cotton, while being transported on a steamboat by the breaking of a hog chain against which it was placed, the break being on account of a secret flaw in the iron, was not the result of an act of God or unavoidable accident. The chain ought to have been made stronger; it ought to have been tested. The case is one of a simple failure to have a good vessel. Central Line of Boats v. Lowe, 50 Ga. 509, 511.

Where the bottom of a dock in a river had a considerable declivity, and vessels grounding there on the outflow of the tide do not lie on an even keel, injury to goods in the hold of a vessel so grounding, caused by the flow of the bilge water to the lower end of the vessel, cannot be attributed to an act of God, so as to excuse the carrier from liability. Such result was one naturally to be foreseen, and against which it was the duty of the carrier to guard. Ewart v. Street (S. C.) 2 Bailey, 157, 162, 23 Am. Dec. 131.

An act of God is commonly illustrated by such natural convulsions as tempests, lightning, earthquakes, the unknown shifting of shoals, and the like, and it is said that the act of God means something in opposition to the act of man. A loss to a vessel occasioned by the shifting of a buoy is not caused by an act of God. Reaves v. Waterman (S. C.) 2 Speers, 197, 206, 42 Am. Dec. 364.

Where a steamboat stranded in entering a harbor in the nighttime, in consequence of the master mistaking a light upon a stranded vessel for a light usually exhibited by the keeper of the beacon light, by means whereof the plaintiff sustained damage, the accident was not the result of an act of God. McArthur v. Sears (N. Y.) 21 Wend. 190, 197.

Damage to goods stored in the hold of a vessel, occasioned by the bursting of casks of chloride of lime, such accident, being attributable to an excess of unslacked lime in the composition of the chloride, cannot be attributed to an act of God, but resulted from human agency or negligence. *Brosseau v. The Hudson*, 11 La. Ann. 427, 428.

#### Earthquake.

An earthquake is an "act of God." *Slater v. South Carolina Ry. Co.*, 6 S. E. 936, 937, 29 S. C. 96.

#### Fire.

Loss by fire does not constitute loss by "act of God." Thus, where a carrier failed to deliver goods by reason of their being destroyed in the great Chicago fire, he was not exempt from liability on the ground that they were destroyed by the act of God. *Merchants' Despatch Co. v. Smith*, 76 Ill. 542, 544; *Chicago & N. W. R. Co. v. Sawyer*, 69 Ill. 285, 289, 18 Am. Rep. 613.

Accidental fire not caused by lightning, which destroyed the building in which the county treasurer had his office, and with it all the money, books, records, and documents connected with his office, is not an act of God, since it is not an irresistible, superhuman cause, and will not excuse him from performance of the obligation of his bond, requiring him to well and faithfully and impartially perform the duties and execute the office, it not being specially so stipulated, and he not being bound only to the exercise of reasonable care and diligence. *Clay County v. Simonsen*, 46 N. W. 592, 596, 1 Dak. 403.

Destruction by an accidental fire, not caused by lightning, is not an act of God so as to excuse the carrier, though the proximate cause of the burning was a sudden gust of wind diverting the course of a distant fire, so as to drive the flames in the direction of and upon them. *Miller v. Steam Nav. Co.*, 10 N. Y. (6 Seld.) 431.

Where a carrier, while transporting cotton by wagon, placed the wagons containing the cotton within 15 feet of a campfire, and during the night the wind arose and ignited the cotton by sparks blown from such campfire, the loss was the result of the carrier's negligence, and not an act of God. *Chevalier v. Straham*, 2 Tex. 115, 124, 47 Am. Dec. 639.

An accidental fire is not deemed so far the act of God as to be received as a legal excuse for the nonperformance of a contract, and where a plumber contracted to furnish the materials and do the work of plumbing in a building then in the process of construction, for a gross sum, and before the work was complete the building was destroyed by an accidental fire, he could not recover for the work done. *Niblo v. Binsse* (N. Y.) 44 Barb. 54, 60.

#### Flood.

An unusual and extraordinary flood or freshet in a river is such an act of God as excuses a common carrier from his liability at all events for goods he has undertaken to transport. *Wallace v. Clayton*, 42 Ga. 443, 446; *Backus v. Start* (U. S.) 13 Fed. 69, 71; *Strouss v. Wabash, St. L. & P. Ry. Co.* (U. S.) 17 Fed. 209, 213; *Dorman v. Ames*, 12 Minn. 451 (Gil. 347, 362); *New Haven & Northampton Co. v. Quintard*, 31 N. Y. Super. Ct. (1 Sweeny) 89, 97; *Nashville & C. R. Co. v. Daniel*, 53 Tenn. (6 Heisk.) 261, 262.

"While every shower of rain that falls upon the earth is an act of God, in contradistinction to the act of man, yet an ordinary freshet is not the act of God in the legal sense, which protects a man against responsibility for the nonperformance of a contract." *Doster v. Brown*, 25 Ga. 24, 26, 71 Am. Dec. 153.

A common carrier assumes all risks except those caused by the "act of God" and the public enemy. One of the instances mentioned by elementary writers of loss by the act of God is the case of loss by flood and storm. When a common carrier shows that a loss was by an act of God, as by flood, he is excused without proving affirmatively that he was not guilty of negligence. In the case of a loss for which the proximate cause was the act of God, the common carrier was excused, though his own negligence might have contributed to the loss as a remote cause. *Memphis & C. R. Co. v. Reeves*, 77 U. S. (10 Wall.) 176, 189, 19 L. Ed. 909.

An act of God is an act which no human prudence or power can prevent or avert. While it is true that no human agent can prevent or stay an act of God, the act itself being that of omnipotence, it is frequently the case that the result or natural consequence of an act of God by the exercise of reasonable foresight and prudence may be foreseen and guarded against. Where this can be done by the exercise of reasonable diligence and prudence, a failure to do so would be negligence, and subject the party upon whom this duty devolves to danger, though the original cause was an act of God. The sudden and unprecedented overflow of a river is such an act of God as would relieve a railroad company from liability and danger to freight caused thereby, if after knowledge of the danger the company did not unnecessarily expose it, but made all effort to save it. *Smith v. Western Ry. of Alabama*, 8 South. 754, 91 Ala. 455, 11 L. R. A. 619, 24 Am. St. Rep. 929.

The term "act of God," in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them; and, where injuries were caused from timber being floated by a lumber company

during a flood, liability therefor could not be avoided on the ground that the flood was an act of God, where from the climatic and geographical conditions the flood might have been expected, though it occurred infrequently. *Gulf Red Cedar Co. v. Walker*, 31 South. 374, 375, 132 Ala. 553.

In an action against a railroad company for failure to deliver fruit trees shipped over it until they had died, it was contended that owing to the floods in river along which the railroad ran that the railroad company was not liable, floods amounting to an "act of God." It was held, however, that as there was no proof that such floods were not to be anticipated, or that the railroad had been so constructed as to withstand the same, or that the company was unable to transmit the trees in question promptly over another line, they were not exempt from liability. *Chicago, B. & Q. R. Co. v. Manning*, 37 N. W. 462, 464, 23 Neb. 552.

Where goods in a railroad depot, near a river, were injured by an extraordinary flood rising higher than any flood had ever risen before, which it was no negligence not to anticipate, and from which, when the rise of the water became apparent, the goods could not be delivered, if the carrier in the due discharge of his duty had the goods in the regular and usual course of transportation, so that their being in the depot at the time was proper, the injury is by the act of God in such sense that the carrier is excused. But it is the duty of the carrier to carry and deliver within a reasonable time; and if when the goods were in the depot, and the flood came, he had violated his duty, and was under the actual pressure of fault and neglect, without which the goods would have been safe, he is not excused. *Read v. Spaulding*, 18 N. Y. Super. Ct. (5 Bosw.) 395, 396; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 571, 86 Am. Dec. 415.

The Johnstown flood, caused by the breaking of a dam, which retained a large volume of water at a high elevation, due to extraordinary and unprecedented rains, and thereby letting into a narrow valley a large volume of water, 20 to 30 feet in height, was an act of God. *Wald v. Pittsburg Co., O. & St. L. R. Co.*, 44 N. E. 888, 889, 162 Ill. 545, 35 L. R. A. 356, 53 Am. St. Rep. 332.

Under the definitions of "act of God," the performance of a contract was not excused by the fact that an unbridged river between defendant's residence and the place of performance was swollen by recent rains and impassable at the time set for the performance, it not being shown that such a condition of the river was unusual at that season of the year, and could not have been anticipated by ordinary prudence. *Ryan v. Rogers*, 31 Pac. 244, 245, 96 Cal. 349.

Injury to land caused by the overflow of water from a canal cannot be attributed to

an act of God, where the owner of the canal permitted sand to accumulate in the canal, but for which accumulation the overflow would not have occurred. *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197, 202.

Where a tenant covenanted to keep the premises in repair, damages by the elements or acts of Providence only excepted, and the premises were damaged by reason of a torrent of water sweeping through them, the water flowing from a reservoir, and the overflow being caused by an injury to the embankment by some person or persons unknown, such damage was not occasioned by the act of God, but by the act of such third person, and the tenant was liable for the repairs. *Polack v. Pioche*, 35 Cal. 416, 423, 95 Am. Dec. 115.

#### Freezing.

It is held that the freezing of a canal so as to stop traffic is an "act of God," excusing the carrier for failure to make immediate delivery. *Parsons v. Hardy* (N. Y.) 14 Wend. 215, 218, 28 Am. Dec. 521.

The freezing of a river is such an act of God as excuses performance of a contract to tow a vessel thereon. It is an act to which human agency does not contribute and cannot control, and therefore for the consequences of which a party is not responsible. *Worth v. Edmonds*, 52 Barb. 40, 43.

Where a steamship brought a consignment of oranges to New York, and the weather was so cold as to render it impossible to land the oranges without injuring them, and continuing below zero for several days, and the oranges were landed in spite of the consignee's objections, and their value for the most part destroyed, the act which destroyed the fruit was not the act of God, but of man, in discharging the fruit at an unreasonable time. *The Aline* (U. S.) 19 Fed. 875, 876; *Wessels v. The Aline* (U. S.) 25 Fed. 562, 568.

A quantity of wine in casks and cases was delivered at New York to a common carrier, to be transported and delivered at St. Louis. When the wine arrived at East St. Louis the weather was severely cold, and, on account of the ice floating in the river, it could not be carried across. The carrier had it taken from the cars, and stored on a platform, where it was exposed to all the severity and inclemency of the weather for two or three days, during which time it was badly frozen and greatly damaged in value. Under the circumstances, although the cold weather which caused the freezing was the act of God, the carrier was not released from responsibility for the loss, as the freezing of the wine could and should have been guarded against by protecting it, and could not be attributed to the act of God. *Wolf v. American Exp. Co.*, 43 Mo. 421, 425, 97 Am. Dec. 406.



The freezing of perishable articles by reason of an unusual intensity of cold is not such an "act of God" as will excuse the carrier if the accident might have been prevented by the exercise of due diligence and care on the carrier's part. *Wing v. New York & E. R. Co.* (N. Y.) 1 Hilt. 235, 243.

Where fruit trees shipped on a railroad were frozen on the way, the freezing was held to be an act of God, unless caused by unnecessary delay or by careless exposure to cold. *Vail v. Pac. R. Co.*, 63 Mo. 230, 232.

Such an accident as could not happen by the intervention of man, as storms, lightning, and tempests, losses that are occasioned by the violence of nature, by that kind of force of the elements which human ability could not have foreseen or prevented, and extraordinary convulsions of nature, and the like, are acts of God. Freezing weather, coming especially in that season of the year when such weather may be expected, cannot be brought within the definition of acts of God. *McGraw v. Baltimore & O. R. Co.*, 18 W. Va. 361, 364, 41 Am. Rep. 696.

#### **Illness.**

Under the expression "act of God" are comprehended all misfortunes and actions arising from inevitable necessity which human prudence could not foresee or prevent. Hence it is held that illness, being beyond the power of man to control or prevent, is the act of God. *Fish v. Chatman*, 2 Ga. 349, 356, 46 Am. Dec. 393; *Gleeson v. Virginia Midland R. Co.*, 11 Sup. Ct. 859, 861, 140 U. S. 435, 35 L. Ed. 458; *Sanders v. Coleman*, 34 S. E. 621, 622, 97 Va. 690, 47 L. R. A. 581.

The illness of a party, whereby he is prevented from fulfilling his contract, is to be regarded as an "act of God." *Dickey v. Linscott*, 20 Me. (2 App. & 7 Shep.) 453, 456, 37 Am. Dec. 66.

While the death of the principal in a bail bond would be an "act of God" in legal contemplation, excusing his appearance, illness, however severe and critical, is not. *Ringeman v. State*, 84 South. 351, 352, 136 Ala. 131.

#### **Obstructions at sea.**

Injury to a vessel caused by striking on a rock or pile not before known to be there may be attributed to an act of God, and the carrier is not liable for injuries resulting therefrom. But if the rock or pile were previously known, it was the duty of the carrier to avoid it, and the injury would be the result of his own negligence. *Pennewill v. Cullen* (Del.) 5 Har. 238, 241; *Williams v. Grant*, 1 Conn. 487, 491, 7 Am. Dec. 235.

The loss of goods resulting from the vessel running upon a known rock in a dense fog was not caused by an act of God, so as

to exonerate the carrier. *Fergusson v. Brent*, 12 Md. 9, 31, 71 Am. Dec. 582.

By the "act of God" is meant something that operates without any aid or interference from man. The sinking of a steamboat caused by coming in contact with the mast of a schooner which had sunk in a squall two days before was not caused by the act of God, though the sinking of the sloop was caused by the act of God. *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180, 187, 27 Am. Rep. 28 (citing and approving *Merritt v. Earle*, 29 N. Y. 115, 116, 86 Am. Dec. 292).

A defense that loss of goods on board ship, occasioned by water breaking through broken ports, was the result of an act of God, is not sustained by evidence that a short time before the injury was discovered the ship, during a rough sea, passed through some floating wreckage, there being no evidence tending to prove that the port was broken by the wreckage, nor any attempt to show why the ship did not steer away from it nor reduce its speed, nor any satisfactory proof that the ports were properly closed when the vessel sailed, or properly inspected afterwards. *The Majestic*, 17 Sup. Ct. 597, 602, 166 U. S. 375, 41 L. Ed. 1039.

#### **Perils of the sea.**

"An act of God" which will exempt the carrier by sea from liability for the loss of the cargo may include a peril of the sea; but there may be perils of the sea that are not embraced in the terms "act of God," as against which the carrier can only escape liability by such special contract as the law permits. *Clyde Steamship Co. v. Burrows*, 18 South. 349, 351, 36 Fla. 121.

Within the rule that a common carrier by sea is not liable to loss resulting from an "act of God," that term means something in opposition to the act of man. The phrase "perils of the sea," which are generally defined to be such accidents as ordinarily result from navigation upon that element, is not entirely coincident with what is, in many cases, understood by the "act of God." The destruction of a vessel by rats, the precaution of keeping a cat on board having been adopted, has been adjudged a peril of the sea; yet this could hardly be deemed a loss by the act of God, and could have no resemblance to lightning and tempests, so often named as instances that which would exonerate a common carrier from loss. It is well settled that a fire, not the effect of lightning, occurring at sea, is a peril of the sea; yet an accident so happening is not accounted an act of God, excusing the common carrier from responsibility. *Plaisted v. Boston & K. Steam Nav. Co.*, 27 Me. (14 Shep.) 132, 135.

"All that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of

the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if under such circumstances he is overpowered by storm or other natural agency, he is within the rule that gives immunity from the effects of such vis major as the act of God. I do not think that because some one may have discovered some more efficient method of securing the goods, which has not become generally known, or because it cannot be proved that, if the skill and ingenuity of engineers or other were directed to the subject, something more efficient might not be produced, that the carrier can be made liable. I find no authority for saying that the vis major must be such as no amount of human care or skill could have resisted, or the injury such as no human ability could have prevented." *Nugent v. Smith* (Eng.) 3 Cent. Law J. 611, 612.

An act of God sufficient to relieve a carrier for the loss of goods will be construed to include a loss occasioned by goods cast into the sea by the command of the master of a vessel in order to protect vessel and crew in storm. *Gillett v. Ellis*, 11 Ill. (1 Peck) 579, 580.

Where a box of books placed in the cabin of a vessel was injured by bilge water, on the vessel grounding at low tide in entering a stream, although the grounding was unavoidable, the carrier was not excused from liability because it was his duty to place the cargo in such position that it would not be injured by the bilge water when the grounding occurred. *Bason v. Charleston & C. Steamboat Co.* (S. C.) Harp. 262, 265.

#### Rain.

Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be acts of God; but an ordinary rain, which caused a landslide in a cut on a railroad from ten to twenty feet deep, which was not of unusual violence, and the probable results thereof would be the softening of the superficial earth, reasonably to be anticipated, cannot be considered an act of God. *Gleeson v. Virginia Midland Ry. Co.*, 11 Sup. Ct. 859, 861, 140 U. S. 435, 35 L. Ed. 458.

An unprecedented storm is an "act of God," against which a railroad company was not bound to prepare in constructing a ditch to carry away surface water from adjoining land, and is not liable for damages resulting from an extraordinary and severe storm which would have produced the injury complained of if a sufficient ditch had been in existence. *Kansas City, P. & G. R. Co. v. Williams*, 58 S. W. 570, 571, 8 Ind. T. 352.

An express company exposing goods wrapped in paper to rain, while taking them

from the railroad station to its office, whereby the goods were injured, is liable for the damage, such injury being attributable not to the rain as an act of God, but to the negligence of the express company in exposing the goods to the rain. *Klauber v. American Exp. Co.*, 21 Wis. 21, 24, 91 Am. Dec. 452.

It is the duty of the carrier, after transporting goods to the point of destination, to either deliver them to the consignee, or have them put in some safe place for security and protection. And where a railroad company at the place of destination unloaded the goods, and left them exposed, where they were injured by a storm, the injury resulted from the negligence of the carrier, and not from an act of God. *McHenry v. Philadelphia, W. & B. R. Co.* (Del.) 4 Har. 448, 449.

The loss caused to goods unloaded from a vessel by a sudden storm and downpour of rain does not fall within the scope of the phrase "act of God," which was one of the exceptions in the bill of lading; for to constitute the peril contemplated by that exception it would be necessary to show that the damage was due to some inevitable necessity, which was beyond the control of human agency, and that no act of omission or commission contributed thereto. *The St. Georg* (U. S.) 95 Fed. 172, 177.

#### Snow.

An unprecedented snowstorm, of such violence as to obstruct the moving of trains, falls within the term "act of God." *Pruitt v. Hannibal & St. Joseph R. Co.*, 62 Mo. 527; *Black v. Chicago, B. & Q. R. Co.*, 46 N. W. 428, 430, 30 Neb. 197; *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 504, 93 Am. Dec. 315.

#### Storm.

The term "act of God" may be applied to the breaking of an electric wire by a storm. *Cook v. Wilmington City Electric Co.* (Del.) 32 Atl. 643, 645, 9 Houst. 306.

That a severe storm produced an unusually low tide, and thereby caused the carrier's barge to strike against a timber projecting from the wharf, so low as in ordinary tides to be no cause of injury, will not excuse the carrier for the loss of goods occasioned by the timber piercing the vessel. In such case the proximate cause of the injury was the defect in the dock, and not the storm. *New Brunswick Steamboat & Canal Transp. Co. v. Tiers*, 24 N. J. Law (4 Zab.) 697, 714, 64 Am. Dec. 394.

Where a flatboat on which cotton was loaded was in tow of a steamboat, which was compelled to lie to on account of a storm, was discovered to have taken in water, and the cotton was unloaded, and after an examination of the boat, and conclusion that the bottom was not injured, the cotton was reloaded on the boat, when it immedi-

ately sank, an instruction that if the jury believed that the sinking was occasioned by an injury to the boat received from the violence of the storm, and that due care and skill were exercised in the examination of the boat, the carrier would not be liable, was properly refused. *Sprowl v. Kellar* (Ala.) 4 Stew. & P. 382, 386.

What may be called an "act of God" has sometimes occasioned differences of sentiment, but the best opinion is that the act of God is something in which the act of man has no part, such as lightning, tempest, wind, etc. In our rivers, which are interspersed with falls and rapids, a sudden squall, not amounting to storm or tempest, might have such effect as to defeat all human skill and diligence, and should be considered as an act of God. *Gordon v. Little* (Pa.) 8 Serg. & R. 533, 553, 11 Am. Dec. 632.

#### Wind.

A loss occasioned by a sudden gust of wind, such as rarely happens, is caused by the act of God. *Spencer v. Daggett*, 2 Vt. 92, 96.

Where a passenger on a railroad train was injured by the car being blown from the track by a sudden gust of wind, the injury resulted from an act of God; and the fact that the train was three-fourths of an hour behind time, and had it been on time would have been several miles from the point where the accident occurred at the time of the storm, did not make the carrier liable. *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44, 53, 19 Am. Rep. 631.

Injury to a boat caused by a sudden gust of wind, while navigating a well-known and dangerous rapid, cannot be attributed to an act of God, where the gust was not unusual, and the injury would not have occurred but for the want of care and skill in steering the boat. *Elliott v. Russell* (N. Y.) 10 Johns. 1, 11, 6 Am. Dec. 306.

Where a vessel transporting teas could not enter a harbor on account of low stage of water, and reshipped the teas on board of keelboats, one of which was driven by a sudden squall of wind and snow sideways, and upset, whereby the teas were wet and damaged, the carrier was not excused from liability, unless such boat was well fitted for the voyage, properly manned, with a captain of experience, and every reasonable exertion made to save her. *Hart v. Allen* (Pa.) 2 Watts, 114, 115.

An act of God is an event which happens without the intervention of man, and which could not have been prevented by any human prudence; as where a vessel was beating up the Hudson against a light and variable wind, and being near the shore, and while changing her tack, the wind suddenly failed, in consequence of which she ran

aground and sunk, the sudden failure of the wind was the act of God. *Colt v. McMechen* (N. Y.) 6 Johns. 160, 163, 5 Am. Dec. 200.

A carrier is not liable for an injury caused by an "act of God," where the attending circumstances show no concurring negligence of the carrier. Plaintiff delivered to defendant, a carrier, a wagon to be transported to another town. It was placed upon the platform customarily used for loading wagons, etc., on the cars. During the night the wagon was blown off the platform by a whirlwind, and injured, resulting in the delay of the shipment. Held, that defendant was not liable for the delay. *Gulf, C. & S. F. Ry. Co. v. Compton* (Tex.) 38 S. W. 220, 221.

#### ACT OF INSOLVENCY.

An "act of insolvency" by a bank is an act which shows the bank to be insolvent, such as nonpayment of its circulating notes, bills of exchange, or certificates of deposit, failure to make good the impairment of capital, or to keep good its surplus or reserve; in fact, any act which shows that the bank is unable to meet its liabilities as they mature, or to perform those duties which the law imposes for the purpose of sustaining its credit. In re *Manufacturers' Nat. Bank* (U. S.) 16 Fed. Cas. 665, 669.

An act of insolvency takes place when a business concern or a bank has failed to pay some of its obligations, made an assignment for the benefit of its creditors, suspended business, or done any of those things which indicate to creditors that a debtor has become insolvent. *Hayden v. Chemical National Bank* (U. S.) 84 Fed. 874, 876, 28 C. C. A. 548.

"Act of insolvency, which is an occasional act frequently passed by the legislature, whereby all persons whatsoever who are either in too low a way of dealing to become bankrupts, or, not being in a mercantile state of life, are not included within the laws of bankruptcy, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath." In re *Klein* (U. S.) 14 Fed. Cas. 719, 728 (quoting 2 Bl. Comm. 494).

The making of a general assignment is not evidence of insolvency only; it is an act of insolvency itself; for a man who has put all his property out of his hands cannot himself pay his debts as they come due in the ordinary course of business. *Merrill v. Bowler*, 38 Atl. 114, 116, 20 R. I. 226.

#### ACT OF THE LAW.

When used to define a reason by which a person has been prevented from forming a contract, etc., the expression, "act of the law," means an act performed by judicial

authority, which prevents or precludes a compliance with the contract. The defense is like that of the act of God, differing from it only in the facts constituting it. Thus it is settled that where one becomes bail for another he will be exonerated where the performance of his condition to surrender the defendant becomes impossible by the reason of the principal's death before the day of performance, since performance is rendered impossible by act of God; but where the court before which the principal was bound to appear is abolished without qualification the principal in that case will be exonerated from his failure to surrender by "act of the law." *Taylor v. Taintor*, 83 U. S. (16 Wall.) 368, 369, 21 L. Ed. 287 (citing *People v. Bartlett* [N. Y.] 3 Hill, 571; *Co. Litt.* 206a; *Bac. Abr.* tit. "Conditions" [2]; *Vin. Abr.* tit. "Condition" [G. C.] pl. 18, 19, and *Id.*, [I. c.] pl. 16; *Hurl. Bonds*, 48).

#### ACT OF OWNERSHIP.

Within an instruction that if the jury believed that plaintiff and those under whom he claimed title for more than thirty years prior to the vesting of the land in controversy, continuously exercised "acts of ownership" over such land, and that defendant during that time had never asserted or claimed any title or interest in the land or exercised any act of ownership over it, they were entitled to presume that a deed regular had been given to plaintiff's ancestor under whom he claimed title, the expression "acts of ownership" means such acts of dominion and proprietorship over the land as were proper to the character and condition thereof, and such open conduct with respect thereto as would be ordinarily exercised by the owner thereof. *Gage v. Eddy*, 53 N. E. 1008, 1012, 179 Ill. 492.

#### ACT OF PROVIDENCE.

"An act of Providence, in legal phraseology, is an accident against which ordinary skill and foresight is not expected to provide; it does not include those floods which happen so frequently that men of ordinary prudence are expected to calculate upon them." A person erecting a dam is bound to provide against such ordinary floods. *McCoy v. Danley*, 20 Pa. (8 Harris) 85, 91, 57 Am. Dec. 680.

#### ACT OF SALE.

By the civil law in Louisiana the common mode of making conveyances of land certificates was by an act of sale, so called, done before a notary, who wrote down in a record kept by him the agreement of the parties as stated by them, which was then signed by the parties and attested by witnesses. The record remained with him, but upon request he gave out authenticated copies to the parties. On request also the notary delivers

the record of the act of sale to the parish recorder, to be recorded in his office. *Hodge v. Palms* (U. S.) 117 Fed. 396, 398, 54 C. C. A. 570.

#### ACTING.

Acting in fiduciary capacity, see "Fiduciary Capacity or Character."

Acting within the scope of his employment, see "Scope of Employment."

"Attorneys for the estate," when used in speaking of the liability of attorneys for moneys collected while acting as attorneys for the estate of a deceased person, necessarily implies an employment by the administrator, as any employment by the deceased in his life was terminated by his death. *Dinsmoor v. Bressler*, 45 N. E. 1088, 1090, 164 Ill. 211.

Rev. St. 1874, c. 112, authorizing quo warranto proceedings against persons "acting as a corporation" without being legally incorporated, relates to the attempted doing of acts such as may be legally done only by corporations, such as assuming obligations with a limitation of amount of liability, or attempting to establish perpetual succession. *Greene v. People* (Ill.) 21 N. E. 605.

Under an article of agreement providing that, until the franchises of two railroad companies should be united, one of them should be the "acting" and controlling company, the word "acting" does not signify that this company was to be the agent merely and for a time of the other company. An agent is not in reference to his principal the controlling person, but the reverse. "Acting" is used in the sense of operating, and renders such company the operating and controlling company. *Meyer v. Johnston*, 64 Ala. 603, 665.

In 9 & 10 Vict. c. 95, limiting the sum to be recovered by an attorney for appearing and "acting on behalf of any other person" in the county court, the words, "acting on behalf of any other person," include everything done by an attorney in regard to a suit in that court, whether before or at or after the hearing. *In re Clipperton*, 12 Adol. & E. 687, 693.

#### ACTING EXECUTOR.

Acting executor means a person assuming to act as executor for a deceased person without being the executor legally appointed or the executor in fact. *Morse v. Allen's Estate*, 58 N. W. 327, 328, 99 Mich. 803.

#### ACTING OWNER.

A master who operated a schooner, and furnished the supplies to run the vessel, and paid a certain part of the net earnings to the owners, was not the "acting and managing owner," within the meaning of Rev.

St. § 4141, requiring a vessel to be registered at the usual residence of the "acting and managing owner." *The Jennie B. Gilkey* (U. S.) 19 Fed. 127, 129.

**ACTING SUPERVISING ARCHITECT.**

"Acting," as used by a person designating himself as "acting" supervising architect, does not designate an appointed incumbent, but merely a locum tenens, who is performing the duties of an office to which he does not himself claim title. *Fraser v. United States*, 16 Ct. Cl. 507, 514.

**ACTING TICKET AGENT.**

An agent employed by a union railway company, owning and operating a union depot, to whom different railroad companies entering and using the depot furnish tickets, and who reports the sales thereof daily to the respective companies, accounting to them at regular intervals for the proceeds of such sales, was an "acting ticket agent" of one of such railroads, within Gen. St. 1894, § 5202, providing for the service of process in civil actions upon railroad companies. *Hillary v. Great Northern Ry. Co.*, 64 Minn. 361, 362, 67 N. W. 80, 32 L. R. A. 448.

**ACTING TOGETHER.**

The term "acting together," in the statutory definition of principals in the commission of a crime as all persons guilty of acting together in the commission of an offense, is not to be understood as restricted to the very act of the perpetration of the crime; for those also are principals who being present, and knowing the unlawful intent of the actual perpetrator, aid him by acts or encourage him by words or gestures, and those who, though not personally present, keep watch to prevent his interruption, or procure means to assist him while engaged in its perpetration, or endeavor at the time to secure his safety or concealment. *Welsh v. State*, 8 Tex. App. 413.

**ACTING TRUSTEE.**

A will declared that if a trustee shall refuse to act before the trust shall be fully performed it shall be lawful for the survivor of the trustee so acting to appoint, etc. Held, that by the use of the word "acting" the testator intended to designate those who had taken on themselves to perform some of the trusts mentioned in the will, and did not include one who had refused to act in limine. A person who had so refused could not be considered as acting in any of the trusts. *Sharp v. Sharp*, 2 Barn. & Ald. 405, 415.

**ACTION.**

Within the meaning of the statute prohibiting the bribery of a United States officer with intent to influence his decision or

"action" on any question, matter, cause, or proceeding, the certificate which a board of examining surgeons is required to make out is in effect both a decision of the board and an action by the board and the members thereof upon the question or matter submitted to them for their official action and decision. It is true that the board of surgeons cannot decide the question of the granting or increasing of a pension, nor do they finally decide the rating of the applicant, but they are required to thoroughly examine the claimant, and to give a certificate containing a full description of the physical condition of the claimant and of all structural changes. This requires of the board a proper consideration of the symptoms or evidences of disease or disability, and the result thereof is a decision of the board upon the question of the claimant's physical condition. *United States v. Van Leuven* (U. S.) 62 Fed. 62, 66.

The term "action" in Gen. St. § 3862, declaring that the pendency of an appeal by a taxpayer to the Supreme Court from the refusal of the board of relief to abate an assessment will suspend "action" upon the tax, means the well-known proceedings in law or in equity which may be resorted to for the collection of an overdue tax, such as a levy and sale under a tax warrant, a complaint in the name of the community in whose favor the tax is assessed, as provided by section 3901, or an action by such community to foreclose the tax lien under section 3891. It does not mean that all proceedings for the collection of such taxes are suspended during the pendency of the appeal. Thus, an appeal does not include interest from the date of the assessment, as such interest is not a part of the proceedings to collect the taxes, but a part of the tax to be collected. *City of Hartford v. Hills*, 45 Atl. 433, 434, 72 Conn. 599.

**ACTION—ACTION AT LAW.**

See "Amicable Action"; "Chose in Action"; "Civil Action—Case—Suit—etc."; "Common-Law Action"; "Criminal Action"; "Equitable Action"; "Future Action or Proceeding"; "Hypothecary Action"; "Judgment Creditor's Action"; "Local Action"; "Mixed Action"; "Penal Action"; "Personal Action"; "Petitory Action"; "Plea to the Action"; "Political Action"; "Possessory Actions"; "Private Action"; "Public Action"; "Qui Tam Action"; "Real Action"; "Remedial Action"; "Right of Action"; "Special Action"; "Transitory Action."

See, also, "Case"; "Cause (In Practice)."

All actions, see "All."

Any action, see "Any."

Other action, see "Other."

One of the oldest English legal definitions of "action" is that given by Lord Coke,

"that it is the form of a suit given by law for the recovery of that which is one's due; the lawful demand of one's right." Co. Litt. 285, 285a. Blackstone traces his definition back to the civil law, in which Cicero defines an action to be the means by which men litigate with each other. 3 Bl. Comm. 117. Bracton, I think, embodies the whole idea of an action much better in the Latin expression, "Trinus actus, trium personarum," which seems to include not only the act of a plaintiff who makes a lawful demand and the act of a defendant in opposition, but also the action of the court in passing judgment between the parties. This is full and comprehensive, and I think expresses our notion of a legal action in the ordinary understanding of the term. *People v. Colborne* (N. Y.) 20 How. Prac. 378, 380.

Blackstone defines an action, suit, or proceeding as the instrument whereby the party injured obtains redress for wrongs committed against him, either in respect to his personal contracts, his person, or his property; and Bracton and Fleta characterized an action or suit, in the words of Justinian, as the rightful method of obtaining in court what is due to any one. *Badger v. Gilmore*, 37 N. H. 457, 458 (citing 3 Bl. Comm. 116); *Inhabitants of Bridgton v. Bennett*, 23 Me. (10 Shep.) 420, 425. When there is an intention to limit its signification and apply it only to include common-law and civil suits, it becomes necessary to use some other word for that purpose with it, such as "personal," "real," or "mixed." *Inhabitants of Bridgton v. Bennett*, 23 Me. (10 Shep.) 420, 425.

"An action, in the ordinary use, is simply a legal demand of one's right." *Valentine v. City of Boston*, 37 Mass. (20 Pick.) 201, 203; *Peeler v. Norris' Lessee*, 12 Tenn. (4 Yerg.) 331-339; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 376, 38 Am. Rep. 518; *People v. Sage* (N. Y.) 3 How. Prac. 56, 57. And the cause of this lawful demand is some wrong committed by the defendant, and some damage sustained by the plaintiff in consequence thereof. *Foot v. Edwards*, 9 Fed. Cas. 358, 359; *Deseret Irr. Co. v. McIntyre* (Utah) 52 Pac. 628, 629.

"Coke declared that an action is 'a legal demand of a man's right,' and the action itself has been long considered to be the prescribed mode of enforcing the right in the proper tribunal." *Inhabitants of Webster v. County Com'rs*, 63 Me. 27, 29; *Wilt v. Stickney* (U. S.) 15 Nat. Bankr. R. 23, 24; *Badger v. Gilmore*, 37 N. H. 457, 458.

A suit or action, according to its legal definition, is the lawful demand of one's right in a court of justice. *Appeal of McBride*, 72 Pa. (22 P. F. Smith) 480, 483 (citing 3 Bl. Comm. 116); *Hook v. McCune* (Pa.) 39 Atl. 72, 73; *Taylor v. Kelly*, 80 Pa. (30 P. F. Smith) 95, 98; *In re Agnew's Estate*, 24 Pa. Co. Ct. R. 327, 334; *Citizens' St. R. Co.*

*v. Shepherd* (Ind.) 62 N. E. 800-804; *Evans v. Evans* (Ind.) 5 N. E. 24, 27; *Hall v. Decker*, 48 Me. 253, 256; *Sanford v. Sanford*, 28 Conn. 6, 22; *Lightfoot v. Grove*, 52 Tenn. (5 Helsk.) 473, 477.

An "action" is defined to be a legal demand of one's right, for it is the form of a suit given by law for the recovery of that which is due. *Wilt v. Stickney*, 30 Fed. Cas. 256, 257; *Eaton v. Elliot*, 28 Me. (15 Shep.) 436, 438 (citing Co. Litt. 285, and quoting Web. Dict.); *Brewington v. Lowe* (Ind.) Smith, 79, 80, 48 Am. Dec. 349.

An "action" is the prosecution of some demand in a court of justice. *Porter v. Ritch*, 39 Atl. 169, 177, 70 Conn. 235, 39 L. R. A. 353 (citing Chief Justice Marshall in *Cohens v. Virginia*, 19 U. S. [6 Wheat.] 264, 407, 5 L. Ed. 257).

According to Lord Coke, every writ whereunto the defendant may be pleaded, be it original or judicial, is in law an "action." *Potter v. Titcomb*, 13 Me. (1 Shep.) 86, 40.

"Though, in general, 'action' signifies merely motion or an act, yet, when applied to legal subjects, it means a proceeding by one party against another to try their mutual rights." *Society for Propagating the Gospel v. Whitcomb*, 2 N. H. 227, 229.

A suit or action is the means of administering judgment, which is the remedy prescribed by law for the redress of an injury. *Ziegler v. Vance*, 3 Iowa (3 Clarke) 528, 530.

An action is merely the judicial means of enforcing a right. Civ. Code Ga. 1895, § 4930.

The term "action" is very commonly confounded with the suit (lis) in which the action is enforced, but this is not the technical meaning of the term, according to which an action is simply the right or power to enforce an obligation. An action is nothing less than the right or power of prosecuting in a judicial proceeding what is owed of one, which is but to say an obligation. *Frost v. Witter*, 64 Pac. 705, 707, 132 Cal. 421, 84 Am. St. Rep. 53; *People v. Sage*, 3 How. Prac. 56, 57.

An "action" is the legal and formal demand of one's right from another person or party, insisted on in a court of justice. Black, Law Dict. The constituent elements of a legal cause of action consist of a wrongful act by the defendant, or the omission by him of a legal duty which he owes to the plaintiff, and of either the material damage to the plaintiff caused thereby, or of the damage which the law implies therefrom. The right of action springs from the cause of action, but does not accrue until all of the facts which constitute the cause of action have occurred. *White v. Rio Grande Western Ry. Co.*, 71 Pac. 593, 594, 25 Utah, 346.

An action is a legal proceeding by a party complainant against a party defendant to obtain the judgment of the court in relation to some right claimed to be secured, or some remedy claimed to be given by law, to the party complaining. It is given by law for the recovery of that which is one's due, or a legal demand of one's rights. *Haley v. Eureka County Bank*, 21 Nev. 127, 135, 28 Pac. 64, 67, 12 L. R. A. 815.

Any ordinary proceeding in a court of justice by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of the wrong, or punishment of a public offense, involving process and pleadings, and ending in a judgment, is an action. *Missionary Soc. of M. E. Church v. Ely*, 47 N. E. 537, 538, 56 Ohio St. 405.

An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding. Rev. Codes N. D. 1899, §§ 5156, 5157; Code Civ. Proc. S. D. 1903, §§ 12, 13; Rev. St. Wis. 1898, §§ 2595, 2596; *Cornish v. Milwaukee & L. W. Ry. Co.*, 19 N. W. 443, 444, 60 Wis. 476; *In re Welch*, 84 N. W. 550, 552, 108 Wis. 387; *Clark's Code N. C.* 1900, §§ 126, 127; Code Civ. Proc. S. C. 1902, §§ 2, 3; Gen. St. Kan. 1901, § 4432; *Fullenwider v. Ewing*, 1 Pac. 300, 306, 30 Kan. 15; Code Civ. Proc. Cal. 1903, § 22; *Smith v. Westerfield*, 28 Pac. 206, 207, 88 Cal. 374; *In re Joseph's Estate*, 50 Pac. 768, 118 Cal. 600; Code Civ. Proc. N. Y. 1899, § 3333; Code Civ. Proc. Mont. 1895, § 3471; Rev. St. Okl. 1903, §§ 4202, 4203; *In re Attorney General*, 47 N. Y. Supp. 883, 884, 22 App. Div. 285; *First Nat. Bank v. Yates*, 47 N. Y. Supp. 484, 485, 21 Misc. Rep. 373; *Losey v. Stanley*, 31 N. Y. Supp. 950, 953, 83 Hun. 420; *People v. American Loan & Trust Co.*, 44 N. E. 949, 951, 150 N. Y. 117; *People v. County Judge of Rensselaer (N. Y.)* 13 How. Prac. 398, 400; *Lawrence v. Thomas*, 51 N. W. 11, 84 Iowa, 362.

An action is a proceeding in a court of justice, the object of which is to obtain a judgment of the court affecting either the rights of the person or property of the parties thereto. The party or parties beginning or prosecuting the action are called the "plaintiff" or "plaintiffs," and he or they attempting to resist or ward off the result of the action are called "defendants." *Brower v. Nellis*, 33 N. E. 672, 673, 6 Ind. App. 323 (citing 3 Bl. Comm. 296, Chit. Pl. 428).

A borough resolution prescribing the duties of the town clerk, and providing that he is to be paid the usual professional charges for conducting actions or suits at law or in equity, will be construed not to be confined to actual proceedings in an action or suit, but

to include everything that is done with a view to the action or to the preventing of it. *Queen v. Prest*, 16 Q. B. 32, 44.

In several of the state Codes an action is defined as an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. *Bouvier* defines an action to be a formal demand of one's right from another person or party, made and insisted on in a court of justice. *Abbott* observes that "action" in its broadest sense includes all the various proceedings ordinarily allowed in courts of justice. More narrowly, and as applied to prosecution, it includes the modes allowed to individuals for enforcement of civil rights or redress of private wrongs, excluding proceedings instituted by the government for the punishment of offenses; or, as opposed to suit, it means an ordinary proceeding according to the course of courts at law, excluding resort to equity or to remedies of equitable cognizance. *In re Hunter's Will*, 6 Ohio, 500, it is said "action" may be defined as an abstract legal right in one person to prosecute another in a court of justice; and suit is the actual prosecution of such right in a court of justice. Under such definition, the mere fact that the court did not have jurisdiction of the proceeding does not deprive it of its character as an action. *Pittsburg, C. & St. L. Ry. Co. v. Bemis*, 59 N. E. 745, 64 Ohio St. 26.

An "action" is but the legal demand of a right, without regard to the form of proceedings by which that right may be enforced. When there is an intention to limit its significance and apply it only to include common-law and civil suits, it becomes necessary to use some other word for that purpose with it, such as "personal," "real," or "mixed." *Inhabitants of Bridgton v. Bennett*, 23 Me. 420, 425.

The term "action," when used in the Revision, shall be construed to include all proceedings of any court of the commonwealth. Ky. St. 1903, § 469.

The act of April 22, 1858, providing "that the probate by the register of the proper county of any will devising real estate shall be conclusive as to such realty, unless within five years from the date of such probate those interested to controvert it shall by caveat and action at law, duly pursued, contest the validity of such will as to such realty," is badly worded, and hence difficult of comprehension. The framer of the act knew that it would not do to make the probate absolutely conclusive of the execution of the will, that some time must be given within which to contest that execution, but he evidently was not acquainted with the legal forms necessary to reach that end. This is evident from the manner in which he has

used the word "caveat," and also that in which he has connected it with the words "and action at law." He evidently regarded a caveat as a means of process for contesting a will, and an action or issue at law as a continuation thereof. Taking this view of the matter—and it is the only one that can be adopted without the rejection of a word which was evidently deemed material by the framer of the act—and the difficulty is of easy solution. Thus the caveat will then mean the initiatory process, or notice preceding a contest before the register, and the action at law an issue triable in the common pleas, directed by the orphans' court, after an appeal thereto from the decree of the register, and this appeal may be taken, in the ordinary form, at any time within five years. *Wilson v. Gaston*, 92 Pa. 207, 213, 215 (cited and approved in *Appeal of McCort*, 98 Pa. 33, 37).

"Action" cannot exist without a plaintiff in being. *Alexander v. Davidson* (S. C.) 2 McMul. 49, 51.

#### **As action resulting in judgment.**

An action "is any judicial proceeding which, conducted to a termination, will result in a judgment." *Berry v. Berry* (Ind.) 46 N. E. 470, 471 (citing *Deer Lodge County v. Kohrs*, 2 Mont. 66, 70); *Evans v. Evans* (Ind.) 5 N. E. 24, 27; *Boyle v. Puget Sound Co-operative Colony*, 28 Pac. 376, 8 Wash. St. 138; *People v. County Judge of Rensselaer* (N. Y.) 13 How. Prac. 398, 400.

An "action" is a judicial proceeding which, if prosecuted effectually, will result in a judgment. *Willey v. Shaver* (N. Y.) 1 Thomp. & C. 324, 327.

Under a condition in a policy of fire insurance that no "action" against the insurer for recovery of any claim under the policy shall be sustained unless commenced within 12 months after the loss shall have occurred, the action in the condition, which must be commenced within 12 months, is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case, although such previous action was commenced within the period prescribed. *Riddlesbarger v. Hartford Ins. Co.*, 74 U. S. (7 Wall.) 386, 387, 19 L. Ed. 257.

#### **Acknowledgment by notary.**

Within Code Civ. Proc. § 547, providing that a judge should not act in an action or proceeding to which he is a party or in which he is interested, etc., the terms "action" or "proceeding" refer to actions or proceedings in courts of justice, and cannot be held to apply to the taking of an acknowledgment by a notary public. *First Nat. Bank v. Roberts*, 23 Pac. 718, 722, 9 Mont. 323.

#### **Appeal and error.**

The term "action," as used in a statute allowing costs to a prevailing party in an

"action," includes a motion to dismiss an appeal, and authorizes the allowance of costs to an appellee upon whose motion an appeal from a lower court has been dismissed, though no action was ever brought in a lower court to be appealed from. *Pomroy v. Cates*, 17 Atl. 311, 81 Me. 377.

Code Civ. Proc. § 411, relating to the revival of an "action," applies to proceedings in error, though "a proceeding in error is not properly an action within the meaning of the Code." *Black v. Hill*, 29 Ohio St. 86, 88.

"A writ of error is in the nature of a suit or action when it is to restore the party who obtains it to the possession of anything which is withheld from him; not when its operation is entirely defensive." *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264, 409, 5 L. Ed. 257.

A writ of error is not a suit or action as those words are understood and used; hence such section does not require the substitution of a successor in office as plaintiff in a writ of error which was sued out by his predecessor. *Overseers of Poor of Town of Clayton v. Beedle* (N. Y.) 1 Barb. 11, 15, 16.

A writ of error is an action, and a release of all actions is a good bar to it. An ejectment removed by writ of error to the Supreme Court is still a "writ of ejectment" pending, and there is no reason, if the death would not abate it in the court below, why the writ of error should fall and the representatives of the party decedent be driven to take out a new writ of error. *Ulshafer v. Stewart*, 71 Pa. (21 P. F. Smith) 170, 172.

"An appeal in insolvency" is not an action within Rev. St. c. 82, § 1, or rule 2 of the Supreme Judicial Court. Nor does it vacate the decree appealed from, as is the usual effect of appeal in other cases. This results from the peculiar provisions of section 12 of the insolvency law. That section provides that no appeal in insolvency lies in any case unless specially provided for in the insolvency law. It follows that such appeals, to be effective, must be taken and prosecuted as provided by that act. No latitude or discretion is given to the court by the act. *Tuttle v. Fletcher*, 44 Atl. 908, 904, 93 Me. 249.

#### **Application to redeem from tax sale.**

An application to redeem land sold for taxes was to be made to the court of common pleas of the county in which the lands were situated, notice of the application was to be given in newspapers, and the court was required to examine the facts touching the applicant's right to redeem and the counter testimony of the adverse party. Held, that the proceeding was in the nature of a suit or action, and hence might be certified to the Supreme Court. *Rawson v. Boughton*, 5 Ohio (5 Ham.) 328.



**Arbitration or submission by agreement.**

In a general sense, the word "action" means the legal demand of one's rights in a court of justice, and in this sense it may be said to include any proceeding in such a court for the purpose of obtaining such redress as the law provides. So it is held that where a controversy is submitted to arbitration by agreement under the rule of the district court, passed at the request of the parties, and judgment is rendered on the award of the arbitrators, such proceeding is an action within the meaning of the statute providing that an appeal shall lie to the superior court from all final judgments of the district court rendered in actions when the amount in controversy exceeds a certain sum. *Waterbury Blank Book Mfg. Co. v. Hurlburt*, 49 Atl. 198, 199, 73 Conn. 715.

2 Rev. St. p. 309, § 37, making it the duty of a court in which a judgment had been rendered in an "action" of ejectment to vacate the same and grant a new trial on the application of the party against whom the judgment was rendered, cannot be construed to include a case in which the controversy had been submitted without action by the agreement of the parties; such a proceeding is not an "action" within the meaning of the statute. *Lang v. Ropke*, 8 N. Y. Super. Ct. (1 Duer) 701, 702.

**Attachment proceedings.**

The term "action" is a comprehensive one, and is applicable to almost any proceeding in a court of justice by which an individual pursues that remedy which the law affords him. Thus it includes an attachment proceeding. *Gibson v. Sidney*, 69 N. W. 314, 315, 50 Neb. 12; *Jordan v. Dewey*, 59 N. W. 88, 89, 40 Neb. 639.

The term "action" includes proceedings by foreign attachment. *Allen v. Partlow*, 3 S. O. (3 Rich.) 417, 418.

**Case synonymous.**

There is no distinction between the term "action" as usually employed by the members of the profession and writers on law, and the word "case" in Rev. Code, c. 106, § 12, providing that it shall not be necessary to set forth in any manner the place in which an act is done, unless from the nature of the case the place may be material. A case as here referred to and the word employed imports means a civil action of some form and nature between two or more parties in a court of law, either decided or still pending, which may be of different kinds; but the first and most prominent distinction between them, when they differ from each other, is the form and legal nature of the action in which the case is instituted, and the best general indication of this distinction in the nature of these different cases in courts

of law is the different forms of action in which they are commenced. The pleadings also vary very considerably in these various actions and cases at common law, with the several forms of action appropriately adapted to them, and with the issues of fact as well as law joined and presented in the pleadings; but, whatever may be the form of the action, or the difference of the pleadings in it from those in any other action, each is alike usually termed a "case" or an "action at law," and usually import one and the same thing. *Parvis v. Truax*, 32 Atl. 1050, 1051, 7 Houst. 575.

**As cause of action.**

The word "action," as used in the law of 1853 relating to the competency of a witness "when one of the parties to such action has deceased," is used as an equivalent expression to the "cause of action," and in common parlance it is not uncommon to speak of "action" when in strictness we mean the "cause of action." *Kimball v. Baxter's Estate*, 27 Vt. (1 Williams) 628, 631.

The marked distinction that exists between the word "suit," "cause," or "action," and the words "cause of action," is sharply presented in *Koon v. Nichols*, 85 Ill. 155. It is there said: "The word 'cause' here means the particular suit in which the order is made; not that the cause of action shall be considered as abandoned, but only that such particular suit shall be considered as abandoned, and no further action shall be had thereon." Thus, Prac. Act, § 23, authorizing the allowance of amendments changing the form of action, and in any matter, either of form or of substance, in any pleading or proceeding, which may enable plaintiff to sustain the action or the claim for which it was intended to be brought, and providing that the adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action, does not apply to amendments setting up new causes of action. *Fish v. Farwell*, 43 N. E. 367, 372, 160 Ill. 236.

**Certiorari.**

A certiorari is no more an action than a writ of error, but is a special proceeding. *People v. Oswego County Court of Sessions* (N. Y.) 2 Thomp. & C. 431, 433.

**Change of venue.**

An "action" is the lawful demand of one's right in a court of justice. 3 Bl. Comm. 116. It is defined as the legal and formal demand of one's rights from another person or party, made and insisted on in a court of justice. The mere change of venue of a local action to a newly organized county within which the land is situated does not affect the action. *Bookwalter v. Conrad*, 39 Pac. 573, 575, 15 Mont. 464.

**Condemnation proceedings.**

A proceeding to condemn land for a railroad right of way is not a special proceeding, but a civil action. *State v. Rowe*, 65 S. W. 463, 464, 69 Ark. 642.

In this state an action for a proceeding to assess the amount of just compensation for private property taken for public uses is not an action. *Kennebec Water Dist. v. City of Waterville*, 52 Atl. 774, 780, 96 Me. 234.

**Contempt proceedings.**

Appeal Law 1891, § 1, providing that a judgment or order in a civil action, or in a special proceeding, may be removed to the Supreme Court by appeal, and section 24 providing that an official order affecting a substantial right made in the special proceedings may be reviewed on appeal, does not include an order adjudging a defendant guilty of contempt in disobeying an injunction, such proceeding being purely of a criminal nature, and its object being exclusively to vindicate the authority of the court. *State v. Davis*, 51 N. W. 942, 945, 2 N. D. 461.

Code, § 416, providing that civil actions shall be commenced by the service of summons, does not include an application by the receiver of taxes of the city of New York for the enforcement of a tax on personal property, which was commenced by an order to show cause why defendant should not be committed for contempt, and was not commenced by the service of summons, but such an application constituted a special proceeding within the meaning of Code, § 3334, providing that every proceeding which did not constitute an ordinary prosecution in a court of justice by one party against another for the enforcement or protection of a right, or the redress or prevention of a wrong, or the punishment of a public offense, was a special proceeding. *McLean v. Jephson* (N. Y.) 13 N. Y. Supp. 834, 835.

**Controversy synonymous.**

Under Code, c. 130, § 23, providing that all persons to any civil action, suit, or proceeding shall be competent witnesses for or against each other in the same manner as other witnesses, except that the husband shall not be examined for or against his wife or the wife for or against her husband, except in an "action or suit" between the husband and wife, it was held that the words "action" and "suit" are synonymous with "controversy," and cannot be construed as merely designating the particular mode in which the controversy may be presented to the court by action or suit, and, in order to exclude either the husband or wife as a witness, the controversy, in whatever form presented, must be between the husband and wife, and does not include a controversy between a stranger and the husband and

wife. *Anderson v. Snyder*, 21 W. Va. 682, 645.

**Counterclaim and set-off.**

The term "action," as used in the negotiable instruments law, includes counterclaim and set-off. *Rev. Laws Mass. 1902*, p. 562, c. 73, § 207; *Code Supp. Va. 1898*, § 2841a; *Bates' Ann. St. Ohio 1904*, § 3178; *Ann. Codes & St. Or. 1901*, § 4592; *N. D. Negotiable Instruments Law*, § 191; *Rev. Codes N. D. 1899*, § 1060.

In *R. S. Conn. tit. 81, § 3*, providing that no "action" shall be brought for the recovery of a claim or debt of more than six years' standing, the word "action" will not be construed in a narrow and technical sense, as applying only to a demand made by a plaintiff, but extends also to a plea of set-off, since such set-off is as much a claim as it would be if the party attempted to enforce it by direct suit. *Appeal of Hart*, 32 Conn. 520, 539.

**Criminal prosecution.**

"An 'action' is defined to be 'the legal demand of one's rights, or the form given by law for the recovery of that which is due.' A criminal prosecution, although instituted by an individual, is not in any sense an action between the person instituting it and the prisoner." *Harger v. Thomas*, 44 Pa. (8 Wright) 128, 130, 84 Am. Dec. 422.

*Rev. Laws, p. 614, § 1*, provides that the mayor, recorder, aldermen, and common council may make and limit and impose a tax or reasonable fee and amercements against all and upon all who shall offend against their laws, and the said mayor, recorder, or either of the said aldermen shall and may have and take cognizance before them of all or any "action" brought for a breach of any of the said laws. It was held that the word "action" meant "action" in its broader sense, including information, complaint, conviction, etc., and meant no more than that the magistrate may hear, try, and determine any complaint or information for a breach of the law, convict the offender thereof, and thereupon adjudge the proper fine or amercement, and was not used in the sense of a civil action. *Weeks v. Forman*, 16 N. J. Law (1 Har.) 237, 243.

Under the definition of "action" in *Code Civ. Proc. § 3333*, though the *Code of Criminal Procedure* has no express provision authorizing the reading on a second trial of the evidence of a witness since deceased, *Code Civ. Proc. § 830*, authorizing the reading of such testimony taken in an "action," renders it admissible, the word "action" including a criminal prosecution. *People v. Elliott*, 64 N. E. 837, 172 N. Y. 146, 60 L. R. A. 318.

An "action" is the formal demand of one's rights from another person or party,

made and insisted on in a court of justice. In a quite common sense "action" includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person or party of another in such court, including an adjudication upon the right, and its enforcement or denial by the court. Bouvier. A civil action is one of those actions which have for their object the recovery of private or civil rights or of compensation for their infraction, and a criminal action is one of those actions prosecuted in a court of justice in the name of the government against one or more individuals accused of a crime. Hence both civil and criminal actions are included within the term "action," but as used in Laws 1899, p. 53, providing that all actions commenced before a justice of the peace shall be brought in the justice's court in the precinct in which one or more of the defendants reside, the term "action" will be held not to include criminal actions, but applicable alone to civil actions. *State v. Schomber*, 63 Pac. 221, 222, 23 Wash. 573.

The word "actions" may include both civil and criminal proceedings, so that as used in the statute creating Oklahoma Territory, which preserves to the United States court previously having jurisdiction thereof all actions commenced or crimes committed, the word "actions" would include criminal cases, and hence would indicate that the expression "crimes committed" did not mean criminal actions. *Caha v. United States*, 14 Sup. Ct. 513, 514, 152 U. S. 211, 38 L. Ed. 415.

#### **Divorce proceedings.**

The term "action," as used in Civ. Code, § 1, providing that there shall be no distinction in pleading and practice between "actions" at law and suits in equity, and there shall be but one form of "action," which shall be denominated a "civil action," includes an action for divorce. *Evans v. Evans*, 5 N. E. 24, 27, 105 Ind. 204.

#### **Election contest.**

Rev. Code, § 75, c. 31, declares that in all actions the party in whose favor judgment shall be given is entitled to costs. Held, that a contested sheriff's election is not an "action" within the meaning of the word as used in the statute. *Patterson v. Murray*, 53 N. C. 278, 279.

#### **Equity proceedings.**

The word "action" has a legal significance, and does not apply to a suit or proceeding in equity. *Mynes v. Mynes*, 35 S. E. 935, 940, 47 W. Va. 681.

The term "action," as used in Pub. St. c. 189, § 8, and chapter 205, § 9, which provides that no "action" shall be brought against an executor or administrator in his official capacity within one year after the

will shall be proved or administration granted, except for certain specific causes, applies only to actions at law, and not to suits in equity. *Stone v. Corcoran*, 24 Atl. 781, 17 R. I. 759.

"The term 'action' is never properly applied to a suit in equity, nor is a 'suit' a proper designation for an action of account." *Mahar v. O'Hara*, 9 Ill. (4 Gilm.) 424, 429.

"An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong." This definition embraces suits in equity for relief, as well as actions at law. *Tate v. Powe*, 64 N. O. 644, 646.

Code, § 2934, authorizes a new action within one year after abatement of a former action seasonably commenced or reversal or a judgment on the ground not precluding a new action for the same cause. It is held that the word "action" as so used applies only to actions at law, and not to equitable proceedings; this being evidenced from the fact that other terms in the section are terms which are peculiar to actions of law, and are wholly inapplicable to suits in equity. *Dawes v. New York, P. & N. R. Co.*, 82 S. E. 778, 96 Va. 733.

In holding that Pub. St. c. 189, § 8, and chapter 205, § 9, fixing periods of limitations as to "actions" against executors and administrators, were applicable to a suit in equity brought by a creditor, the courts say that it is a familiar doctrine that suits in equity are not within the letter of the statutes of limitation, but these in terms relate to legal remedies only; courts of equity, though regarding themselves as bound by the statutes, applying them rather by way of analogy, and with less strictness where equities are involved than do courts of law. *Warren v. Providence Tool Co.*, 35 Atl. 1041, 1042, 19 R. I. 656.

The term "action," as used in statutes prescribing periods within which civil actions may be commenced, includes actions equitable as well as legal. *Smith v. Richmond*, 19 Cal. 476, 481; *Lux v. Haggin*, 10 Pac. 674, 677, 69 Cal. 255; *Humphrey v. Carpenter*, 39 Minn. 115, 116, 39 N. W. 67.

Rev. St. § 4962, declaring that no person shall maintain an "action" for the infringement of a copyright, unless he shall give notice of such right by inserting in each copy or every edition published a statement of such copyright of a certain prescribed form, means an "action" either at law or in equity. *Thompson v. Hubbard*, 9 Sup. Ct. 710, 719, 131 U. S. 123, 33 L. Ed. 76.

A statute authorizing "civil actions" does not use the term "action" as applying exclusively to an "action at law," in contradistinction to a suit in equity, but includes both

actions at law and suits in equity, and is used only to distinguish proceedings instituted for the purpose of enforcing a private right or redressing a private wrong from proceedings instituted to punish crimes. *Fenstermacher v. State*, 25 Pac. 142, 143, 19 Or. 504.

Code Civ. Proc. § 547, providing that a judge shall not act as such in an "action or proceeding" to which he is a party or interested, refers to actions and proceedings in courts of justice, as provided for in the Code. *First Nat. Bank v. Roberts*, 23 Pac. 718, 721, 9 Mont. 323.

Comp. Laws, § 1316, which provides that in any action brought on negotiable paper given on a usurious consideration, if the plaintiff becomes a bona fide purchaser of the paper before it becomes due he will be entitled to recover, unless he had notice of the usury, construed to include suits in equity as well as actions at law. *Coatsworth v. Barr*, 11 Mich. 199.

The word "actions," as used in the statute regulating jurisdiction of circuit and supreme courts of Michigan, is not used in a limited or technical sense, but it is used in its largest sense, and includes all civil actions, whether cases at law or in equity, being intended to distinguish between civil actions and criminal prosecutions. *Scott v. Smart's Ex'rs*, 1 Mich. 295, 297.

The term "action," as used in Act April 15, 1869, providing that interest shall not disqualify a party as a witness, but that such statute shall have no application to "actions" by or against executors, administrators, etc., construed to "embrace civil proceedings, whatever their form, as well as 'actions' technically so called." *Taylor v. Kelly*, 80 Pa. 95, 98; *Appeal of McBride*, 72 Pa. (22 P. F. Smith) 480, 483.

The words "action" and "suit," as used in Code, § 69, providing that the distinction between "actions" and "suits" heretofore existing is abolished, mean the formal methods of pursuing and establishing rights, and the actual or substantial difference between legal and equitable causes of action, and the various forms of relief applicable to each, are not disturbed by the statute. *Marsh v. Benson* (N. Y.) 19 How. Prac. 415, 419.

The term "action," as used in Code, § 227, providing that in actions for the recovery of money plaintiff shall be entitled to a writ of attachment, includes an action to enforce a contract of sale made for the plaintiff's benefit and to recover the purchase money contracted to be paid thereby, since by Code, § 69, the distinction previously existing between actions at law and suits in equity was abolished, and there now exists but one form of action, denominated a "civil action," and, when the word "action" is used in re-

lation to attachments, it must be deemed to include all civil actions both at law and in equity. *Corson v. Ball* (N. Y.) 47 Barb. 452, 453.

The word "action," as used in 2 Starr & C. Ann. St. Ill. p. 2642, c. 83, par. 25, which provides that in any of the actions specified in any of the sections of the act, if judgment shall be given for plaintiff and shall be reversed by writ of error or on appeal, or if plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of the suit, plaintiff may commence a new action within a year after such judgment reversed or given against the plaintiff, is not limited to actions at law, but includes suits in equity; and hence, where plaintiff was nonsuited in a chancery suit, and limitations ran against his claim, he was entitled to commence an action at law on the claim within a year after the entry of the nonsuit. *Lamson v. Hutchings* (U. S.) 118 Fed. 321, 324, 55 O. C. A. 245.

#### **Ex parte proceedings.**

"The vital idea of an action," as given by Bouvier, "is a proceeding on the part of one person as actor against another for the infringement of the right of the first in the manner prescribed by law." There can be no action unless there is not only a petitioner or complainant, but a respondent or defendant, and an ex parte proceeding is not an "action" within the meaning of a statute relating to actions. *Jones v. Bank of Leadville*, 17 Pac. 272, 273, 279, 10 Colo. 464.

#### **Foreclosure of lien on contract.**

Code Civ. Proc. § 829, providing that "on the trial of an action" the surety interested shall not be examined on his own behalf against the administrator of a deceased person, includes the trial of a cause brought to foreclose and collect the amount due on a land contract. *Parks v. Andrews*, 10 N. Y. Supp. 344-346, 56 Hun, 391.

Code Civ. Proc. § 414, subd. 4, provides that the word "action" contained in this chapter is to be construed, when it is necessary so to do, as including a special proceeding or any proceeding thereafter in an action. Thus, a proceeding to enforce a mechanic's lien will be included. *Gee v. Torrey*, 28 N. Y. Supp. 239, 241, 77 Hun, 23.

Code, § 2, defines an "action" to be an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, and section 3 enacts that every other remedy is a special proceeding. Held, that a proceeding under and as prescribed by the mechanic's lien law of 1851 for the city and county of New York (chapter 513, Laws 1851, as amended by chapter 404, Laws 1855) for the enforcement

of a lien was not an action, but a special proceeding.—*Hallahan v. Herbert*, 57 N. Y. 409, 413.

As the term is used in Laws 1864, c. 402, limiting the taxable cost, exclusive of disbursements, in "actions at law" on contract to \$25, it includes personal actions on contract the judgments in which are enforced by execution, though to a certain extent they may be proceedings in rem, which circumstance does not necessarily divest them of their character of actions at law, such as actions to enforce mechanics' liens, which, though they possess some of the characteristics of suits in equity, are not sufficiently marked to authorize a disregard of their indicia of actions at law.—*Marsh v. Fraser*, 27 Wis. 596, 597.

#### **Habeas corpus.**

An "action" is the lawful demand of one's right in a court of justice. It is any proceeding for the purpose of obtaining such remedy as the law allows, and under such definition a proceeding upon habeas corpus is in the nature of an action. *State v. Newell*, 34 Pac. 28, 29, 13 Mont. 302.

An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right. Unless the state is the plaintiff, and the proceeding is against the defendant for the punishment of a criminal offense, it is a civil action, so that a writ of habeas corpus is a civil action. *State v. Huegin*, 85 N. W. 1046, 1053, 110 Wis. 369.

#### **Highway proceeding.**

Act April 1, 1874, provides that appeals, writs of error, and certiorari, to be effective, must be taken within two years after "any judgment in any real, personal or mixed action." Held, that the words "judgment" and "action" were to be used in their comprehensive rather than in their strictly technical sense, embracing decrees and orders in the nature of judgments, and including proceedings to vacate and relocate a township road. *In re Road in Salem Tp.*, 103 Pa. 250, 254, 40 Leg. Int. 375.

The word "action" as employed in Rev. St. c. 1, § 5, providing that actions pending at the time of the passage or repeal of an act are not affected thereby, does not include a petition pending before the county commissioners for gates at a railroad crossing, founded on chapter 51, § 34. *Grand Trunk Ry. of Canada v. Cumberland County Com'rs*, 33 Atl. 988, 88 Me. 225.

Rev. St. c. 1, § 3, providing that "actions" pending at the time of the passage or repeal of an act should not be affected thereby, construed not to include a petition for the location of a highway, pending before a board

of county commissioners. *Inhabitants of Webster v. County Com'rs*, 63 Me. 27, 29.

#### **Insolvency proceedings.**

Civ. Code, §§ 2466, 2468, requiring partnerships doing business in the state, under a designation not showing the names of the persons, to file a certificate with the clerk before they shall be allowed to maintain an "action," does not include proceedings in insolvency, since they are special proceedings, and are not actions. *In re Dennery*, 26 Pac. 639, 640, 89 Cal. 101.

Rev. St. c. 21, § 3, providing that "actions" pending at the time of the passage or repeal of an act shall not be affected thereby, does not include proceedings in insolvency. *Inhabitants of Belfast v. Fogler*, 71 Me. 403, 404.

#### **Mandamus.**

In Gen. St. tit. 1, § 189, which provides that whenever any action at law shall be tried by the superior court without a jury the court shall, upon the motion of either party, find the facts upon which its judgment is rendered, the term "action at law" includes a proceeding by mandamus. *State v. New Haven & Northampton Co.*, 41 Conn. 134, 137. See, also, *City of Roodhouse v. Briggs* (Ill.) 62 N. E. 778; *Kentucky v. Dennison*, 65 U. S. (24 How.) 66, 97, 16 L. Ed. 717.

A mandamus proceeding is an "action at law," and it is therefore governed by the same rules of pleading that are applicable to other actions at law. *People v. Board of Trade of City of Chicago*, 62 N. E. 196, 193 Ill. 577; *Dement v. Rokler*, 19 N. E. 83, 39, 126 Ill. 174.

A proceeding on mandamus, where there has been a return and the suit has gone to pleadings and a trial thereon has been had, is not a special proceeding, but an "action," under the Code of New York. *People v. Lewis* (N. Y.) 28 How. Prac. 159, 172.

#### **Motion for judgment.**

A motion for judgment under the provisions of a statute is an action, and as such is embraced within the provisions of the statute defining the term "action." *Banks v. Brown*, 12 Tenn. (4 Yerg.) 198, 199.

#### **Petition for new trial.**

A suit or action is a legal demand of one's right. But a petition for a new trial, like a motion for the same object, is not an action. It demands nothing, but simply asks permission to review a cause already decided. *Magill v. Lyman*, 6 Conn. 59, 61.

#### **Petition to vacate judgment.**

A petition to vacate a judgment and for a new trial, though in one sense a mere incident to the original action, is yet to be considered as being to a very great extent of

the nature of a suit in equity to vacate or set aside a judgment for fraud or otherwise, and rising nearly or quite to the dignity of an action. *Fullenwider v. Ewing*, 1 Pac. 300, 301, 80 Kan. 15.

#### Probate proceeding.

Under Code Civ. Proc. § 2223, providing that an action is an ordinary proceeding for the enforcement and protection of a right and the redress of a wrong, and that every other remedy is a special proceeding, the statutory proceeding in the superior court to determine the heirship of certain claimants is a special proceeding. *Smith v. Westerfield*, 26 Pac. 206, 207, 88 Cal. 374.

Code, §§ 2265-2603, declaring that actions commenced by or against a personal representative of the decedent may be prosecuted against any succeeding executor or administrator, includes a claim filed under order of court against the estate of another decedent. *Reynolds v. Crook*, 11 South. 412, 414, 95 Ala. 570.

By Code Civ. Proc. § 21, an action is defined to be an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement of a right, the redress or prevention of a wrong, or the punishment of a public offense. Under such statute a proceeding to set aside the probate of a will is not an action, though section 363 provides that the word "action" shall be construed, whenever necessary, as including an action or proceeding of a civil nature. In *re Joseph's Estate*, 50 Pac. 768, 118 Cal. 660.

Under Code, § 2505, providing that an action is a proceeding for the enforcement or protection of a private right or the prevention or redress of a private wrong, the term "action" does not include proceedings for the appointment of a guardian. *Lawrence v. Thomas*, 51 N. W. 11, 84 Iowa, 362.

"Action," which, as defined in Rev. St. 1898, § 2595, is an ordinary proceeding in a court of justice by which a party prosecutes another for the enforcement of a right, the redress or prevention of a wrong, or the punishment of a public offense, does not include an application for the appointment of a guardian for one alleged to be insane, but it is "special proceedings," which latter term is expressly provided in section 2596 to include all remedies other than actions. In *re Welch*, 84 N. W. 550, 552, 108 Wis. 387.

The term "action" in Gen. St. § 1094, providing that, in actions by or against the representatives of a decedent, entries of memoranda of his relative to matters in issue are admissible, does not include an appeal from the probate decree admitting the will to probate. *Appeal of Barber*, 27 Atl. 973-981, 63 Conn. 393, 22 L. R. A. 90.

The term "action," as used in the title of an act and its subsequent provisions de-

claring that the statute of limitations shall only begin to run in respect to "such actions" after the happening of a certain contingency, does not apply to special proceedings in surrogates' courts. In *re Perry's Estate*, 15 N. Y. Supp. 535, 537, 2 Con. Sur. 536.

The vital idea of an "action" is the proceeding on the part of one party as actor against another for the infringement of some right of the first before a court of justice in the manner prescribed by the court or law. The contest of a will is not an action. The thing before the court, and about which it was to judicially inquire, was a paper, in form a testamentary disposition of property. If it was a will, certain legal consequences would follow. If it was not a will, certain other legal consequences would follow. *Clough v. Clough*, 51 Pac. 513, 515, 10 Colo. App. 433.

Under Code Civ. Proc. § 414, subd. 4, providing that the word "action" contained in the chapter relating to the time for enforcing a civil remedy is to be construed as including special proceedings so to do, a special proceeding in a surrogate's court to obtain payment of a judgment from a decedent's estate is an action on the judgment, within the meaning of the statute of limitations. In *re Morton's Estate*, 23 N. Y. Supp. 1104, 1107, 70 Hun, 61.

A demand for an allowance of attorney's fees against an estate in process of administration is considered an action at law. *MacDonald v. Tittmann*, 70 S. W. 502, 504, 96 Mo. App. 536.

#### Quo warranto.

An information in the nature of quo warranto is not regarded as an action. It involves a civil right—that of holding office—and the relator may recover his costs against defendant, but it is in the nature of a criminal proceeding. *Everet v. Roe*, 26 N. J. Law (2 Dutch.) 215, 217.

The term "action," as used in Kan. Code, § 652, embraces all proceedings in a court of justice by which a party prosecutes another for the enforcement or protection of a right, or the redress or prevention of a wrong, or the punishment of a public offense, and includes proceedings in quo warranto. *Ames v. State of Kansas*, 4 Sup. Ct. 437, 442, 111 U. S. 449, 28 L. Ed. 482.

Laws Idaho 1st Sess. § 601, authorizing any person to intervene in an action who has an interest in the matter in litigation, by the word "action" means a civil action purely, and does not apply to a proceeding in quo warranto. *People v. Green*, 1 Idaho, 235, 239.

#### Recovery of penalty or forfeiture.

A civil action is an ordinary proceeding in a court of justice by one party against an-

other for the enforcement or protection of a private right or the redress or prevention of a private wrong. It may also be brought for the recovery of a penalty or forfeiture. Code, § 8. *Chandler v. Commonwealth*, 61 Ky. (4 Metc.) 66, 69.

A proceeding to "amerce" a sheriff for neglecting and refusing to execute a special writ of execution issued to him is a proceeding in the nature of an action to redress a wrong. The object of the proceeding is to give the judgment creditor satisfaction or a penalty for the omission of the official duty of a sheriff. An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, and hence a proceeding to "amerce" a sheriff falls within the provisions of Code, § 18, subd. 4, providing that an action for a penalty or forfeiture must be brought within one year, though section 18 does not technically and strictly embrace a proceedings to "amerce," because it refers to civil actions exclusively, but its spirit and intent does apply to such a proceeding. *Fuiler v. Wells, Fargo & Co.*, 22 Pac. 561, 562, 42 Kan. 551.

#### As right of action.

The term "action," as used in Code, § 9220, declaring that "an action" for the death of a father shall survive on the death of the mother of the children, means the right of action. *David v. Southwestern R. Co.*, 41 Ga. 223, 224.

#### Scire facias.

A scire facias is an action. *Milsap v. Wildman*, 5 Mo. 425; *Chestnut v. Chestnut*, 77 Ill. 346, 349.

"Action at law" and "suit at law" are synonymous terms; they are one and the same thing; and hence a scire facias, being an action which may be pleaded to as an action and may be released by the rules of all actions, is comprehended within the term "suit at law" in a city charter, giving a right of appeal from the city court to the superior court at the first term to which any suit at law is returnable. *White v. Washington School Dist.*, 45 Conn. 59, 61.

"Actions are to be distinguished from those proceedings, such as writs of error, scire facias, and the like, where, under the form of proceedings, the court and not the plaintiff appears to be the actor. A scire facias is not an action." *Heath v. Bates*, 70 Ga. 633, 636; *Challenor v. Niles*, 78 Ill. 78, 79; *Sutton v. Cole* (Mo.) 55 S. W. 1052, 1053.

The word "action," as defined by the New York Code, is sufficiently comprehensive to include the proceeding by sci. fa. to have execution, etc. It is a proceeding in a court of justice by which plaintiff prosecutes de-

fendant for the enforcement of a right; the remedy therefor given by sci. fa. to obtain execution of the judgment is superseded by the provisions for an action therefor under the Code. *Cameron v. Young* (N. Y.) 6 How. Prac. 372, 373.

#### Special and statutory proceedings.

An "action," defined by the Code to be an ordinary proceeding in a court of justice, does not include an application by petition to the Supreme Court under the statute to compel a specific performance by infant heirs of a contract for the sale of land made by the ancestor, as the statutory definition of an "action" can hardly be held to embrace a proceeding which is purely statutory and new, and which is conducted in no respect according to the ordinary forms of the common law, as is the case of the proceeding in question, which is peculiar and unknown to our courts, except by special statutory provision. *Hyatt v. Seeley*, 11 N. Y. (1 Kern.) 52, 55.

By Rev. St. c. 114, it is provided that "all controversies which might be the subject of a personal action at law or of a suit in equity" may be submitted to the decision of arbitrators. Held, that such section did not authorize the submission to arbitrators of a claim under the mill act (Rev. St. c. 116) for damage occasioned to land by flowing it by a milldam, collectible under a particular statutory mode of redress, and hence not a controversy which might be the subject of a personal action at law or of a suit in equity. *Henderson v. Adams*, 59 Mass. (5 Cush.) 610, 612.

A proceeding by a trustee to mortgage trust property is a special proceeding, and not an action. *Losey v. Stanley*, 31 N. Y. Supp. 950, 953, 83 Hun. 420.

Pasch. Dig. art. 4604, which provides that limitation will be suspended on all debts grounded upon contract in writing by the commencement of an "action or suit" within four years next after the same could have been instituted, is not met by the posting of notices of a trust sale by a trustee before the debt secured by the trust is barred, but not in time to make the sale before the bar of limitation would be complete. *Blackwell v. Barnett*, 52 Tex. 326-335.

Section 3333 of the Code of Civil Procedure provides that the word "action," as used in the new revision of the statutes, signifies an ordinary prosecution in a court of justice by a party against another party for the enforcement of a right, the redress of a wrong, or the punishment of a public offense. Section 3334 provides that every other prosecution by a party for either of the purposes specified in the last section is a special proceeding. Under this definition the court held that an application by the Attorney General for the examination of witnesses

prior to the beginning of an action, as authorized by Laws 1897, c. 383, is not a special proceeding, and therefore an order of the Appellate Division, affirming an order in relation to such examination, is not appealable to the Court of Appeals. *In re Attorney General*, 50 N. E. 57, 155 N. Y. 441.

The word "action" as used in Code Civ. Proc. §§ 392, 395, providing for a place of trial of civil actions, and in the amendment of 1901 to section 394, providing as to the venue of actions against a city, refer to actions as defined in section 22 of the Code, ordinary proceedings between parties, and not to special proceedings, defined by section 23 to include all other remedies. *City of Santa Rosa v. Fountain Water Co.*, 71 Pac. 1123, 1124, 138 Cal. 579.

The word "action," as used in relation to the time of commencing actions, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature. Code Civ. Proc. Cal. 1903, § 363; *Rev. St. Utah* 1898, § 2901; *Gwinn v. Melvin* (Idaho) 72 Pac. 961, 962.

#### Suit synonymous.

The words "suit" and "action," as applied to legal proceedings, are synonymous terms. *Dullard v. Phelan*, 50 N. W. 204, 205, 83 Iowa, 471; *Lamson v. Hutchings* (U. S.) 118 Fed. 321, 323, 55 C. C. A. 245; *Page v. Brewster*, 58 N. H. 126; *Magill v. Parsons*, 4 Conn. 317, 322; *Wilt v. Stickney*, 15 Nat. Bankr. R. 23, 24; *Kennebec Water Dist. v. City of Waterville*, 52 Atl. 774, 780, 96 Me. 234; *White v. Washington School Dist.*, 45 Conn. 59, 61; *Overseers of Poor of Town of Clayton v. Beedle* (N. Y.) 1 Barb. 11, 15, 16; *Webb v. Allen*, 40 S. W. 342, 343, 15 Tex. Civ. App. 605; *Cobbey's Ann. St. Neb.* 1903, § 1851.

The words "suit" and "action" are generally synonymous, though the term "suit" is the appropriate one to designate a proceeding in a court of equity, and "action" to designate one in a court of law. *Miller v. Rapp*, 34 N. E. 125, 126, 7 Ind. App. 89.

"Action" and "suit" are often synonymous, though an action may be considered a form of a suit, and the latter is often applied to proceedings in equity, and "actions" to those at law, up to judgment. *Hall v. Bartlett* (N. Y.) 9 Barb. 297, 300 (citing *Weston v. City of Charleston*, 27 U. S. [2 Pet.] 449, 464, 7 L. Ed. 481); *Miller v. Rapp*, 34 N. E. 125, 126, 7 Ind. App. 89.

The word "suit" is a generic term, which denotes any legal proceeding of a civil kind by one person against another. The term "suit," however, is used in opposition to "action," suit being the proper word for a litigation in equity, and "action" for a litigation in the court of law. *Branyan v. Kay*, 11 S. E. 970, 971, 33 S. C. 293; *Appleton v. Turnbull*, 24 Atl. 592, 593, 84 Me. 72.

The term "suit" is more comprehensive in its signification than the word "action," extending to any proceeding in a court of justice seeking a remedy which the law affords, and to any legal application to a court of justice. *City of Marion v. Ganby*, 26 N. W. 40, 41, 68 Iowa, 142.

While the common use of the terms "action" and "suit" is to limit the former to proceedings at law and the latter to equitable proceedings, the words are not used with such exactness in statutes as to warrant the conclusion that they are only to be taken in this limited sense. The word "suit" is the more general term, and is broad enough to cover either form of proceeding; but the terms are often used in application to both classes of cases, and we so find them in our statutes. *Nlantic Mills Co. v. Riverside & O. Mills*, 81 Atl. 432, 19 R. I. 34; *Didier v. Davison*, 10 Paige, 515, 517; *McPike v. McPike*, 10 Ill. App. (10 Bradw.) 332, 333.

"The legal signification of the word 'suit' comprehends the prosecution of any claim, demand, or request, and is much broader than the term 'action,' and may embrace it, but does not define it." *Cornish v. Milwaukee & L. W. R. Co.*, 19 N. W. 443, 444, 60 Wis. 476 (quoting *Burrill*, *Law Dict.* tit. "Suits").

"Suit" is defined to be the prosecution or presentation of some claim, demand, or request. In law language, it is a prosecution of some demand in a court of justice. *Story*, *Const.* § 1791. The word "suit" as used in its modern sense is synonymous with "action." 1 Barb. 15. An "action" is defined to be a legal demand of one's right, or it is the form of a suit given by law for the recovery of that which is due. 1 Barb. 15. Until judgment the suit is called an action. *Bouv. Wilt v. Stickney* (U. S.) 80 Fed. Cas. 258, 257.

The word "action," in Code Iowa 1873, providing that the actions in a court of record shall be commenced by serving defendant with a notice signed by plaintiff and his attorney, etc., is identical with the word "suit" in the act of Congress authorizing the removal of suits from state to federal courts. *In re Receivership of Iowa & Minnesota Const. Co.* (U. S.) 6 Fed. 799, 800.

The words "suit," "action," or "proceedings at law," in Gen. St. c. 36, § 24, providing that no person shall be disqualified as a witness in common civil suits or proceedings at law or in equity by reason of his interest in the event of the same as a party or otherwise, and providing that in all actions except actions on book account, where one of the original parties to a contract or cause or action at issue on trial is dead or insane, the other party shall not be admitted to testify in his own favor, and in Acts 1864, No. 31, § 1, providing that the proviso in the former act shall not in any man-



ner affect any suit brought or pending on the 1st day of August, 1863, were used in reference to the same subject-matter and substantially as synonymous terms. *Calderwood v. Calderwood's Estate*, 38 Vt. 171-174.

The word "suit" is a more comprehensive word than "action," and may include a special proceeding. Cent. Dict. The substitution of the word "action" in Code Civ. Proc., prohibiting attorneys from buying a demand with the intent to bring an action thereon, the word "suit" having been used in a former statute, shows the intent to narrow the statute, and therefore the statute does not preclude an attorney from buying a demand against an estate with the intent to institute a special proceeding for its collection. *Tilden v. Aitkin*, 55 N. Y. Supp. 735-737, 37 App. Div. 28.

"'Suit' is a more general and comprehensive word than 'action.' It means, in its ordinary and popular acceptation, 'any action or process for the recovery of a right or claim; legal application to a court for justice; prosecution of right before any tribunal.' Webst. Dict. It is undoubtedly derived originally from the secta or suit of witnesses, which every plaintiff was required to produce or offer to produce when he preferred his claim in court. 'Inde product sectam'—thereupon he brings suit—a form of words still continued. 2 Bl. Comm. 295. In this wide sense a writ is pending and undetermined in court until the plaintiff has fully recovered and realized his just demand. While seeking to compel its satisfaction by a sale of the property of the defendant, he is still pursuing his suit; prosecuting his claim." *Ulshafer v. Stewart*, 71 Pa. (21 P. F. Smith) 170, 174.

The word "suit" in section 6097, Rev. St. providing that a creditor whose claim is rejected shall commence a suit thereon within six months or be barred, is used as synonymous with the word "action" in Rev. St. § 4971, providing that there shall be but one form of action, known as a "civil action." A suit brought in the court of common pleas under the provisions of Rev. St. § 6352, against an assignee for the benefit of creditors, to require him to allow the claim of the plaintiff in the settlement of his trust, is a civil action. *Kennedy v. Thompson*, 3 Ohio Cir. Ct. R. 446.

The word "action" in Code Civ. Proc. § 73, prohibiting an attorney from buying a demand with an intent to bring an action thereon, is narrower than the word "suit," which is used in a former statute prohibiting attorneys from buying demands with intent to bring suit thereon; and therefore the statute first mentioned does not prohibit an attorney from buying a demand against an estate with intent to institute special proceedings thereon. *Tilden v. Aitkin*, 55 N. Y. Supp. 735, 737, 37 App. Div. 28.

### Summary proceeding.

A summary proceeding is not an "action" within Laws N. Y. 1896, c. 748, authorizing justices of the district court to set aside a verdict rendered in an action. *Decker v. Sexton*, 43 N. Y. Supp. 167, 171, 19 Misc. Rep. 59.

### Supplementary proceedings.

The word "action," as used in Code Civ. Proc. § 382, subd. 7, providing that an "action" on a judgment rendered in the court not of record must be commenced within six years, does not include supplementary proceedings to enforce the collection of a justice's judgment which had been filed and docketed in the office of the county clerk. *Green v. Hauser*, 9 N. Y. Supp. 660, 18 Civ. Proc. 354; *Bolt v. Hauser*, 10 N. Y. Supp. 397, 399, 19 Civ. Proc. R. 7.

Rev. St. 1881, § 412, providing that the court in term or the judge in vacation shall change the venue of any "civil action" on application of either party, includes proceedings supplementary to execution. *Burkett v. Holman*, 3 N. E. 406, 408, 104 Ind. 6; *Same v. Bowen*, 21 N. E. 38, 39, 118 Ind. 379.

It is said in 1 Bac. Abr. 46, note "b," that a suit, till judgment, is properly called an "action," but not after; and hence a release of all actions is regularly no bar to an execution. Prac. Act, art. 18, § 2, provides that after the lapse of five years from the entry of judgment an execution may be issued only by leave of the court and notice to the adverse party. Article 32 declares that the act shall not apply to actions brought before it takes effect. Held, that the statute applies to judgments rendered before the passage of the act as well as subsequently, since the word "action" should not be extended beyond its ordinary signification. *Bolton v. Landsdown*, 21 Mo. 399, 400.

"Action" is the name properly given to a suit until after judgment, and therefore a release of all actions is no bar to an execution. *Tichenor v. Collins*, 45 N. J. Law (16 Vroom) 123, 124.

### ACTION AFFECTING CHARACTER.

See "Affecting."

### ACTION AFFECTING TITLE.

See "Affecting."

### ACTION CONCERNING REAL ESTATE.

See "Concern."

### ACTION CONCERNING THE TRADE OF MERCHANDISE BETWEEN MERCHANTS.

The clause in the statute of limitations which excepts "actions which concern the

trade of merchandise between merchant and merchant" extends only to open and current accounts stated. It must be a direct concern of trade; liquidated demands or bills and notes which are only traced up to the trade of merchandise are too remote to come within its description. *Ramchander v. Hammond* (N. Y.) 2 Johns. 200, 202.

The clause in the statute of limitations which excepts "actions which concern the trade of merchandise between merchant and merchant" has, according to the courts of New York, "given rise to much discussion in the English courts as well as in those of this country, and it has not always been attended by the same results. \* \* \* The most prominent case in which the ruling of this clause \* \* \* was involved is *Coster v. Murray* (N. Y.) 5 Johns. Ch. 522, and, on appeal, in *Murray v. Coster* (N. Y.) 20 Johns. 576, 11 Am. Dec. 333. It appears to have established this result: that the clause only applies to open and current accounts, as well between merchants as others, where there are mutual dealings and mutual debits and credits, and had no application to such a case as the one then before the court, where the items of the account were all on one side, arising from the joint purchase of goods, one of the purchasers taking the whole goods and agreeing to account to the other for one-third of the proceeds. No part of such account had arisen within six years, and under these circumstances the demand was considered to be barred." *Atwater v. Fowler* (N. Y.) 1 Edw. Ch. 417, 425.

#### ACTION EX CONTRACTU.

The term "actions ex contractu," as used in Appellate Court Act, § 8, has reference to the nature of the cause of action, and not to the form of the proceeding to enforce it. By it is meant all causes of action arising ex contractu, as distinguished from those arising ex delicto, without regard as to whether the proceeding is at law or in equity. *Umlauf v. Umlauf*, 103 Ill. 651, 654.

The expression "actions ex contractu," as used in *Hurd's Rev. St.* 1899, p. 525, c. 37, § 8, giving appellate courts jurisdiction in certain actions ex contractu, has reference to the nature of the cause of action, rather than to the form of the proceeding for its enforcement, and it is immaterial whether such proceeding is in law or equity. *Clinton Mut. County Fire Ins. Co. v. Zeigler*, 66 N. E. 222, 223, 201 Ill. 371.

An action on the violation of an express contract made by the parties themselves is called an "action ex contractu," and, where it is sought to combine in the same action charges against a carrier for violation of a special contract and also for violation of his common-law duties, the action is called "ex delicto quasi ex contractu." *Nelson*

*v. Great Northern Ry. Co.* (Mont.) 72 Pac. 642, 645.

#### ACTION EX DELICTO.

Actions ex delicto are such as arise from torts or wrong, and in which the party may be arrested on process and imprisoned on the judgment, and in which there is no right of contribution between the several defendants for a joint wrong, and which at common law abated on the death of the party, and in which joint tortfeasors are severally liable, and in which the damages to be recovered are general damages, or those which necessarily or by implication of law result from the act or default complained of, and are unliquidated. *Van Oss v. Syon*, 56 N. W. 190, 191, 85 Wis. 661.

An action to recover unliquidated damages for a personal injury caused by negligence, although the negligence complained of amounts to a breach of contract on the part of the defendant, belongs to the class of cases "actions ex delicto." Tort is the ground of the action, and the law of torts must govern the case. *Doremus v. Root* (U. S.) 94 Fed. 760, 761.

The form of action based on violations of the implied contract of a carrier declared by law is called an action "ex delicto" or in tort. It is frequently difficult to determine from an examination of the complaint whether the action is on contract or in tort; that is, whether it is intended to charge the carrier with a violation of the express contract made by the parties, or a violation of the implied contract made by the law. The implied contract created and declared by law relative to the duties and liabilities of a carrier is so complete within itself that there is little necessity for any additional contract, unless the carrier desires to limit his liability; and so usual is it for shippers to rely upon this contract created by law in actions against carriers that it has been held that "tort is the natural and habitual foundation of an action for the breach of an ordinary contract of carriage." *Nelson v. Great Northern Ry. Co.* (Mont.) 72 Pac. 642, 645 (citing *Whittenton Mfg. Co. v. Memphis & O. R. Packet Co.* [U. S.] 21 Fed. 896, and cases there cited).

A suit under the national banking act to recover twice the amount of interest paid is a suit for a penalty and is ex delicto. *Union Glass Co. v. First Nat. Bank of New Castle*, 10 Pa. Co. Ct. R. 565, 572.

#### ACTION FOR DECEIT OR FRAUD.

The common-law "action for deceit" is an action in tort. There can be no recovery unless it can be shown that the injury was done and loss occasioned by the false statement relied upon. In actions of this sort it

was long ago laid down that fraud without damage, or damage without fraud, could not give rise to such an action. It therefore must clearly appear upon the face of the petition that the false statement complained of actually caused loss to the claimant. *Brady v. Evans* (U. S.) 78 Fed. 558, 560, 24 C. C. A. 236.

Code, § 291, subsec. 4, authorizing the arrest of a defendant in a civil action brought to recover damages for fraud and deceit, will be construed to include an action for seduction. *Hood v. Suddeth*, 16 S. E. 397, 400, 111 N. C. 215.

Code Civ. Proc. § 28, providing that "an action for relief on the ground of fraud" must be begun within three years from the time the cause of action accrued, does not include an action to remove a cloud on plaintiff's title caused by a fraudulent conveyance. The statute has reference to suits by parties who are asking to be relieved from contracts which they were fraudulently induced to make, as where a deed has been fraudulently obtained, and suits of that character, where fraud is the substantive cause of the action; but where the alleged fraud is only an incident of the action, and the fraudulent deed conveyed nothing, and the plaintiff was in a position to recover possession of the land notwithstanding the fraudulent conveyance, and without first procuring its cancellation in equity, the statute has no application. *Wagner v. Law*, 28 Pac. 1109, 1115, 3 Wash. St. 500, 15 L. R. A. 784, 28 Am. St. Rep. 56.

A complaint alleging that plaintiff recovered a judgment against defendant, which is still unpaid and unsatisfied; that defendant willfully and falsely represented that he could not pay any of his debts, but that if plaintiff would accept a small portion of such judgment in full settlement, and give defendant a release, then defendant would procure a person to take an assignment of the judgment; that, relying on such statement, plaintiff accepted the offer and gave defendant a release, and made an assignment to one M.; that the money was paid not by M., but by defendant; and that the defendant was able to pay the judgment in full—states all the constituents in an action for deceit, viz., representation, falsity, scienter, distribution, or injury. *Wessels v. Carr*, 38 N. Y. Supp. 600, 16 Misc. Rep. 440.

The gist of the action for deceit is that the defendant made false representations knowing them to be untrue. *Watson v. Jones*, 25 South. 678, 681, 41 Fla. 241.

In order to sustain an action for deceit, there must be proof of fraud; nothing short of this will suffice. *Bank of Atchison County v. Byers*, 41 S. W. 325, 331, 139 Mo. 627 (citing *Verry v. Peek*, L. R. 14 App. Cas. 874).

## ACTION FOR INJURY TO PERSON OR CHARACTER.

The words "action for injury to the person," as generally used, include not only such injuries as result from trespass, but also such as result from a breach of the contract obligation. It will not, however, cover an action against a physician for negligence or want of skill in the treatment of a patient. *Wood v. Downing's Adm'r*, 62 S. W. 487, 489, 23 Ky. Law Rep. 62-64, 110 Ky. 656.

Rev. St. c. 127, § 2, subd. 1, providing that the defendant shall be liable to arrest where the "action is for an injury to person or character," does not include an action by the personal representatives for the wrongful death of the decedent, and such an action is not for an injury to the person of the deceased. *Gibbs v. Larrabee*, 23 Wis. 495, 496.

Code, § 291, authorizing the arrest of a defendant in a civil action for injury to character and person, was construed to include an action for seduction. *Hood v. Suddeth*, 16 S. E. 397, 399, 111 N. C. 215.

## ACTION FOR MESNE PROFITS.

See "Mesne Profits (Action for)."

## ACTION FOR NUISANCE.

The "action for a nuisance" provided for in Code Civ. Proc. tit. 1, c. 14, art. 7, is a strictly common-law action. At the common law the remedy for an injury sustained by a private nuisance was an action on the case for damages, or by assize of nuisance, or by a writ of quod permittat prosternere. In the former action the party injured only recovered satisfaction for the injury, but could not thereby remove the nuisance. In the two latter, if the plaintiff prevailed, he not only recovered damages for the injury sustained, but judgment that the nuisance be abated or removed. *Waggoner v. Jermaine* (N. Y.) 3 Den. 306, 310, 45 Am. Dec. 474. By Code Civ. Proc. § 453, the proceedings by writ of nuisance were changed into an action, and it has been declared that the action thus provided for is a substitute for the writ of nuisance. *Miller v. Edison Electric Illuminating Co.*, 80 N. Y. Supp. 319, 320, 78 App. Div. 390 (citing *Ellsworth v. Putnam* [N. Y.] 16 Barb. 565).

Code Civ. Proc. § 963, declares that in certain actions, including an action for a nuisance, the issues of fact must be tried by a jury. Held, that the phrase "for a nuisance" imported an action for damages, and hence an action to enjoin a nuisance was not within the purview of the section. *Olmsted v. Rich*, 6 N. Y. Supp. 826, 53 Hun, 638 (following *Cogswell v. New York, N. H. & H. R. Co.*, 105 N. Y. 819, 11 N. E. 518).

**ACTION FOR PENALTY OR FORFEITURE.**

Code, § 18, subd. 4, providing that an "action for a penalty or forfeiture" must be brought within one year, must be construed to embrace within its terms a proceeding to amerce a sheriff for neglecting and refusing to execute a special writ of execution issued to him, though, technically and strictly, the language of the section does not embrace the proceeding to amerce, because it refers to civil actions exclusively. An action is defined by Code, § 4, as an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. The proceeding to amerce is in the nature of an action to redress a wrong, its object being to give the judgment creditor satisfaction or a penalty for the omission of the official duty of the sheriff. *Fuller v. Wells, Fargo & Co.*, 22 Pac. 561, 562, 42 Kan. 551.

**ACTION FOR RECOVERY OF MONEY.**

See "For the Recovery of."

The words "recovery of the money," as used in Code, § 227, allowing the property of a debtor to be attached in an action for the recovery of the money against the debtor who is not a resident of the state, do not include an action for damages for wrongs, and hence an attachment cannot be issued in an action for the conversion of personal property. *Shaffer v. Mason* (N. Y.) 43 Barb. 501, 502, 18 Abb. Prac. 455, 29 How. Prac. 55.

The words "recovery of money," as used in the statutes authorizing an attachment in a case for the recovery of money, include an action for wrong, as well as an action on a contract. An action of assault and battery is as much an action for the recovery of money as an action for the breach of a contract, and the amount claimed, and the grounds thereof, can as well be stated in the former case, and with as much certainty, as can the claim for unliquidated damages in the latter. *Floyd v. Blake* (N. Y.) 11 Abb. Prac. 349, 351.

Code Civ. Proc. § 3245, which provides that costs cannot be awarded to plaintiff in an action against a municipal corporation, in which the complaint demands judgment for a sum of money, unless the claim upon which it is founded shall be presented before the commencement thereof, includes actions *ex delicto* as well as actions *ex contractu*. *Cavan v. City of Brooklyn*, 5 N. Y. Supp. 758, 761.

Actions arising on contract for the recovery of money only are actions for the recovery of a definite sum of money as such,

and without calling on the court to ascertain or adjudge anything but the existence and terms of the contract; and an action that requires the determination of amounts unliquidated, in their nature requiring other proof and depending on other considerations than such as appear in the contract itself, is not such an action. *Tuttle v. Smith* (N. Y.) 6 Abb. Prac. 329, 334.

As used in Comp. Laws, § 4894, authorizing an attachment in actions arising on contract for the recovery of a sum of money only, the phrase "for the recovery of money only" must be construed to mean the recovery of a definite sum of money as such, and without calling on the court to ascertain or adjudge anything but the existence and terms of the contract by which it is due. No action can properly be said to be within such provision unless the supposed contract relates to property of some kind—to some pecuniary interest to be affected by its breach—and the violation of which enables the party aggrieved to state to the court in its complaint such facts as will show damages of a pecuniary nature, and such damages as may be ascertained by some legal rule of indemnification. *Coats v. Arthur*, 58 N. W. 675, 681, 5 S. D. 274.

An action for the foreclosure of a mortgage is not an action for recovery of money only, within Gen. St. c. 17, § 227, providing that no action shall be commenced against an executor, except "actions for the recovery of money only," until the expiration of a certain time. *Jones v. Null*, 1 N. W. 867, 868, 9 Neb. 57.

The expression "recovery of money," as used in Code, § 277, authorizing an attachment in an action for the recovery of money, refers to cases where a sum of money is specified in the summons, as the sum for which plaintiff will take judgment if defendant fail to answer the complaint, and does not embrace actions for wrongs. *Gordon v. Gaffey*, 11 Abb. Prac. (N. Y.) 1, 2.

Code Civ. Proc. § 248, allowing an attachment to issue in any action for the "recovery of money or property" and for damages for conversion, or in an action for the "recovery of damages" done to personal property, does not authorize an attachment in a suit for slander. *Addison v. Sujette* (S. C.) 27 S. E. 631, 636.

A proceeding for an accounting between partners, though it is merely collateral, and for the purpose of enabling the court to render a money judgment in favor of the party entitled thereto, is not an action for the recovery of money only. *Powell v. Bennett*, 29 N. E. 926, 4 Ind. App. 112.

Where defendant induces plaintiff by false and fraudulent representations to purchase from him land by way of exchange,

and defendant pays part cash and the said land in exchange for plaintiff's land, an action by plaintiff after a tender of reconveyance of the land fraudulently conveyed to him and for the agreed price thereof in money is an action in tort, and not an action arising on a contract for the recovery of money only. *Crossman v. Lindsley* (N. Y.) 42 How. Prac. 107, 108.

#### **ACTION FOR RECOVERY OF REAL ESTATE.**

"Action for the recovery of real estate," as used in Gen. St. 1878, c. 75, § 11, providing that any person against whom a judgment is recovered in an action for the recovery of real property may have a new trial on notice, etc., is to be construed as meaning actions "in the nature of actions of ejectment—that is, in which a recovery of possession is sought—and does not include all actions in which the title may come in question and be determined." *Knight v. Valentine*, 29 N. W. 3, 4, 35 Minn. 307. It includes proceeding under the statute, of forcible entry and detainer for recovery of possession. *Ferguson v. Kumler*, 25 Minn. 183, 185.

An action brought in Arkansas by a daughter, whose father left all his property to his sons, "having full confidence in their disposition to deal justly and liberally," and leaving it "to them to make proper and suitable provisions for their sisters," against the collusive purchaser from her brothers, is not an action for the recovery of real property within the meaning of the statute of limitations of Arkansas. *Percy v. Cockrill* (U. S.) 53 Fed. 872, 876, 4 C. C. A. 73 (citing *Mansf. Dig.* § 4471).

Under a statute authorizing a married woman to maintain an action for the recovery and protection of her real estate without joining her husband, it is held that an action for partition is an action for the recovery and protection of land within the meaning of the statute. *Castner v. Silker*, 10 Atl. 493, 43 N. J. Eq. 8.

#### **ACTION FOR SEDUCTION.**

The action at common law known as an "action for seduction" would only in fact be an action of trespass or trespass on the case (authorities were not agreed upon that point) for the loss of services. The person entitled to the services of the party seduced could maintain the action, but none other could. *Bartley v. Richtmyer*, 4 N. Y. (4 Comst.) 38, 53 Am. Dec. 338. The law gave no remedy to the parent for the mere seduction of his daughter, however wrongfully it might have been accomplished. Incontinence on the part of the young woman could not be made the foundation of an action against the person who had tempted her and deprived her of her chastity, but if she were living with her

parent at the time of the seduction, and the seduction were followed by pregnancy and illness, whereby the parent was deprived of the filial services theretofore rendered to him, an action was maintainable against the seducer. Add. Torts, § 1277. The foundation of the action was not placed upon the seduction itself, but upon the loss of services. *Breon v. Henkle*, 13 Pac. 289, 290, 14 Or. 494.

#### **ACTION FOR SLANDEROUS WORDS.**

An action for written slander is an action for "slandorous words" within the General Judiciary Act of March 2, 1797, § 97, providing that in "all actions of case for slanderous words, if the damages found or assessed by the jury do not surmount the sum of \$7.00, the court shall allow no greater costs than damages." *Parsons v. Young*, 2 Vt. 434.

#### **ACTION FOR WASTE.**

An action for waste is a proceeding *ex delicto*, and lies for whatsoever does a lasting damage to "the freehold or inheritance," either intrinsically injurious thereto in contemplation of law, or shown so to be by proofs for the jury, a special and sufficient license in writing to commit the waste done being requisite to avoid such action of waste and its consequences. *Purton v. Watson*, 2 N. Y. Supp. 661 (citing *McGregor v. Brown*, 10 N. Y. [6 Seld.] 114, 119; *Code Civ. Proc.* § 1651).

#### **ACTION IN EQUITY.**

An application to a district court by an executor or administrator for license to sell real property is not an "action in equity," within *Code Civ. Proc.* § 675, providing that appeals may be brought to the Supreme Court by either party in all actions in equity. Such a proceeding is not, strictly speaking, an action, but a special proceeding. In *re Entenmann's Estate* (Neb.) 89 N. W. 1033.

#### **ACTION IN REM.**

See "In Rem."

#### **ACTION OF ACCOUNT.**

See "Account (Action of)"; "Controversy Touching an Account."

#### **ACTION OF ACCOUNT RENDER.**

See "Account Render (Action of)."

#### **ACTION OF BOOK DEBT.**

See "Book Debt (Action of)."

#### **ACTION OF CASE.**

See "Case (Action of)."

**ACTION OF CONVERSION.**

See "Conversion (Action of)."

**ACTION OF COVENANT.**

See "Covenant (Action of)."

**ACTION OF DEBT.**

See "Debt (Action of)."

**ACTION OF EJECTMENT.**

See "Ejectment."

**ACTION OF TRESPASS.**

See "Trespass (Action of)."

**ACTION OF TRESPASS VI ET ARMIS.**

See "Trespass Vi et Armis."

**ACTION ON THE CASE.**

See "Case (Action on)."

**ACTION ON CONTRACT.**

The phrase "action arising on contract," as employed in Comp. Laws, § 4993, specifying the kinds of actions on which attachments may issue, is the equivalent of "actions ex contractu," since actions at law are fundamentally and logically divided into two classes—actions ex contractu and actions ex delicto. *First Nat. Bank of Nashua v. Van Voorhis*, 62 N. W. 378, 379, 6 S. D. 548.

Act March 3, 1875, declares that no federal, circuit, or district court shall have cognizance of any suit founded on a contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, etc. Held, that the term "founded on contract" should not be limited and restrained to cover only suits brought on the contract to recover the amount called for by the contract, or to have a specific performance of its terms, so as to include suits for damages for breach of contract, but should be held to embrace the latter form of action as well as the former. *Republic Iron Mining Co. v. Jones* (U. S.) 37 Fed. 721, 722, 2 L. R. A. 746.

The term "action of contract" in St. 1890, c. 457, allowing one who has loaned money in dealing in margins to recover the same in an action of contract, includes an action for money had and received. *Crandell v. White*, 41 N. E. 204, 205, 164 Mass. 54.

An action brought to recover damages for a breach of the condition of a bond given by the plaintiff in a suit in another state upon the issuance of a writ of ne exeat, to secure the defendant therein for his costs and

damages, is an action upon contract. The technical common-law form of actions ex contractu are abolished by the Code, and actions which would formerly be distinguished as debt, covenant, or assumpsit all fall under the general designation of "actions upon contract." *Midland Co. v. Broat*, 50 Minn. 562, 567, 52 N. W. 972, 973, 17 L. R. A. 312.

**Bonds.**

Rev. St. 1839, § 250, giving to a defendant in an "action arising on contract" the right to counterclaim any other cause of action also "arising on contract," includes an action on an appeal bond, though the judgment appealed from was rendered for a tort, since the prior proceedings were merged in the judgment, which became the contract in suit, and was subject to a counterclaim, irrespective of the character of the original claim. *Green v. Conrad*, 21 S. W. 839-843, 114 Mo. 651.

Code, § 3456, providing that causes of "action founded on contract" are revived by an admission in writing signed by the party to be charged, should be construed to include an action or proceeding to enforce a guardian's duty to safely care for the trust funds coming into his hands, and to account therefor to the ward or to the court for the ward's benefit, for it is founded on a contract of the most solemn nature. *Blakeney v. Wyland*, 89 N. W. 16, 17, 115 Iowa, 607.

On motion for a new trial on an action on a sheriff's bond for breach of official duty in making an execution sale, where the fifth statutory cause for a new trial (Rev. St. 1881, § 559) is not assigned, namely, "error in the assessment of the amount of recovery where the action is on contract," the fourth statutory cause, "excessive damages," does not call in question the assessment of the amount of recovery, as "the action is on contract." *Moore v. State*, 114 Ind. 414, 423, 16 N. E. 836.

**Breach of marriage promise**

Code, § 227, providing that an attachment may issue in an "action arising on contract for the recovery of money only," cannot be construed to embrace an action founded on an alleged breach of promise of marriage, though such action is founded on an alleged contract to marry between the parties, and is for the recovery of money only. An action cannot properly be said to be an action arising on contract for the recovery of money only, unless it relates to property of some kind, to some pecuniary interest to be affected by its breach, and the violation of which requires the party aggrieved to state to the court in his complaint such facts as will show damages of a pecuniary character, and such damages as may be ascertained by some legal rule of indemnification. *Barnes v. Buck*, 1 Lans. (N. Y.) 268, 269.

**Deposit.**

An action to recover back a deposit of money made under an executory contract, on the ground of alleged fraud in inducing plaintiff to make the deposit, and without any allegation of demand and refusal, is not an "action on contract" within the meaning of Code Civ. Proc. § 227, authorizing the issuance of an attachment in "actions arising on contract," but is an action for fraud, and therefore an attachment cannot be issued. *Knapp v. Meigs* (N. Y.) 11 Abb. Prac. (N. S.) 405, 406.

**Judgment.**

Code, § 129, directs the insertion of a notice, in a summons in an "action on contract," that judgment will be taken for a specified sum on failure of the defendant to answer. Held, that the term "action on contract," as there used, meant an action relating to an agreement between the parties, either express or implied, and had no application to, and did not include, actions to recover statutory penalties, actions founded on judgments, etc. *White v. Wood*, 2 N. Y. Supp. 673, 674, 49 Hun. 381 (citing *McCoun v. New York Cent. & H. R. R. Co.*, 50 N. Y. 176).

Code Iowa, § 2539, providing that causes of action founded on contract may be revived by an admission or new promise in writing, construed not to include an action on a judgment. *McAleer v. Clay County* (U. S.) 38 Fed. 707, 708.

The phrase "action arising on contract" includes an action on a money judgment, whether the same was recovered for a tort or on a contract. *First Nat. Bank v. Van Vooris*, 62 N. W. 378, 379, 6 S. D. 548.

**Lease.**

Under Comp. Laws, § 6104, authorizing actions of assumpsit in "all cases arising upon contract under seal, or upon judgments, when an action of covenant or of debt may be maintained," "in the same manner in all respects as upon contracts without seal," applies to an action for use and occupation on a lease under seal. An action directly on the terms of the case, and one simply for use and occupation, differ only in that in one the declaration is special, and in the other general; the purpose in each action is the same, and both are actions arising upon contract. *Dalton v. Laudahn*, 30 Mich. 349, 350.

**Open account.**

"Contract," as used in the Georgia Constitution of 1868 in reference to "cases founded on contract," in which a court may enter verdict without a jury, does not include an action on an open account, wherein, under Code, § 3405, on personal service and no defense made, the plaintiff may take a ver-

dict without proving every item. *Jones v. Adams*, 46 Ga. 605.

**Statutory liability.**

Code Civ. Proc. § 587, authorizing an attachment in an "action on contract" for the payment of money, includes a liability of the stockholder of a corporation under Const. art. 12, § 3, making such a stockholder liable for his portion of the corporate debts. *Kennedy v. California Sav. Bank*, 31 Pac. 846, 847, 97 Cal. 93, 33 Am. St. Rep. 163.

An action by the fire department of a city against an insurance agent to recover the percentage of insurance premiums received by him to which plaintiff is entitled under Rev. St. § 1924, is an "action on contract," as used in Rev. St. § 2918, subd. 7, authorizing the recovery of full costs in certain actions on a contract, when the damages recovered exceed \$50. *Fire Dept. of City of Oshkosh v. Tuttle*, 7 N. W. 549, 50 Wis. 552.

**Waiver of tort.**

Rev. St. 1879, § 3522, subd. 2, providing that the defendant in any action arising on contract may plead any other cause of "action arising on contract" existing at the commencement of the action as a counterclaim and set-off, is liberally construed to include all independent express contracts, whether liquidated or unliquidated, and also to include that class of cases in which tort has been suffered. The law permits the sufferer to waive the tort and sue on an implied contract. If he indicates in his plea that he is proceeding on the implied assumpsit, his action will be sustained as an action arising on contract, and hence a cross-demand for damages suffered by reason of false and fraudulent representations of a vendor before and at the time of a sale, and not a demand for damages for a breach of a contract, is not an "action arising on contract." *Barnes v. McMullins*, 78 Mo. 260, 274; *Green v. Conrad*, 21 S. W. 839, 843, 114 Mo. 651.

**ACTION ON JUDGMENT.**

An "action on a judgment" is not necessarily a proceeding to enforce the judgment, but may be for the purposes of renewing it and continuing it in force; but supplementary proceedings are not an action on a judgment within Code Civ. Proc. § 382, subd. 7, providing that an action on a judgment rendered in a court not of record must be commenced within six years. *Green v. Hauser*, 9 N. Y. Supp. 660, 662, 18 Civ. Proc. R. 354.

**ACTION ORIGINALLY COMMENCED.**

See "Originally Commenced."

**ACTION PENDING.**

See "Pending."

**ACTION PUTTING CHARACTER IN ISSUE.**

See "Putting Character in Issue."

**ACTION TO DETERMINE CLAIM TO REAL ESTATE.**

Code Civ. Proc. § 3252, allowing certain additional costs in actions "to determine a claim to real property," refers only to proceedings to assert a claim to title to land, and does not include an action to foreclose a mechanic's lien. *Wright v. Reusens*, 15 N. Y. Supp. 504, 590, 80 Hun, 585.

**ACTION TO INVALIDATE TAX DEED.**

The expression "action to invalidate or cancel any tax deed," used in Comp. Laws, § 1643, providing that in an action to recover the possession or title of any property, real or personal, sold for taxes, or to invalidate or cancel any tax deed, etc., must be confined to suits where the legality of the entire tax is in good faith controverted. A suit to quiet plaintiff's title to real estate, and to annul defendant's adverse title based upon a tax deed, is an action to invalidate or cancel a tax deed. *O'Neill v. Tyler*, 53 N. W. 434, 438, 3 N. D. 47.

**ACTIONABLE FRAUD.**

"Actionable fraud" consists in a false representation made with an intention to deceive, and may be committed by stating what is known to be false or by professing knowledge of the truth of a statement which is false, but in either case the essential ingredient is a falsehood uttered with intent to deceive. *Marsh v. Falker*, 40 N. Y. 562, 575, note.

As a general rule, "actionable fraud" or misrepresentations consist in a false statement concerning a fact material to the contract, and which is influential in producing it. The mere expression of opinion, estimate, or judgment of the value of property, even if false, does not ordinarily constitute actionable fraud, but a willful misrepresentation by a vendor that the rent from property charged was greater than it was, when relied upon by the vendee, is actionable fraud; also a willful representation by the owner that the property was high and dry and located in a particular place, which representation was relied upon by the purchaser as true, but which was false, and which operated to his personal injury, is an actionable fraud. *Hecht v. Metzler*, 48 Pac. 37, 40, 14 Utah, 408, 60 Am. St. Rep. 906.

Actionable fraud consists in misrepresentation or concealment as to the existence or nonexistence of some fact or circumstance. Such an action cannot therefore be based upon the expression of hopes, expectations, and beliefs. *Farrington v. Bullard*, 40 Barb.

(N. Y.) 512, 516; *Sawyer v. Prickett*, 86 U. S. (19 Wall.) 146, 22 L. Ed. 105, 103; *Gallagher v. Bunnell*, 6 Cow. (N. Y.) 346, 347; *Lexow v. Julian*, 21 Hun (N. Y.) 477. A statement by the owner of property, to induce another to make a loan on the security thereof, that he then had a customer ready and willing to pay a certain amount in cash for property, is actionable. *Seaman v. Becar*, 38 N. Y. Supp. 69, 70, 15 Misc. Rep. 616.

"Actionable fraud" consists either in a misrepresentation or concealment as to the existence of some fact or circumstance. *Farrington v. Bullard*, 40 Barb. (N. Y.) 512, 516. A mere promise of something in the future cannot be regarded as a fraudulent representation of an existing fact. *Kley v. Healy*, 29 N. Y. Supp. 3, 6, 9 Misc. Rep. 98, 97.

"Actionable fraud" is a deception practiced in order to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. *Cooley, Torts* (1st Ed.) 474. The false statement must be material, must be connected with the particular transaction complained of, must be made to influence the opposite party's conduct, and must be relied upon by some party. Further, damages must be shown, and such damages must follow proximately the deception. *Ansbacher v. Pfeiffer*, 13 N. Y. Supp. 418, 419, 59 Hun, 624.

"A statement of value made by a vendor during negotiations between parties, the value known to be excessive, does not frequently constitute fraud. The mere expression of opinion as to value, although the amount stated is known to be excessive, is not fraud, unless the person making it knew at the time that in consequence of the relations—the trust and confidence existing between himself and the person to whom it was made—the vendor would rely on it and be controlled by it." *Story, Eq. Jur.* § 197. "The purchaser is not entitled to relief against the vendor for false affirmation of value, it being deemed his own folly to credit a new assertion of that nature; and, besides, the value consists in judgment and estimation, in which men necessarily differ." But the remedy will lie against the vendor for falsely affirming that a greater rent is paid for the estate than is actually reserved, inasmuch as that is a fact within his own knowledge. *Dobell v. Stevens*, 3 Barn. & C. 623; *Lysney v. Selby*, 2 Ld. Raym. 1118. An inadequacy of value is, in general, of itself no evidence of fraud, although, taken together with other circumstances, it may constitute the same element of proof in establishing fraud. *Wise v. Fuller*, 29 N. J. Eq. (2 Stew.) 257, 262.

**ACTIONABLE INJURY.**

An injury that is not the natural consequence of an act or omission, and that would not have resulted but for the interpo-



sition of a new and independent cause, is not actionable; nor is an injury that could not have been foreseen or reasonably anticipated as the probable result from an act of negligence. *Little Rock & M. R. Co. v. Barry* (U. S.) 84 Fed. 944, 950, 28 C. C. A. 644, 43 L. R. A. 349.

### ACTIONABLE MISREPRESENTATION.

It may be said generally that "actionable misrepresentations" consist in a false statement respecting the fact material to the contract, and which is influential in producing it. *Wise v. Fuller*, 29 N. J. Eq. (2 Stew.) 257, 262.

### ACTIONABLE NEGLIGENCE.

"Actionable negligence" consists in the breach of some duty owing to the defendant by the plaintiff, by reason of which the plaintiff was injured. *Salem-Bedford Stone Co. v. O'Brien*, 40 N. E. 430, 431, 12 Ind. App. 217 (citing *Morrow v. Sweeney*, 38 N. E. 187, 10 Ind. App. 628; *Carskaddon v. Mills*, 31 N. E. 559, 5 Ind. App. 22; *Thiele v. McManus*, 28 N. E. 327, 8 Ind. App. 132); *South Bend Iron Works v. Larger*, 39 N. E. 209, 210, 11 Ind. App. 387; *Hettchen v. Chipman*, 41 Atl. 65, 87 Md. 729; *Singleton v. Felton* (U. S.) 101 Fed. 528, 528, 42 C. C. A. 57; *O'Reilly v. Brooklyn Heights R. Co.*, 81 N. Y. Supp. 572, 573, 82 App. Div. 492 (citing *McGrath v. New York Cent. & H. R. R. Co.*, 39 N. Y. 468, 17 Am. Rep. 359).

"Actionable negligence" consists in the breach or nonperformance of some duty of the party charged with the negligent act or omission, owed to the one suffering loss or damage thereby. *Brett, M. R., in Heaven v. Pender*, 17 Rep. 511, defines "actionable negligence" to consist in the failure to exercise ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care, by which failure the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. This definition is accepted and approved by the court for the purposes of this case. *Roddy v. Missouri Pacific Ry. Co.*, 15 S. W. 1112, 1113, 104 Mo. 234, 12 L. R. A. 746, 24 Am. St. Rep. 333.

A correct definition of "actionable negligence" must include the notion that a legal duty has been violated, whether that duty arose from the common law or from a valid statute or a municipal ordinance being immaterial. *Flanders v. North Jersey St. Ry. Co.*, 53 Atl. 404, 406, 68 N. J. Law, 343, 59 L. R. A. 455, 96 Am. St. Rep. 552.

Actionable negligence arises from a neglect to perform a legal duty. *Boardman v. Creighton*, 49 Atl. 663, 665, 95 Me. 154; *Buch v. Amory Mfg. Co.*, 44 Atl. 809, 810, 69 N. H. 257, 76 Am. St. Rep. 163; *Akers v. Chicago, St. P. & O. Ry. Co.*, 60 N. W. 669, 670, 58 Minn.

540. Some relation of duty, public or private, special or general, must exist, either by contract or as an implication of public policy, before one man becomes liable to another for the consequences of a careless act or omission on the part of the first man which causes injury to the second man. *Western Maryland R. Co. v. Kehoe*, 35 Atl. 90, 94, 83 Md. 434. With purely moral obligations the law does not deal. *Buch v. Amory Mfg. Co.*, 44 Atl. 809, 810, 69 N. H. 257, 76 Am. St. Rep. 163. Even if a defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie. Under these principles the failure of a railroad company to comply with a statute requiring such companies to block frogs in their yards and terminal stations did not render it liable to a trespasser in its yards for injuries received by him owing to such failure. *Akers v. Chicago, St. P. & O. Ry. Co.*, 60 N. W. 669, 670, 58 Minn. 540.

To constitute actionable negligence, there must be not only causal connection between the negligence complained of and the injury suffered, but the connection must be by natural unbroken sequence, without intervening efficient causes, so that but for the negligence in the defendant the injury would not have occurred. It must not only be the cause, but it must be the proximate—that is, the direct and immediate—efficient cause of the injury. *Decatur Car Wheel & Mfg. Co. v. Mehafeey*, 29 South. 646, 651, 128 Ala. 242 (citing *Western Ry. of Alabama v. Mutch*, 97 Ala. 196, 11 South. 895, 21 L. R. A. 316, 38 Am. St. Rep. 179); *Western Maryland R. Co. v. Kehoe*, 35 Atl. 90, 94, 83 Md. 434.

"Actionable negligence" is a failure in legal duty which occasions an injury to a party free from contributory negligence, or who has not failed in the discharge of his duty in the given circumstances. The failure of a railroad company to furnish a reasonably safe passage to and from its mail train while stopping at its regular stations for the purpose of mailing letters is actionable negligence. *Hale v. Grand Trunk R. R.*, 15 Atl. 300, 303, 60 Vt. 605, 1 L. R. A. 187.

Actionable negligence involves a breach of duty owed by a responsible person either to the public generally or to some particular person. It makes it necessary that we shall consider the duty owed to the defendant by the plaintiff. "Duty" and "negligence," thus considered, are correlative terms. *Bethlehem Iron Works Co. v. Weiss* (U. S.) 100 Fed. 45, 49, 40 C. C. A. 270.

Actionable negligence may spring from the careless performance of a legal duty, or from a total neglect or disregard of such duty, but it can never be consistently predicated of a purely accidental occurrence. *Fidelity & Casualty Co. v. Cutts*, 49 Atl. 673, 674, 95 Me. 162.

The element which distinguishes actionable negligence from criminal wrong or willful tort is inadvertence on the part of the person causing the injury. He may advert to the act of omission of which he is guilty, but he cannot advert to it as a failure of duty; that is, he cannot be conscious that it is a want of ordinary care without subjecting himself to the charge of having inflicted willful injury. *Proctor v. Southern Ry. Co.*, 39 S. E. 351, 358, 61 S. C. 170.

The standard of duty imposed by law in the different contractual relations of life varies in degree from ordinary care, as in the relation of master and servant, to extreme vigilance, as in the case of common carriers of passengers for hire. In no case, excepting possibly that of the carrier of merchandise for hire, is the duty absolute, such as involved in the obligation of an insurer or guarantor; but in all cases failure of duty is regarded as actionable negligence. *Obanhein v. Arbuckle*, 81 N. Y. Supp. 133, 135, 80 App. Div. 465.

#### ACTIONABLE NUISANCE.

An "actionable nuisance" is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal right. *Cooper v. Overton*, 52 S. W. 183, 184, 102 Tenn. 211, 45 L. R. A. 591, 78 Am. St. Rep. 864; *Chicago North Shore St. Ry. Co. v. Payne*, 61 N. E. 467, 468, 192 Ill. 239

"Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property is a nuisance and subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance and by the judgment the nuisance may be enjoined or abated as well as damages recovered." Code Civ. Proc. § 731. *Grandona v. Lovdal*, 21 Pac. 366, 368, 78 Cal. 611, 12 Am. St. Rep. 121.

By Code Civ. Proc. § 731, an "actionable nuisance" is defined as follows: Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. *Grandona v. Lovdal*, 21 Pac. 366, 368, 78 Cal. 611, 12 Am. St. Rep. 121.

A power house erected next door to a boarding house, and injuring it by reason of the noise and vibrations caused by its machinery, would not be a private nuisance if it was run in a skillful and proper manner and the maintenance was authorized by its charter. *Chicago North Shore St. Ry. Co. v. Payne*, 61 N. E. 467, 468, 192 Ill. 239.

#### ACTIONABLE PER SE.

"Words actionable per se" are such words as charge some punishable offense, some disgraceful disease, or spoken of a person in relation to some profession, occupation, or official station in which he is employed. *Barnes v. Trundy*, 81 Me. 321, 323.

The expression "actionable per se" at common law refers to words importing a felony, but many public offenses were felonies at common law which were made mere misdemeanors by the more enlightened American statutory law. The general rule is that any words which charge a person with an indictable offense which is punishable by an infamous or corporal punishment, or which involves moral turpitude, are actionable in themselves. *Lemons v. Wells*, 78 Ky. 117, 118.

The expression "actionable per se," as used in the law of slander, means words from which damages are presumed, without any special damage being done, and must be such as, if true, would subject a private person to legal punishment, or, if spoken of a person holding an office or profession, such as are calculated to injure him in his office, profession, or trade; and, if the words are not actionable under this rule, falsehood and malice cannot make them so. Thus, to say of a young lady that she is not handsome, might be false and malicious, but it would not be actionable. *Mayrant v. Richardson* (S. Ct.) 1 Nott & McC. 347, 349, 9 Am. Dec. 707.

When language is used concerning a person or his affairs which from its nature necessarily must or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication, prima facie, constitutes a cause of action, and prima facie constitutes a wrong, without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication; and this is all that is meant by the term "actionable per se." *Newell, Defam.* p. 181. "When defamatory words spoken of a person in relation to his business, profession, or occupation are such that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when from the nature of the business great confidence must necessarily be reposed, they are 'actionable per se,' although not applied by the speaker to the profession or occupation of the plaintiff; but when they convey only a general imputation upon his character, injurious to any one of whom they might be spoken, they are not actionable unless such application be made." *Sanderson v. Caldwell*, 45 N. Y. 398, 405, 6 Am. Rep. 105; *Continental Nat. Bank v. Bowdre*, 23 S. W. 131, 134, 92 Tenn. (8 Pickle) 723.

Words charging the wife with deserting her husband during his illness are action-

able per se in connection with words forbidding all persons to give her harbor or trust on his account, such words not being privileged. *Smith v. Smith*, 41 N. W. 499, 500, 73 Mich. 445, 3 L. R. A. 52, 16 Am. St. Rep. 594.

When language is used concerning a person or his affairs which necessarily must or presumably will, as its natural consequence, occasion him pecuniary loss, its publication prima facie constitutes a cause of action, and prima facie constitutes a wrong, without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication; and this is all that is meant by the term "actionable per se." *Pratt v. Pioneer Press Co.*, 35 Minn. 251, 254, 28 N. W. 708, 709, 710.

### ACTIONABLE WORDS.

"Actionable words" in libel are those which (1) import a charge of some punishable crime, or (2) import some offensive disease which would tend to deprive a person of society, or (3) which tend to injure a party in his trade and occupation or business, or (4) which have produced some special damage. *Cady v. Brooklyn Union Pub. Co.*, 51 N. Y. Supp. 198, 199, 23 Misc. Rep. 409 (citing *Moore v. Francis*, 23 N. E. 1127, 121 N. Y. 199, 8 L. R. A. 214, 18 Am. St. Rep. 810; *Onslow v. Horne*, 3 Wils. 177).

### ACTIVE.

That is in action; that demands action; actually subsisting; the opposite of passive. An active debt is one which draws interest. An active trust is a confidence connected with a duty. An active use is a present legal estate. *Black, Law Dict.*

### ACTIVE DUTY.

Every member of the State Guard, while in attendance at the regular drill provided for by law, or at any parade, review, battalion, regimental, or other drill, or any escort duty, or paying military honors, or either, within or without the state, or any military excursion authorized by the Governor, or by his commanding officer, shall be considered on "active duty" at such time, except as to pay and rations. *Ky. St. 1903, § 2700.*

### ACTIVE TRUST.

An "active trust" is where special and particular duties are pointed out to be performed by a trustee. *Flaherty v. O'Connor* (R. I.) 54 Atl. 376, 377 (citing 1 *Perry on Trusts* [5th Ed.] § 18).

An "active trust" is one in which active duties, requiring the exercise of sound personal discretion, are enjoined on the trustee. *Appeal of Barnett*, 48 Pa. (10 Wright) 392, 399, 86 Am. Dec. 502 (quoted and approved

In *re Eshelman's Estate*, 43 Atl. 201, 202, 191 Pa. 68).

Where a special duty is to be performed by the trustee in respect to the estate, such as to collect the rents and profits, to sell the estate, etc., the trust is called "active." All other trusts are denominated "passive" trusts, because there is no duty imposed on the trustee. He simply acts as the reservoir of the legal estate, because, from terms and character of the conveyance and limitation, the statute cannot transfer the legal estate to the cestui que use or trust. *Perkins v. Brinkley*, 45 S. E. 541, 542, 133 N. C. 154.

If the trustee is to exercise any direction in the management of the estate or in the investment of the proceeds, or if the purpose of the trust is to protect the estate for a given time, or until the death of some one, or until division, or until a request for a conveyance is made, the trust is active. Although the direction may be for the trustee to permit and suffer another person to receive the rents, yet if any duty is to be imposed upon the trustee, expressly or by implication, the legal title is in him. *First Nat. Bank v. Nashville Trust Co.* (Tenn.) 62 S. W. 392, 401.

An analysis of the cases which have settled the distinction between active and dry trusts will show that in the former class the duty to be performed by the trustee must not only involve some positive action on his part, but an action attended with some discretion. The automatic function of merely receiving for the cestui que trust, and immediately paying over to him the trust fund or its income, will not make a trust active. The cestui que trust could perform the act as well, and he has no protection in the superior judgment of the trustee, because the trustee is not empowered to exercise his judgment. The cases properly describe him as a mere conduit. But when the trustee is invested with a discretion, however slight, he takes the place of the donor, and the trust committed to him is "active." A trust for the protection of the beneficiary, who may be a spendthrift, or a married woman, or a party in remainder, stands, of course, on a different footing, and is equally valid, whether the duties of the trustee are active or passive. In *re Hempill's Estate*, 36 Atl. 409, 410, 180 Pa. 95.

A bequest in trust for testator's daughter for her natural life, the interest and income alone for her share to be paid to her, whether covert or discover, is an active trust. In *re Forney's Estate*, 28 Atl. 1086, 1087, 161 Pa. 209.

Where a will created the following trust: "I give and bequeath to my five children [naming them] in trust for their children, all my real estate, share and share alike, after the decease of my wife, \* \* \* and the payment of the said bonds and mortgages against my real estate shall have been satis-

fied. Should any of my children before mentioned die without children, then their share of the said estate shall go to the surviving heirs, and the said children shall not have any power to sell or mortgage any of the said estate"—the trust created was active, because active duties attended it, and because it subserved contingent interests. *In re Malseed's Estate* (Pa.) 18 Phila. 405, 406.

### ACTIVE VIGILANCE.

"Active vigilance," in reference to an executor's duty in collecting a debt due the estate, is a relative term, and depends on facts appearing in each case; and an executor, who claims that certain property not in his possession belongs to the estate, though he does not know how he can prove or who it actually belongs to, and who is advised by counsel in good faith that he cannot make such proof, and who actually believes it, will not be deemed not to have used "active vigilance" in failing to bring such action. *O'Connor v. Gifford*, 22 N. E. 1036, 1037, 117 N. Y. 275.

### ACTOR.

Chinese actor as laborer, see "Chinese Laborer."

### ACTUAL.

"Actual" mean "real," as opposed to "nominal." *Astor v. Merritt*, 4 Sup. Ct. 413, 419, 111 U. S. 202, 23 L. Ed. 401.

The word "actual" has a definite and well-understood meaning. It is something real, in opposition to constructive or speculative; something existing in fact. A life insurance policy, requiring proof of "actual" death before payment, requires actual proof of the death of insured, and the mere presumption of death arising from seven years absence is insufficient. *Kelly v. Supreme Council Catholic Mut. Ben. Ass'n*, 61 N. Y. Supp. 394, 395, 46 App. Div. 79.

"Actual" means existent, but does not preclude the idea of change, so that a statute giving supervisors power to regulate water rates, and providing that until so regulated the "actual" rates established and collected by the water company shall be deemed the legal established rates thereof, does not prevent the water company from increasing the rates. *Osborne v. San Diego Land & Town Co.*, 20 Sup. Ct. 860, 866, 178 U. S. 22, 44 L. Ed. 961.

#### As contrasted with option.

"Actual," as used in a letter between a broker and his customer, "I now see that you have my actual wheat account mixed with my option account," was used to distinguish two classes of transactions; the actual ac-

count referring to the actual purchase and sale of wheat, and the option account being merely fictitious transactions, which did not relate to the intended actual purchase and sale of that commodity, but merely a gambling contract on the rise and fall of the market. *Dows v. Glaspel*, 60 N. W. 60, 64, 4 N. D. 251.

### ACTUAL ACCEPTANCE.

"Actual acceptance," as applied to a non-existing bill of exchange, must point to the particular bill to be accepted, and describe it in unmistakable terms, and a general letter of credit cannot be construed to be an acceptance of any particular bill. *Valle v. Cerre's Adm'r*, 36 Mo. 575, 590, 88 Am. Dec. 161.

### ACTUAL AGENCY.

An agency is actual when the agent is really employed by the principal. *Civ. Code Cal. 1903, § 2299; Rev. Codes N. D. 1899, § 4307; Civ. Code S. D. 1903, § 1660; First Nat. Bank v. Minneapolis & N. Elevator Co.*, 91 N. W. 436, 438, 11 N. D. 280.

### ACTUAL AUTHORITY.

"Actual authority" is such as a principal intentionally confers upon the agent, or intentionally or by want of ordinary care allows the agent to believe himself to possess. *Civ. Code Cal. 1903, § 2316; Rev. Codes N. D. 1899, § 4321; Civ. Code S. D. 1903, § 1674.*

### ACTUAL BIAS.

"Actual bias" of a juror is defined by *Rev. St. Utah*, p. 993, § 4833, subd. 2, as the existence of a state of mind on the part of the juror which leads to a just inference in reference to the case that he will not act with entire impartiality. *State v. Haworth*, 68 Pac. 155, 158, 24 Utah, 398.

By *Pen. Code Cal. § 1073*, actual bias is defined to be the existence of a state of mind on the part of the juror in reference to the case or to either of the parties which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party. *People v. Wells*, 34 Pac. 718, 719, 100 Cal. 227.

"Actual bias consists in the existence of a state of mind on the part of the juror which satisfies the court, in the exercise of a sound discretion, that such juror cannot try the issues impartially and without prejudice to the substantial rights of the party challenging." *State v. Chapman*, 47 N. W. 411, 414, 1 S. D. 414, 10 L. R. A. 432 (citing *Comp. Laws*, § 7358, subd. 2); *People v. McQuade*, 16 N. E. 156, 160, 110 N. Y. 284, 304, 1 L. R. A. 273 (citing *Code Cr. Proc. § 376*, subd. 2). Actual bias is defined in the same language by *Code Cr. Proc. § 22*, art. 9, under which

It was held that the formation and expression of an opinion are not alone the test of the juror's competency, but the nature of the opinion may be inquired into, and, if found to be only a transitory inclination of the mind, based upon rumor, newspaper statement, general notoriety, etc., the truth of which the juror does not inquire into nor judge, it is not a disqualifying opinion. *Huntley v. Territory*, 54 Pac. 314, 315, 7 Okl. 60.

### ACTUAL BIRTH.

The term, "in existence by actual birth," as used in Pen. Code, art. 545, providing that the person upon whom the homicide is alleged to have been committed must be in existence by actual birth, means a complete expulsion of the child from the body of the mother alive. *Wallace v. State*, 10 Tex. App. 255, 270.

### ACTUAL BREAKING.

See "Breaking (In Criminal Law)."

### ACTUAL CASH PAYMENT.

Gen. St. c. 55, §§ 2-4, requires a special partner to contribute to the common stock of the firm a specified sum in actual cash payment as capital. Held, that the phrase "actual cash payment," in such connection, was emphatic, and was intended to exclude an instrument by which commercial securities of any description short of cash may be regarded by the aid of mercantile usage as spontaneously equivalent to cash, and to remove from all parties the temptation to evade its requirements in this respect. *Haggerty v. Foster*, 103 Mass. 17, 19. Such statute is not complied with by giving promissory notes of the special partner, payable on time to the general partner, and which, when negotiated, constitute a debt for which both members of the firm are liable. Such notes are in no legitimate sense a contribution of money to the common stock. It creates no fund or capital to which persons dealing with the firm might look for the payment of their debts, but substitutes in its place a debt for which each copartner is severally liable only. Nor is a note of a third person, not indorsed by the payee, of which the special partner and the copartnership were equitable owners, to be regarded as equivalent to money. A note is an agreement to pay money, and cannot be treated as cash. *Pierce v. Bryant*, 87 Mass. (5 Allen) 91, 92. A like statute is held to merely require the capital contributed to be completely subjected to the control and distribution of the firm in the form of money, and hence the certified check of a solvent bank is an "actual cash payment." *Metropolitan Nat. Bank v. Palmer*, 9 N. Y. Supp. 239, 56 Hun, 641. Such a statute requires the entire payment to be made in money, and

such payments cannot be made partly in cash and partly in goods, securities, or assets of another firm. *Lineweaver v. Slagle*, 2 Atl. 693, 696, 64 Md. 465, 54 Am. Rep. 775.

Actual cash payment includes a contribution to the capital of a limited partnership by checks which were actually cashed, and the amount of which actually went into the firm business, since payment by check is recognized by commercial law, and has come into use so frequently as to almost supersede payments of any considerable amount in any other manner, and when one man draws a check on his banker in favor of another, and it is accepted by the payee, and the debt is receipted, and all parties agree that the check was cashed, it cannot be said that such transaction was not an actual payment, and an actual payment is not required to be made in coin, and a payment by check which was actually cashed constituted an actual cash payment, within the meaning of the statute. *Hogg v. Orgill*, 34 Pa. (10 Casey) 344, 351.

The expression "actual cash payment" excludes a construction by which commercial securities of any description may be regarded, by the aid of mercantile uses, as substantially equivalent to cash. *Lineweaver v. Slagle*, 2 Atl. 693, 696, 64 Md. 465, 54 Am. Rep. 775.

Contribution of capital by a special partner for a limited partnership by means of a certified check on a solvent bank is an actual cash payment. *Metropolitan Nat. Bank v. Palmer*, 9 N. Y. Supp. 239, 56 Hun, 641.

### ACTUAL CASH VALUE.

The phrase "actual cash value" is practically synonymous with "fair cash value." The actual cash value of the property is the price which it will bring in a fair market, after fair and reasonable efforts have been made to find a purchaser who will give the highest price. The actual cash value, then, is the fair or reasonable cash price for which the property can be sold in the market. *Birmingham Fire Ins. Co. v. Pulver*, 18 N. E. 804, 807, 126 Ill. 329, 9 Am. St. Rep. 598; *Conness v. Indiana, I. & I. R. Co.*, 62 N. E. 221, 225, 193 Ill. 464; *Manchester Fire Ins. Co. v. Simmons*, 35 S. W. 722, 723, 12 Tex. Civ. App. 607; *Wolfe v. Howard Ins. Co.*, 7 N. Y. (4 Seld.) 583, 584; *Mack v. Lancashire Ins. Co. (U. S.)* 4 Fed. 59, 60; *Conness v. Indiana, I. & I. R. Co.*, 62 N. E. 221, 225, 193 Ill. 464 (citing *Birmingham Fire Ins. Co. v. Pulver*, 18 N. E. 804, 126 Ill. 329, 9 Am. St. Rep. 598).

The actual cash value of real or personal property is the price it would sell for, for cash, in the ordinary course of business, free from incumbrance, otherwise than at forced sale. *Morgan's L. & T. R. S. Co. v. Board of Reviewers*, 3 South. 507, 511, 41 La. Ann. 1156.

**ACTUAL AND CONTINUED CHANGE OF POSSESSION.****In statutes of frauds.**

Civ. Code, § 3440, declaring that no sale of personal property shall be good as against the creditors of the seller, unless it is followed by an "actual and continued change of possession," requires a delivery of the property into the hands of the buyer, who must have physical possession of the same. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous; not taken to be surrendered back again; not formal, but substantial. But it need not necessarily continue indefinitely, when it is bona fide and openly taken, and is kept for such a length of time as to give general advertisement to the status of the property and the claim to it by the vendee. *Stevens v. Irwin*, 15 Cal. 506, 506, 76 Am. Dec. 500 (quoted and approved in *Bell v. McClellan*, 67 Cal. 283, 7 Pac. 699; *O'Gara v. Lowry*, 5 Pac. 583, 588, 5 Mont. 427; *Godchaux v. Mulford*, 26 Cal. 316, 85 Am. Dec. 178; *Hesthal v. Myles*, 53 Cal. 623, *Walters v. Rath*, 61 Pac. 1070, 1073 10 Okl. 262).

Gen. St. 1878, c. 41, § 15, declares that every sale of goods in the possession of the vendor or under his control, unless the same is accompanied by an immediate delivery and followed by an "actual and continued change of possession," is presumed fraudulent as against the vendor's creditors. Held, that the actual and continued change of possession declared by the statute must be an absolute change of the possession, and that a mere formal or constructive taking possession of the vendee, and immediately leaving the property in the actual control and possession of the vendor, was not sufficient to prevent the presumption of fraud created by the statute from obtaining. *Murch v. Swensen*, 42 N. W. 290, 291, 40 Minn. 421. There must be such a change as the circumstances of the sale and nature of the property admit, such as the vendor is capable of making. *Chickering & Sons v. White*, 44 N. W. 988, 989, 42 Minn. 457.

Rev. St. p. 436, § 169, provides that every sale made by a vendor of goods in his possession or under his control, unless the same be accompanied by the immediate delivery and followed by an actual and continued change of possession, shall be conclusive evidence of fraud. Held, that the word "actual" was designed to exclude the idea of a mere formal change of possession, and means possession which is open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee; in other

words, he must be in that relation to the property which owners of goods occupy to their property. *Dodge v. Jones*, 14 Pac. 707, 710, 7 Mont. 121.

"Actual and continued change of possession," as used in reference to the sale of personal property by a judgment debtor, means "an open and public change of possession, which is to continue and to be manifested continually by outward and visible signs, such as to render it evident that the possession of the judgment debtor has ceased." *Topping v. Lynch*, 25 N. Y. Super. Ct. (2 Rob.) 484, 488.

The "actual change of possession" required to rebut the presumption of fraud in a sale of goods means such a change that the vendor ceases to possess the goods in any capacity whatever. The continuance of the vendor in possession as the vendee's agent is not "actual change of possession," so as to rebut the presumption of fraud. *Grant v. Lewis*, 14 Wis. 487, 490, 80 Am. Dec. 785.

"Actual change of possession," within the statute requiring every sale of personalty to be followed by an actual change of possession, is plainly used in opposition to "virtual" or "constructive." An actual change, as distinguished from that which by the mere intentment of law follows a transfer of the title, is an open, visible, public change, manifested by such outward signs as render it evident: that the possession of the owner, as such, has wholly ceased, and where, after a sale, the goods remained in the same house, in the same possession, were applied to the same usages, and, so far as the public had any means of judging, remained in the possession of the same person as owner, there was no such change. *Randall v. Parker*, 5 N. Y. Super. Ct. (3 Sandf.) 69, 73.

In the provision of the statutes that every transfer of personal property, if made by the person having at the time possession or control, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the thing transferred, is conclusively presumed to be fraudulent, the word "actual" is designed to exclude the idea of a mere formal change of possession. *Morris v. McLaughlin*, 64 Pac. 219, 221, 25 Mont. 151.

**In chattel mortgage laws.**

"Actual and continued change of possession," under a statute relating to chattel mortgages, means an open, public change of possession, which is to continue and be manifested continually by outward and visible signs, such as render it evident that the possession of the judgment debtor has changed. Constructive possession cannot be taken under a chattel mortgage. The possession must be taken in fact, and that possession cannot be taken by words and inspection. *Steele v. Benham*, 84 N. Y. 634, 638.

Actual change of possession imports at least something more than a mere legal or fictitious change to be worked by the operation of a chattel mortgage alone. *Camp v. Camp* (N. Y.) 2 Hill, 628, 629.

The "actual and continued change of possession" of mortgaged personalty, required by statute in order to prevent the presumption of fraud arising as to the transaction, cannot be construed to mean a constructive change of possession; and hence the act of an agent of the mortgagee in going to the mortgagor's place of business and taking possession of the mortgaged property with the mortgagor's assent, at the same time putting it in charge of one who was then and for a long time afterwards was in the mortgagor's employ, the property remaining in his place of business in its usual place and being used by the mortgagor in his business the same as before, did not amount to an "actual and continued change of possession." *Brunswick v. McClay*, 7 Neb. 137, 139.

Under Acts 1879, p. 134, § 1, requiring an "actual and continued change of possession" of mortgaged personal property to entitle plaintiff to relief as against a subsequent attaching creditor of the mortgagors, it is said that what will constitute a delivery and an actual and continued change of possession must necessarily depend on the character and situation of the property in question, and it was held that where, in an action to foreclose a chattel mortgage on cattle against the mortgagor and an attaching creditor, plaintiff sequestered the cattle, which the sheriff delivered to him under a "range levy," and plaintiff left the cattle with one of the mortgagors as keeper, and with other cattle to which plaintiff held title, there was an actual and continued change of possession within the statute. *Randolph v. Brown*, 53 S. W. 825, 828, 21 Tex. Civ. App. 617.

Comp. Laws 1885, c. 68, art. 2, § 11, providing that a chattel mortgage shall continue in force for only one year, unless a renewal affidavit is filed, or there is "an actual and continued change of possession," means that the actual possession must pass from the mortgagor, and does not return to him; and hence, where a chattel mortgage was executed on a stock of goods, and the store was placed in charge of an agent of the mortgagee, and the mortgagor was employed as a clerk, and subsequently the agent was discharged and the entire control of the store was placed in the hands of the mortgagor, there was not an "actual and continued change of possession," as required by the statute. *Swiggett v. Dodson*, 17 Pac. 594, 596, 38 Kan. 702.

An "actual and continued change of possession," within the meaning of the Oklahoma statute, relative to sales, must be open, notorious, and unequivocal, and such as to apprise the community or those who are ac-

customed to deal with the party that the goods have changed hands, and that the title has passed from the vendor to the vendee. *Swartzburg v. Dickerson*, 73 Pac. 282, 12 Okl. 566.

### ACTUAL CONDITION.

"Actual condition," as used in the charter of a banking corporation, requiring the publication in newspapers of quarterly statements showing the "actual condition" of the bank, means something more than the condition shown by the books of the bank. It means that the statement shall show what actually exists in the way of assets, and that those assets bear, approximately at least, the value at which they are stated in the statement. Those statements are made and published for the benefit of the public, so that the dealers with the bank and the depositors, as well as bill holders, may know what is the actual condition of the institution with which they are dealing. *Campbell v. Watson*, 50 Atl. 120, 131, 62 N. J. Eq. 396.

### ACTUAL CONTEST.

As used in an action for attorney's fees for counsel in settling an estate, in a hypothetical question to an expert as to the value of the services, stating that there was an "actual contest" in the probate court, the natural import of the words "actual contest," considered in connection with the context and subject-matter, meant that the proceedings to prove the will were not entirely *ex parte*, and a showing that there was a filing of papers in the case, and that attorneys for certain heirs, who denied the validity of the will, were present at the probate court and examined the witnesses, sustained the statement that there was an "actual contest." *Turnbull v. Richardson*, 37 N. W. 499, 503, 69 Mich. 400.

### ACTUAL COST.

#### Of alteration of grade crossings.

St. 1890, c. 428, providing for the abolition of grade crossings, and declaring that the allowances shall be for the total "actual cost" of the alterations, should be construed to include nothing in the nature of investment, intended to give a more proper return on the road, or to include improvements such as the cost of a new station, but that the allowance should be merely for the expense of altering the old station, and lowering it to meet the tracks, and providing new approaches, etc. *City of Newton v. Boston & A. R. Co.*, 51 N. E. 183, 185, 172 Mass. 5.

#### Of imported article.

"Actual cost," as used in the revenue act of 1818, means the actual price paid in a bona fide purchase, and not the market value; but the market value may be, and often is,

justly resorted to as a means of ascertaining the "actual cost" in doubtful and suspicious cases; for it may be fairly presumed in ordinary cases that the market value, and no more and no less, is given for the commodity. The terms, however, are not identical in their meaning, nor is the one necessarily the true interpretation of the other. *Alfonso v. United States* (U. S.) 1 Fed. Cas. 395.

"Actual cost," in the revenue laws, means "the price given and every charge which attended the purchase, and the exportation, paid or supposed to be paid at the place whence the article is exported." *Goodwin v. United States*, 10 Fed. Cas. 625, 627. "The true and real price paid for the goods upon a genuine bona fide purchase." *United States v. Sixteen Packages* (U. S.) 27 Fed. Cas. 1111, 1113.

#### Of plates.

An act providing that whenever the numbers of copies of the published Reports of the state should reach a certain amount, then the Secretary of State should sell the plates of such volumes at the "actual cost" of the same to the state, means the cost per plate of stereotype matter, and does not include an additional sum for the composition. *State v. Price*, 42 Pac. 120, 121, 12 Wash. 653.

#### Of running trains.

"Actual cost," as used in a lease of plaintiff's railroad to defendants, providing that, whenever an increase of business on the line shall warrant it, additional regular trains shall be established and run by defendants, who shall be allowed "actual costs" of running the same, means money actually paid out for extra trains, and hence does not include the items of expense which would have been incurred whether extra trains had been run or not; no new engines or cars and no extra hands being required for the trains, and no additional compensation paid to the men employed thereon. *Lexington & W. C. R. Co. v. Fitchburg R. Co.*, 75 Mass. (9 Gray) 226, 230.

### ACTUAL DAMAGES.

Actual damages are such compensation for an injury as would follow from the nature and character of the act. Actual damages are those which the injured party is entitled to recover for the wrongs received and injuries done, when none were intended. *Ross v. Leggett*, 28 N. W. 695, 697, 699, 61 Mich. 445, 1 Am. St. Rep. 608.

Actual damages are compensatory only. *Lord, Owen & Co. v. Wood*, 94 N. W. 842, 845, 120 Iowa, 303.

Actual damages are such losses as are actually sustained and are susceptible of as-

certainment. *Western Union Tel. Co. v. Lawson*, 72 Pac. 283, 284, 66 Kan. 660.

The purpose of the law in awarding actual damages is to repair the wrong that has been done, to compensate for the injury inflicted, and not to impose a penalty. Actual damages are not dependent on nor graded by the intent with which the wrongful act is done. *Field v. Munster*, 32 S. W. 417, 418, 11 Tex. Civ. App. 341.

By "actual damages" is meant in law such damages as the testimony will justify the jury in awarding to recompense the plaintiff for loss of time or money, for incurred expenses, for bodily injuries, for mental pain and suffering, for the permanency of the injuries, and the like. *Oliver v. Columbia, N. & L. R. Co.*, 43 S. E. 307, 320, 65 S. O. 1.

Damages in a tort action are not divided into actual, compensatory, and exemplary. The term "compensatory damages" covers all loss recoverable as matter of right. It includes all damages for which the law gives compensation, and that gives rise to the term "compensatory damages." "Compensatory damages" and "actual damages" are synonymous terms. Pecuniary loss is an actual damage. So is bodily pain and suffering. *Gatzow v. Buening*, 81 N. W. 1003, 1009, 106 Wis. 1, 49 L. R. A. 475, 80 Am. St. Rep. 1.

Actual damages are either general or special. The former are such as naturally result from the act complained of. Injury to the feelings, caused by the willful neglect or default of another, constitutes actual damages, for which a recovery could be had. *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 311, 40 Am. Rep. 805 (citing *Hays v. Houston G. N. R. Co.*, 46 Tex. 272, 279).

The words "actual damages" shall be construed to include all damages that the plaintiff may show he has suffered in respect to his property, business, trade, profession, or occupation, and no other damages whatever. *Gen. St. Minn. 1894, § 5418.*

#### Failure to deliver telegram.

The term "actual damages" has a significance and meaning of its own, and will not include mental anguish caused by mere negligence in failing to deliver a telegram. *Gahan v. Western Union Telegraph Co.* (U. S.) 59 Fed. 433, 434.

#### Infringement of patent.

The "actual damages" authorized by statute to be recovered for the infringement of a patent are such as the plaintiff can actually prove and has in fact sustained, as distinguished from mere imaginary or exemplary damages, which in personal torts are sometimes given. *Whittemore v. Cutter* (U. S.) 29 Fed. Cas. 1123, 1125.



**Libel.**

"Actual damages," in an action for libel, "are such as the plaintiff suffered, if any, on account of the libel or injury to the feelings and character, or anguish of mind by the shame, mortification, and degradation caused by the publication." *Grace v. McArthur*, 45 N. W. 518, 521, 76 Wis. 641.

The term "actual damages," as used in an action for libel, is broad enough to include damages for loss of reputation, shame, falsehood, etc. *Hearne v. De Young*, 64 Pac. 576, 577, 132 Cal. 357.

Gen. Laws 1887, c. 191, § 2, entitled "An act to regulate actions for libel," in defining "actual damages," limits them to damages in respect to property, business, trade, profession, or occupation. *Allen v. Pioneer Press Co.*, 41 N. W. 936, 939, 40 Minn. 117, 125, 3 L. R. A. 532, 12 Am. St. Rep. 707.

**Wrongful attachment.**

As used in an act authorizing a recovery of actual damages sustained by the wrongful issue of an attachment, the term "actual damages" does not mean such damages as can be definitely determined as the actual loss which the debtor would incur by reason of the attachment, and which loss could be determined or computed, but an undetermined loss or damage, which is no less actual by reason of its indeterminate character, such as damage to reputation, damage to pride and to feeling, and damage of that character. But it was not the intention of the Legislature to assess an arbitrary punishment against an attaching creditor. *Levy v. Fleischner*, 40 Pac. 384, 385, 12 Wash. 15.

Actual damages, which a defendant is entitled to recover in an action for wrongfully suing out an attachment, only include such damages and current expenses of the business during the detention of the property attached, and reasonable attorney's fees, to be fixed by the court on proper evidence. Actual damages do not include the prospective profits from the use of the property, being inevitable, uncertain, and speculative in their nature, and depend upon so many remote chances of trade and of subsequent causes as to be undeserving of precise estimation. *Seattle Crochery Co. v. Haley*, 33 Pac. 650, 653, 6 Wash. 302, 36 Am. St. Rep. 156.

**ACTUAL DEDICATION.**

"Actual dedication," as applied to the dedication of land to a municipality, means an intention to voluntarily surrender to the public and yield up to it every private right in and every private right growing out of the land, leaving no right in the dedicator, except such as he enjoys in common with the public. *Longworth v. City of Cincinnati*, 29 N. E. 274, 277, 48 Ohio St. 637.

**ACTUAL DELIVERY.**

Actual delivery, as applied to sales of personal property, commonly imports two distinct acts, ceding of actual possession by the seller, and actual taking of such possession by the buyer or as agent. It consists in giving real possession of the thing sold to the vendee or his servants, or to his special agents, who are identified with him in law and represent him. *Bolin v. Huffnagle* (Pa.) 1 Rawle, 9, 19.

**ACTUAL DERELICTION.**

"Actual dereliction" may either be expressly declared, or may be left to be inferred from declaratory acts *verbis vel factis*, vel non factis. *Rhodes v. Whitehead*, 27 Tex. 304, 313, 84 Am. Dec. 631.

**ACTUAL DETERMINATION.**

An actual determination in an action is the judgment rendered thereon, and not an order for judgment, and this applies as well to the judgment entered upon the order of the General Term as it does to a judgment in the first instance. *Whitfield v. Broadway & S. A. R. Co.*, 10 N. Y. Supp. 106, 107, 16 Daly. 288.

"Actual determination," as used in Code, § 11, providing that appeals shall lie only from actual determinations of the various courts named, made at General Term, does not include a judgment entered in conformity with a remittitur from the Court of Appeals to the General Term, since the remittitur controlled the court below and left nothing to be determined by such court, and it could not direct any different judgment. *Wilkins v. Earle*, 46 N. Y. 358.

"Actual determination," as used in Code, § 352, authorizing an appeal to the General Term of the Common Pleas of the City of New York from an actual determination by the General Term of the Marine Court, construed to require a determination on the merits before the latter court, and not to include a default judgment. *McMahon v. Rauhr*, 47 N. Y. 67, 72.

An order made on appeal to the General Term of the Marine Court, reversing the judgment and granting a new trial, does not constitute an actual determination of the action, such as will authorize an appeal to the Court of Common Pleas, under Code, § 352. *Frank v. Benner* (N. Y.) 3 Daly, 422, 423.

Code Civ. Proc. § 3191, provides that appeals may be taken from any court to the Court of Common Pleas from an "actual determination" made at the General Term of any court, where there has been a final judgment entered upon an appeal taken to such General Term. Held, that an order of the General Term, affirming the judgment upon appeal, is not an "actual determination,"

within the meaning of such section, and that an appeal will lie only from the judgment entered pursuant to such an order. *Whitfield v. Broadway & S. A. R. Co.*, 10 N. Y. Supp. 106, 107, 16 Daly, 288; *Fuller v. Tuska*, 17 N. Y. Supp. 856.

### ACTUAL EVICTION.

Eviction is actual when the tenant is deprived of the occupancy of some part of the demised premises. *Talbott v. English*, 59 N. E. 857, 860, 156 Ind. 299.

An actual eviction is an actual expulsion of the tenant out of all or some part of the demised premises; a physical ouster or dispossession from the very thing granted or some substantial part thereof. The mere making of another lease during the term of such premises does not constitute an actual eviction. *Knotts v. McGregor*, 35 S. E. 899, 901, 47 W. Va. 566.

An "actual eviction" consists in the deprivation by the landlord of the tenant of the whole or some portion of the demised premises, and, where there has been an actual eviction from a part of the demised premises, the tenant may retain possession of that which he has; the entire rent being suspended until full possession has been restored. The act of the landlord in depriving a tenant of a portion of the demised premises, being a willful one, and done in defiance of the tenant and his rights under the lease, is in the nature of a trespass. *Selgel v. Neary*, 77 N. Y. Supp. 854, 856, 38 Misc. Rep. 297.

### ACTUAL EXPENSES.

"Actual expenses" as used in Code Civ. Proc. § 2557, providing that the surrogate cannot allow costs, other than actual expenses, out of an estate or fund of less than \$1,000 in land or value, includes an allowance to an administrator for the time occupied in the judicial settlement of his account. In *re Van Kleeck*, 20 N. Y. Supp. 85, 2 Con. Sur. 14.

### ACTUAL FORCE.

Actual force, within a statute providing for imprisonment on a judgment obtained in an action founded on actual force, must be force such as to put one standing in defense of possession in fear of personal injury. In *re Dimmick*, 2 Pa. Dist. R. 842, 843.

Within the statute prohibiting the discharge of a judgment debtor in insolvency, where the judgment was obtained for "actual force," the force must be such as to put one standing in defense of possession in fear of personal injury; and the force to invalidate a marriage must amount to duress per minas. In *re Widmer* (Pa.) 10 Phila. 81. The term "actual force," as so used, means force or violence willfully or wantonly directed against the plaintiff or his property,

such as would amount to an actual breach of the peace, and where a driver recklessly and riotously drives a team upon a public road under circumstances in which he must have known that the probable circumstances would be injurious to others. In *re Graeff*, 2 Pa. Dist. R. 369, 370.

### ACTUAL FRAUD.

Actual fraud implies "deceit, artifice, trick, design; some direct active operation of the mind." *People v. Kelly* (N. Y.) 35 Barb. 444, 457.

Actual fraud is any artifice by which another is deceived. *Jackson v. Jackson*, 47 Ga. 99, 104. "A deception practiced in order to induce another to part with property, or to surrender some legal right, and which accomplishes the end designated." *Haas v. Sternbach*, 41 N. E. 51, 53, 156 Ill. 44 (quoting *Cooley, Torts*, 474); *Lodge v. Rose Valley Mills*, 1 Pa. Dist. R. 811, 812.

Actual fraud consists in any kind of artifice by which another is deceived. It implies moral guilt. Civ. Code Ga. 1895, § 4025.

"Actual fraud is any cunning, deception, or artifice used to circumvent, cheat, or deceive another." *Hatch v. Barrett*, 8 Pac. 129, 137, 34 Kan. 223.

A promise made without any intention of performing it is "actual fraud." The essence of the fraud being the existence, at the time of the promise, of an intention not to perform it, without such intention there is no actual fraud; for a mere failure to fulfill a promise is not fraud. *Brison v. Brison*, 17 Pac. 689, 690, 75 Cal. 525, 7 Am. St. Rep. 189.

"Actual fraud," within the meaning of the chapter relating to contracts, consists in any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1) The suggestion as a fact of that which is not true by one who does not believe it to be true; (2) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (3) the suppression of that which is true, by one having knowledge or belief of the fact; (4) a promise made without any intention to perform it; or (5) any other act fitted to deceive. Civ. Code Mont. 1895, § 2117; Rev. Codes N. D. 1899, § 3848; Civ. Code S. D. 1903, § 1201; Rev. St. Okl. 1903, § 743.

Actual fraud, or fraud in the ordinary sense and meaning of the term, is a matter of fact, to be proved to the satisfaction of the jury. This proof shall consist of proof of acts or conduct which the court calls

badges of fraud, and it is for the court and judge to decide what is such a badge. *Kirkley v. Lacey*, 30 Atl. 994, 995, 7 Houst. 213.

The fraud in those cases where a debt accrues after a settlement by a debtor on a wife consists in the fact that the debtor is knowingly permitted by the beneficiary to have the possession, control, and apparent ownership of the property, so that persons dealing with him are misled by appearances, and suppose him to be the owner, and give him credit on the faith of such ownership. If that be so, it matters not what may be the motive of the parties. Their conscious acts have worked a fraud, and that is the actual fraud necessary in such cases, as distinguished from the constructive fraud which is presumed in favor of a creditor whose debt accrued before the settlement was made. *McCanless v. Smith*, 25 Atl. 211, 224, 51 N. J. Eq. (6 Dick.) 505.

#### **Constructive fraud distinguished.**

Fraud in law is of two kinds, actual and constructive. The former arises from deception practiced by means of the misrepresentation or concealment of a material fact; the latter, from a rule of public policy or the confidential or fiduciary relation which one of the parties affected by the fraud sustained toward the other. It is a constituent of actual fraud that the party alleged to have been defrauded was deceived. No positive dishonesty of purpose is required to show constructive fraud. *Forker v. Brown*, 30 N. Y. Supp. 827, 10 Misc. Rep. 161.

Fraud may be actual or constructive. Actual fraud consists in any kind of artifice by which another is deceived. Constructive fraud consists in any act of omission or commission, contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another. The former implies moral guilt; the latter may be consistent with innocence. *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261. One who knowingly and willfully makes false representations as to material facts, with intention to induce the other to enter into a contract with him, and who does so induce the other to enter into the contract to his injury, is guilty of actual fraud, without regard to his intent as to injury to the other party. It is a fraud in law if the party makes representations which he knows to be false and injury ensues, although the motive from which the representations proceeded may not have been bad. *Northwestern Life Ins. Co. v. Montgomery*, 43 S. E. 79, 80, 116 Ga. 799 (citing *Foster v. Charles*, 6 Bing. 396).

#### **ACTUAL KNOWLEDGE.**

There is evidently a difference between "notice" and "actual knowledge" of the pro-

ceedings in bankruptcy, as used in *Bankr. Act* July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], providing that a discharge shall release the bankrupt, except as to such debts not scheduled, unless the creditor had notice or actual knowledge of the proceedings in bankruptcy. The notice is evidently a written notice delivered to the creditor, but the section evidently contemplates that the creditor may have actual knowledge of the proceedings from other sources than either of those provided by the statute. If it be clearly shown that the creditor had actual knowledge of the application for discharge, it makes no difference how this knowledge may have been acquired. *Jones v. Walter (Ky.)* 74 S. W. 249, 250.

#### **ACTUAL MALICE.**

"Actual malice," in the law of libel, means an evil intent or motive arising from spite or ill will. *McDonald v. Brown*, 51 Atl. 213, 23 R. I. 546.

"Actual malice," in the law of libel, means personal hatred or ill will toward the plaintiff, or wanton disregard of the civil obligation of the defendant toward the plaintiff. *Hearne v. De Young*, 64 Pac. 576, 578, 132 Cal. 357.

By the term "actual malice," as used in the law of libel, is meant personal spite or ill will, or culpable recklessness or negligence. Such malice may be shown by extrinsic evidence, or it may be gathered from the publication itself. *Cherry v. Des Moines Leader*, 86 N. W. 323, 114 Iowa, 298.

"Actual malice" in the publication of a libel exists when the publication is made through motives of ill will and with intent to injure or defame. *Taylor v. Hearst*, 40 Pac. 392, 393, 107 Cal. 262.

"Actual malice," as used in connection with an action for libel in furnishing a report as to the financial standing of the plaintiffs, means that the report in question was prepared and published, not in good faith, but with an intent to injure plaintiffs, or with a willful and wanton neglect of the rights and interests of plaintiffs. *Minter v. Bradstreet Co.*, 73 S. W. 668, 683, 174 Mo. 444.

#### **ACTUAL MARKET VALUE.**

Act March 3, 1863, providing that the invoice of goods imported, which are procured otherwise than by purchase, must state their "actual market value," means their value in the principal markets of the country where they were manufactured, no matter what it cost the manufacturer to produce them, or it is the price at which the manufacturer holds them for sale, or at which he freely offers them in the market, or such

price as he is willing to receive for them if they are sold in the ordinary course of trade. There is no substantial difference between the expressions "market value," "their market value," and "actual market value." Twelve Hundred and Nine Quarter Casks etc., of Wine (U. S.) 24 Fed. Cas. 398, 404.

"Actual market value," as used in the customs duty act, is the price which the owner or purchaser of the goods is willing to receive for them, if they are sold in the ordinary course of trade; the price which a purchaser must pay to get them. This is common sense and reason. It is the popular meaning of the term, and it is also the legal meaning. Three Thousand One Hundred and Nine Cases of Champagne (U. S.) 23 Fed. Cas. 1168, 1172; Six Cases of Silk Ribbons (U. S.) 22 Fed. Cas. 247.

The term "actual market value," as used in Act March 3, 1863 (12 Stat. 737), requiring that the invoice of imported goods, which are procured otherwise than by purchase, must state their "actual market value" at the time and place when and where they are procured or manufactured, means the price at which the owner or manufacturer of goods holds them for sale in the ordinary course of trade. Some of the statutes use the expression "market value," some "fair market value," and some "actual market value"; but there is no substantial difference. The only other possible meaning of the word "actual" is value in the actual market, as contradistinguished from a hypothetical, notional, or ideal value, which may be affixed to an article in a particular case for a particular reason. Whatever men, in the ordinary dealings of society between man and man, would consider to be the fair "actual market value" of property, that is its "actual market value," within the meaning of the revenue laws. In *Cluquot's Champagne*, 70 U. S. (3 Wall.) 114, 18 L. Ed. 116, the court defines the "actual market value" as the price at which the owner or manufacturer of goods holds them for sale; the price at which he freely offers them in the market; such price as he is willing to receive for them if they are sold in the ordinary course of trade. Twelve Hundred and Nine Quarter Casks, etc., of Wine (U. S.) 24 Fed. Cas. 398, 405.

Under Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924], the words "actual market value," whenever used in the act or in any law relating to the appraisement of imported merchandise, are to be construed to mean the actual market value or wholesale price of the merchandise as bought and sold in the usual wholesale quantities, including the value of the cases and coverings of any kind and all other expenses incident to placing the merchandise in condition to pack for shipment. *West v. United States* (U. S.) 119 Fed. 495.

## ACTUAL MARRIAGE.

Proof of actual marriage is always used and understood in opposition to proof by cohabitation, reputation, and other circumstances from which marriage may be inferred, which is sufficiently shown by a copy of the register or by testimony of witnesses who are present at the ceremony. This constitutes proof of marriage in fact, and is merely a direct evidence, as contradistinguished from cohabitation, which is an indirect evidence of marriage. *State v. Winkley*, 14 N. H. 480, 494.

## ACTUAL MILITARY SERVICE.

There is a sound distinction between the calling forth of the militia and their being in "actual service" and employment of the United States, contemplated both in the Constitution and the acts of Congress. The Constitution enables Congress to provide for the government of such part of the militia as may be employed in the service of the United States, and makes the President commander in chief of the militia when called into the actual service of the United States. If the former clause included the authority to call forth the militia, as being, in virtue of the call of the President, in actual service, there would certainly be no necessity for the distinct clause authorizing it to provide for the calling forth of the militia, and the President would be commander in chief, not merely of the militia in actual service, but of the militia ordered into service. The term "actual service" means something more than a mere calling forth of the militia. It includes some act of organization, mustering, or marching done or recognized in obedience to the call in the public service. The terms "called forth" and "employed in the service" cannot, in any appropriate sense, be said to be synonymous. From the very nature of things the call must precede the service. *Houston v. Moore*, 18 U. S. (5 Wheat.) 164, 5 L. Ed. 19.

The fifth amendment to the federal Constitution requiring an indictment or prosecution before any one can be held to answer for high crimes, except cases arising in the land or naval force or in militia "when in actual service in time of war," does not refer to the regular army or navy, but refers only to the militia. *In re Bogart* (U. S.) 3 Fed. Cas. 796, 798.

### As authorizing nuncupative wills.

Act April 8, 1833, permitting any "soldier in actual military service" to dispose of his movables, wages, and personal assets by nuncupative will, means one who is engaged in the active duties of the field, whether it be on the march, in the temporary camp, battle, siege, or bivouac, but can never apply to the soldier who is in regular quarters or at his customary home on leave of absence.

In common parlance, a soldier is understood to be in "actual military service" from the time of his enlistment until his discharge, whether he be in camp, garrison, hospital, at home on furlough, on the march, or engaged in battle or siege. In *re Smith's Will* (Pa.) 6 Phila. 104.

Gen. St. p. 377, § 9, relating to the formalities of wills, and providing that nothing therein shall be construed to prevent any soldier in "actual military service" from disposing of his wages or other personal estate as he might otherwise have done, means one in the enemy's country engaged in actual warfare, where he is liable at any hour to engage in battle; and while serving in that department, whether in camp or campaign services, he was in "actual military service" as fully as if he had been engaged in actual combat with the enemy. When a soldier is in the enemy's country performing military service, whether in camp, campaign, or in battle, such service is "actual military service." *Van Deuzer v. Gordon's Estate*, 39 Vt. 111, 117.

The expression "actual military service," as used in the statute of frauds, "received a full consideration in the case of *Drummond v. Parish* (Eng.) 3 Curt. 522, in which it was held that these words referred to and were intended to designate a service on an expedition, and that the privilege [in respect to nuncupative wills of British soldiers] was limited and confined to those soldiers only who were on that particular service. We are entirely satisfied with this interpretation of the statute, but what shall be considered as an expedition is in some measure a question of fact, depending upon the circumstances of the particular case. The deceased was a soldier belonging to a company and regiment which formed a part of the Army of the Potomac in the recent War of the Rebellion." He had been with his company and regiment during the Peninsular campaign, and during the month of August had been transferred with the entire army to the vicinity of Washington. While the regiment was on the march to engage the enemy, the deceased, who was sick and very weak, was ordered by the captain to fall out, and go on when he was rested. He was sent by the medical director to the hospital in the District of Columbia, which was in fact nothing but a field hospital, where he was told that he had not long to live, and on the same day made the declarations and requests to the witness proposed to be established as a testamentary disposition. "If we regard the nature and object of this privilege, and the situation of the deceased at the time he made the declaration, . . . we can come to no other conclusion than that, in the sense of the statute, the deceased was at that time a soldier in actual military service." *Gould v. Safford's Estate*, 39 Vt. 498, 507.

Where an officer of a regiment embarked from India for England, he was at the time a soldier in "actual military service," within the meaning of St. 1 Vict. c. 26, providing that a soldier in actual military service may dispose of his personal estate as he might have done prior to the act. In *re Johnson*, 2 Curt. 341.

St. 1 Vict. c. 26, § 11, enacting that any soldier, being "in actual military service," may dispose of his personal estate as he might have done before the making of the act, applies to such soldiers only as are on an expedition. From the authorities, it would seem that a military will was only good when made on the field of battle or marching against the enemy. *Drummond v. Parish*, 3 Curt. 522.

Rev. St. c. 74, § 18, authorizing a soldier in actual service to dispose of his property by either a written or a nuncupative will, is not to be limited to those excursions from camps or quarters in the enemy's country which are designed to bring on an immediate engagement, but to include time spent in winter quarters while on an expedition into the enemy's country. *Leathers v. Greenacre*, 53 Me. 561, 573.

An officer in the army of the United States in May, 1864, after it had commenced to move on Richmond, wrote and sent a letter to his sister, saying, if he was killed or did not return, he wanted her to have his property. He was killed in August, 1864. *Held*, that such officer was a "soldier in actual service in peril of immediate death," within the meaning of the statute relating to nuncupative wills, and his will was entitled to probate as such. *Botsford v. Krake* (N. Y.) 1 Abb. Prac. (N. S.) 112, 120.

#### ACTUAL NOTICE.

Actual notice consists in express information of a fact. *Gress v. Evans*, 46 N. W. 1132, 1134, 1 Dak. 387; *La Crosse Boot & Shoe Mfg. Co. v. Mons Anderson Co.*, 70 N. W. 877, 878, 9 S. D. 560; *Kansas Moline Plow Co. v. Sherman*, 41 Pac. 623, 626, 3 Okl. 204, 32 L. R. A. 33; *Jackson v. Waldstein* (Tex.) 27 S. W. 26, 27; *Rev. Codes N. D.* 1899, § 5116; *Civ. Code S. D.* 1903, § 2450; *Rev. St. Okl.* 1903, § 2789.

Notice is actual when it is directly and personally given to the person to be notified. *Jordan v. Pollock*, 14 Ga. 145, 146; *Johnson v. Dooly*, 72 Ga. 279, 299; *Levins v. W. O. Peoples Grocery Co.* (Tenn.) 38 S. W. 733, 740; *College Park Electric Belt Line v. Ide*, 40 S. W. 64, 66, 15 Tex. Civ. App. 273; *Morey v. Milliken*, 30 Atl. 102, 105, 86 Me. 464.

Actual notice exists when the party to be affected by it might by the use of reasonable diligence have informed himself of the existence of certain facts. Any fact or cir-

cumstance that is sufficient to put a prudent man upon inquiry, and is of such a character that he might ascertain the fact by the exercise of reasonable diligence, will be regarded as notice. *College Park Electric Belt Line v. Ide*, 40 S. W. 64, 66, 15 Tex. Civ. App. 273; *Root v. Baldwin* (Tex.) 52 S. W. 586, 587; *Hooser v. Hunt*, 26 N. W. 442, 445, 65 Wis. 71; *Kansas Moline Plow Co. v. Sherman*, 41 Pac. 623, 626, 3 Okl. 204, 32 L. R. A. 33; *Schavely v. Bishop*, 55 Pac. 667, 668, 8 Kan. App. 301; *Johnson v. Dooly*, 72 Ga. 297, 299.

"Actual notice" is notice brought directly home to the parties. *McCray v. Clark*, 82 Pa. 457, 461.

"Actual notice" of a fact is nothing more or less than knowledge of the existence of such a fact. *Fuller & Johnson v. McMahon* (Iowa) 94 N. W. 205. The term is so used in Rev. St. 1858, c. 86, § 32, which provides that when a deed purports to be an absolute conveyance, but is intended to be made defeasible by force of a deed of defeasance or other instrument for that purpose, the general conveyance shall not thereby defeat or vacate, as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having "actual notice" thereof, unless the instrument of defeasance shall have been recorded. *Brinkman v. Jones*, 44 Wis. 498, 519.

Actual notice is a conclusion of fact, capable of being established by all grades of legitimate evidence. *Levins v. W. O. Peoples Grocery Co.* (Tenn.) 88 S. W. 733, 740.

Actual notice does not mean that which in metaphysical strictness is actual in its nature, because it is seldom that ultimate facts can be communicated in a manner so direct and unequivocal as to exclude doubts as to their existence or authenticity. Actual notice means, among other things, knowledge of facts or circumstances so pertinent in character as to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts. *Pope v. Nichols*, 59 Pac. 257, 259, 61 Kan. 230.

"Actual notice" is that which gives actual knowledge, or facts which would lead to such knowledge. *White v. Fisher*, 77 Ind. 65, 71, 40 Am. Rep. 287.

#### Constructive notice distinguished.

Actual notice, which will imply fraud in a purchase of property, implies a wrongful purpose or intent in the mind of the person whose contract is in question. *Reisan v. Mott*, 42 Minn. 49, 43 N. W. 691, 18 Am. St. Rep. 489. A person cannot be held guilty of actual intended fraud because he had imputed or constructive notice thereof. *Benton v. Minneapolis Tailoring & Mfg. Co.*, 76 N. W. 265, 267, 73 Minn. 498.

1 Wds. & P.—11

Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts, and, like other legal presumptions, does not admit of dispute. "Constructive notice," says Story, J., "is in its nature no more than the evidence of notice, the presumption of which is so violent that the court will not even allow it to be controverted." Constructive notice is a legal inference from established facts, and when the facts are not controverted, or the alleged defect or infirmity appears on the face of the instrument and is matter of ocular inspection, the question is one for the court. Whether, under a conceded state of facts, the law will impute notice to the purchaser, is not a question for the jury. *Thomas v. City of Flint*, 81 N. W. 936, 944, 945, 123 Mich. 10, 47 L. R. A. 499, 81 Am. St. Rep. 230.

Notice is of two kinds, actual and constructive. Actual notice may be either express or implied. If the one, it is established by direct evidence; if the other, by proof of circumstances from which it is inferable as a fact. Constructive notice is, on the other hand, always a presumption of law. Express notice embraces, not only knowledge, but also that which is communicative by direct information, either written or oral, from those who are cognizant of the fact communicated. Implied notice, which is equally actual notice, arises where the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him by the exercise of due diligence to a knowledge of the particular facts, or, as defined by the Supreme Court of Missouri, in *Rhodes v. Outcalt*, 48 Mo. 367, 370, "a notice is to be regarded in law as actual when the party sought to be affected by it knows of the particular fact, or is conscious of having the means of knowing it, although he may not employ the means in his possession for the purpose of gaining further information." *City of Baltimore v. Whittington*, 27 Atl. 984, 985, 78 Md. 231.

1 Ter. Laws, 46, declares "that an unrecorded deed shall be void against a subsequent purchaser for a valuable consideration." In the Revision of 1825, the provision was that it should not be binding, except "between the parties and such as have actual notice." Held, that the term "actual notice" was there used, as contradistinguished from implied notice, and, though "actual notice" required by the act was not "certain knowledge," it was such information as men generally act upon in the transactions

of life. In other words, it was knowledge of the state of facts sufficient to put a person on inquiry, which, if prosecuted to a logical termination, would have imparted actual knowledge of the condition of the title. *Vaughn v. Tracy*, 22 Mo. 415, 420.

The term "actual notice," within the meaning of the recording statutes, making unrecorded instruments valid only as against those who have actual notice of their existence, is used in contradistinction to the constructive notice imparted by the record in a conveyance. It does not mean direct evidence that the subsequent purchaser actually knew of the existence of the deed. Any proper evidence tending to show it—facts and circumstances coming to his knowledge that would put a man of ordinary circumspection upon inquiry—will suffice. The mere statement by a third person that, if a person owning land gave another deed to the land it would put her in a fix, is not sufficient to constitute notice, where such a person testifies that they did know of the existence of another deed at the time of making such a remark. *Morrison v. Juden*, 46 S. W. 994, 998, 145 Mo. 282.

#### **Previous notice synonymous.**

"Actual notice" as used in Rev. St. § 2243, providing that, when a deed purports to be an absolute conveyance in terms, but is made or intended to be made defeasible by force of a deed of defeasance or other instrument for that purpose, the original conveyance shall not be thereby defeated or affected, as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having "actual notice" thereof, unless the instrument of defeasance shall have been recorded in the office of the register of deeds of the county where the lands lie, is equivalent to "previous notice," as used in section 2324, providing that the statute shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had "previous notice" of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor. *Hooser v. Hunt*, 26 N. W. 442, 445, 65 Wis. 71.

#### **Conveyance or claim of title.**

"Actual notice" is not synonymous with "actual knowledge" or "personal notice," so as to require a person having actual notice of a registration of a prior conveyance of land to actually know of such conveyance or have been personally notified thereof, but may mean the existence of a state of facts from which the law will conclusively presume that such notice exists. *Cowan v. Withrow*, 16 S. E. 397, 111 N. C. 306.

The actual notice which a purchaser is presumed to have of a prior entry does not

mean direct evidence that he actually knew of the prior entry, but that the possession and the facts and circumstances coming to his knowledge were such as to put a man of ordinary circumspection upon inquiry, and reasonable inquiry would have disclosed the prior entry and superior equity. *Johnson v. Fluetsch*, 75 S. W. 1005, 1011, 176 Mo. 452.

Notice is actual when the purchaser either knows of the existence of the adverse claim or title or is conscious of having the means of knowledge, although he may not use them. It does not mean that there must necessarily be direct and positive evidence that the subsequent purchaser actually knew of the existence of the deed. Any proper evidence tending to show it—facts and circumstances coming to his knowledge that would put a man of ordinary circumspection upon inquiry—should go to the jury as evidence of such notice. Thus, one who has lost his title to the land by a judgment in ejectment cannot claim value of the improvements as having been put on without notice, though he honestly believed he had title, where, before making the improvements, the person whose title was subsequently upheld told him of his claim. *Brown v. Baldwin*, 25 S. W. 858, 860, 121 Mo. 108.

Actual notice arises where a purchaser knows of the existence of the adverse claim or title, or is conscious of having the means of knowing, although he may not use them; and, if the purchaser has such information as would put an ordinarily prudent person on inquiry, he is affected with notice. Actual notice implies the existence of evidence tending to prove knowledge, and there is no implication to be raised, from the words "actual notice," that every person who loans money on real estate security should visit the premises, since it is the policy of the law to make persons record their deeds, and where they fail to do so it is carrying out the intention of the statute to require the person who has disregarded it to introduce some evidence tending to show that the purchaser in good faith and for a valuable consideration, who has observed the requirements of the statute, had knowledge of the facts which are claimed to be essential. To require this is not to require proof of actual knowledge, but to afford some basis for the otherwise unfounded conclusion of actual notice; in other words, to give its proper force to the significant word "actual." *Masterson v. West End N. G. R. Co.*, 5 Mo. App. 64, 71.

Rev. St. c. 59, § 28, provides that any unrecorded conveyance of real estate shall be valid and effectual against any person except the grantor "and persons having actual notice thereof." Held, that the words "actual notice" were used as equivalent to constructive notice, which is to be presumed from the registry of the deed; but the party

claiming under the unrecorded deed is not required to prove that the party claiming under a subsequent deed or attachment had "certain knowledge" of the deed from the debtor to the party claiming under it—such knowledge, for example, as the party claiming by the attachment or a subsequent conveyance would have if he had seen the first deed executed and delivered to the grantee. Something less than positive personal knowledge of the fact of the conveyance would be sufficient to constitute "actual notice," within the true intent and meaning of the statute. *Curtis v. Mundy*, 44 Mass. (3 Metc.) 405, 407.

The registration of a deed in the county where the land is situated, properly authenticated, is notice to every one of its contents as shown by such record; but a recorded deed from an heir, though notice sufficient to put purchasers on inquiry as to the existence of other heirs, is not notice that the grantee therein claimed by unrecorded conveyances from such other heirs. *Root v. Baldwin* (Tex.) 52 S. W. 586, 587.

#### **Dangerous character of dogs.**

In considering the knowledge which the owner of an animal must have as to its dangerous character before he can be held liable for its acts, the court said: "Notice may be of two kinds. It may be an actual notice—that is, knowledge brought home to the party himself—that his dog has bitten a certain person at a certain time under certain circumstances, which he had no right to do; or a man may keep a vicious bull, and may have notice brought home to him of some immediate injury that he has done. That is actual notice. In case of any accident happening or injury being done, either by one animal or the other, in that case, the master would be liable. But that is not the only case in which the master may be liable. There may be a case in which there is no actual notice, but where there are certain facts and circumstances which, being brought to his knowledge, imply notice; that is, by reason of the duty that is imposed upon him, he reasonably ought to know. If a man has a dangerous dog, though he may never have bitten any person, if he is of a vicious and ferocious character, and that knowledge is brought home to his wife, under those circumstances, in case of injury inflicted by that dog, he unquestionably would be liable, though no actual notice had been given. In other words, that is what the law terms 'constructive notice,' which means nothing more nor less than that there are facts and circumstances, which are brought to his knowledge, tending to show that the animal is a dangerous and ferocious animal, and therefore he would be liable for any consequences which may result from the viciousness of the animal." *Barclay v. Hartman*, 43 Atl. 174, 175, 2 Marv. 351.

#### **Defective condition of sidewalk or highway.**

Actual notice of the defective condition of a sidewalk on the part of the mayor and board of aldermen of a city means knowledge of such defects, gained by observation thereof or by information directly given by some person having knowledge of such defect. *Poole v. City of Jackson*, 23 S. W. 57, 59, 93 Tenn. (9 Pickle) 62.

In an action for injuries caused by a defective sidewalk, an instruction that by "actual notice" is meant that if there was a defect in the sidewalk, and some member of the board of mayor and aldermen, or some agent or employé of defendant whose duty it was to keep or see the streets were kept in repair, saw it, or that some one notified or informed them, or some of them, of its existence, was not erroneous. *Poole v. City of Jackson*, 23 S. W. 57, 59, 93 Tenn. (8 Pickle) 62.

The words "actual notice," in a statute relating to actions for the recovery of damages sustained by defects in highways, which requires proof of "actual notice" of municipal officers concerning such defects, signifies something more than an opportunity to acquire notice by the exercise of due care and diligence; but the facts and circumstances may justify the conclusion that such officers must have had actual notice, unless grossly inattentive, though proof of gross inattention is not proof of actual notice. *Hurley v. Inhabitants of Bowdoinham*, 34 Atl. 72, 74, 88 Me. 293.

#### **Legal proceedings.**

Actual notice, within the meaning of a statute requiring actual notice of legal proceedings, does not include notice in a newspaper, which is never seen by the person required to be served with notice. *Spinney v. Spinney*, 32 Atl. 1019, 1021, 87 Me. 484.

#### **Tax sale.**

"Actual notice," as used in Pub. St. c. 12, § 49, providing that real estate which has been sold for taxes may be redeemed when the person offering to redeem is a mortgagee of record, provided such offer is made within two years after "actual notice" of the sale, means something more than knowledge of such facts as might be sufficient to put one on inquiry. The words, "subject to any unpaid taxes," used in a release to the mortgagee of the equity of redemption after a tax sale, though sufficient to put the mortgagee on inquiry, are not equivalent to "actual notice" of the sale for taxes. *Keith v. Wheeler*, 34 N. E. 174, 159 Mass. 161.

#### **Trust.**

Actual notice, within the rule that the party purchasing real estate which is subject to a trust is not a bona fide purchaser with-



out notice, if he has actual notice of such trust, does not necessarily mean actual notice of the fact itself, but notice of facts which would or ought to put him on inquiry in reference to it. *Bradley v. Merrill*, 84 Atl. 160-162, 88 Me. 319.

### ACTUAL OCCUPANCY.

Actual occupancy is defined as an open, visible occupancy, as distinguished from the constructive possession which follows legal title. The word "actual" is usually used in a statute in opposition to virtual or constructive, and calls for an open, visible occupation. *Cutting v. Patterson*, 85 N. W. 172, 173, 82 Minn. 375.

An occupant is one who has the actual use or possession of a thing. Webster defines "occupant" to be the one who has possession. In common parlance, occupancy is synonymous with possession. To create an actual occupancy, within the meaning of the statute respecting the sale of land for taxes, it is not necessary that the part actually occupied of a lot of land sold for taxes should be occupied professedly as a part of such lot. If such part is occupied as a part of another lot, it is equally an occupancy, and is as effectual as if it were occupied as a part of the lot sold. *Smith v. Sanger* (N. Y.) 3 Barb. 360, 366.

The words "actual occupancy," as used to denote one of the elements of adverse possession of land, are indefinite in their meaning; for, though they are usually applied to a case of residence on the land, or to an occupation by fences or buildings, they are not necessarily restricted to such marks of occupation, but may be applied to other acts of ownership which are known to the true owner. Hence actual occupancy is not necessarily synonymous with domicile or residence, but means actual use. *Leeper v. Baker*, 68 Mo. 400, 405 (approved in *Golterman v. Schiermeyer*, 19 S. W. 484, 111 Mo. 404).

The erection on uncultivated land of a hut, and its occasional use for hunting and fishing purposes, by one who makes no claim of ownership of the land, and who resides elsewhere, does not constitute "actual occupancy" of the land, within the meaning of the statute requiring notice of tax sale to be served on the person in "actual occupancy" of the land sold for taxes. *People v. Campbell*, 38 N. E. 300, 143 N. Y. 335 (affirming 22 N. Y. Supp. 458, 459, 67 Hun, 590).

"Actual occupancy," as distinguished from mere possession, is the prominent idea associated with the word "homestead." It is not to be understood, though, as requiring constant personal presence, so as to make a man's residence his prison, or that a temporary absence, enforced by some casualty or for the purposes of business or pleasure, would constitute a removal, ceasing to occu-

py, or abandonment. *Clark v. Dewey*, 73 N. W. 639, 71 Minn. 108; *Kramer v. Lamb*, 87 N. W. 1024, 1025, 84 Minn. 468.

### ACTUAL OCCUPANT.

2 Rev. St. p. 304, § 4, providing that an action of ejectment shall be brought against the "actual occupant" of the premises in controversy, means an occupant who has actual use or possession of the property on his own behalf, and does not apply to a servant holding possession merely for his master, nor to a soldier of the United States claiming to be in charge of the premises under superior officers. *People v. Ambrecht* (N. Y.) 11 Abb. Prac. 97, 101.

Gen. St. c. 23, § 48, providing that, in case of the condemnation of land for railroad purposes, a certain notice shall be served upon the "actual occupant" of such land, requires service on one who is an actual resident thereon. *Hunt v. Smith*, 9 Kan. 137, 145.

### ACTUAL OCCUPATION.

A pauper rented a house, paying rent and residing in the house with his family. He was in the habit of taking persons to sleep in some of the rooms, letting sometimes a bed, sometimes half a bed, generally by the night, but occasionally for a week, in which case, however, the bed only was let, and the pauper reserved the right of putting another bed into the room. The lodgers had no right to the rooms by day. The pauper had constant access to and control over the whole house, and kept the keys to all the rooms. Held to be an "actual occupation" of the dwelling house within St. 1 Wm. IV, c. 18, § 1. *Rex v. Inhabitants of St. Giles-in-the-Fields*, 4 Adol. & E. 495.

Code 1873, § 3087, provides that, if the defendant is in actual occupation and possession of any part of the land levied on, the officer shall, at least 20 days previous to the sale, serve the defendant with written notice of the levy. Held, that the use of the word "actual" implies that the possession by defendant shall be real, and not speculative or constructive. Thus, the possession of an assignee is in legal sense the possession of the principal, but the possession and occupation of the owner through an agent is a theoretical one, and not actual. In truth, the owner does not occupy the land. It is occupied by another under his authority. By use of the expression "actual occupation and possession" the statute implied that the land was in the occupation of the defendant himself, and if this construction be not adopted no force is given to the adjective "actual," which it cannot be presumed the Legislature used tautologically. *Bennett v. Burton*, 44 Iowa, 550, 551.

"Actual occupation," as used in Act March 2, 1889, forfeiting certain unearned

land grants, but providing it should not apply to bona fide homestead claims asserted by actual occupation, means residence. *Edwards v. Begole* (U. S.) 121 Fed. 1, 7, 57 C. C. A. 245.

#### ACTUAL PLACE OF ABODE.

Rev. St. c. 38, § 10, declares that "ratable personal property shall be taxed in the town where the owner shall have had his actual place of abode for the larger portion of the" preceding 12 months. Held, that "actual place of abode" should be construed as the town where he has his home and where his family reside, irrespective of all absences therefrom for temporary or business purposes. *Arnold v. Davis*, 8 R. I. 341, 342.

#### ACTUAL PLACE OF RELIGIOUS WORSHIP.

The phrase "actual places of religious worship" in Const. art. 9, § 1, empowering the Legislature to exempt from taxation actual places of religious worship, does not include a parsonage, though erected upon ground appurtenant to a church, but not actually a part thereof. *Church of Our Saviour v. Montgomery County* (Pa.) 10 Wkly. Notes Cas. 170, 171.

Act May 14, 1874, passed in pursuance of Const. art. 9, § 1, exempts from taxation all churches, meeting houses, and other places of stated worship. It was held that a church which ceases to be used as a place of worship ceases to be exempt from taxation. *Moore v. Taylor*, 23 Atl. 768, 147 Pa. 481.

#### ACTUAL POSSESSION.

Actual possession is the subjugation of the premises to the use and dominion of the claimant. *Lillianskyoldt v. Goss*, 2 Utah, 292, 297; *Coryell v. Cain*, 16 Cal. 567, 573; *Brumagim v. Bradshaw*, 39 Cal. 24, 44; *Davis v. Spring Valley Waterworks*, 57 Cal. 543, 545; *Webber v. Clarke*, 15 Pac. 431, 434, 74 Cal. 11; *Courtney v. Turner*, 12 Nev. 345, 352; *State v. Central Pac. R. Co.*, 30 Pac. 686, 688, 21 Nev. 247; *Gildehaus v. Whiting*, 39 Kan. 706, 18 Pac. 916, 920; *Pendo v. Beakey*, 89 N. W. 655, 657, 15 S. D. 844; *Robinson v. Gantt*, 95 N. W. 506, 1 Neb. (Unof.) 51.

Actual possession of land is the purpose to enjoy, united with or manifested by such visible acts, improvements, or inclosures as will give the absolute and exclusive enjoyment of it. *Staininger v. Andrews*, 4 Nev. 59, 68; *Courtney v. Turner*, 12 Nev. 345, 352; *Davis v. Spring Valley Waterworks*, 57 Cal. 543, 545; *Pendo v. Beakey*, 89 N. W. 655, 657, 15 S. D. 344.

Actual possession is a possession of the character required by the character and situ-

ation of the lands. *Allaire v. Ketcham*, 35 Atl. 900, 901, 55 N. J. Eq. 168.

Possession of land is actual when there is an occupancy according to its adaptation and use. *Morrison v. Kelly*, 22 Ill. (12 Peck) 609, 624, 74 Am. Dec. 169.

Actual possession is usually evidenced by actual occupation, by substantial inclosure, by cultivation, or by proper use, according to the particular locality and quality of the property. *Coryell v. Cain*, 16 Cal. 567, 573; *Brumagim v. Bradshaw*, 39 Cal. 24, 44; *Gildehaus v. Whiting*, 18 Pac. 916, 920, 39 Kan. 706; *Webber v. Clarke*, 15 Pac. 431, 434, 74 Cal. 11; *State v. Central Pac. R. Co.*, 30 Pac. 686, 688, 21 Nev. 247; *Hanson v. Stinehoff*, 72 Pac. 913, 914, 139 Cal. 169 (citing *Coryell v. Cain*, 16 Cal. 567, 573).

"Actual possession" of land consists in exercising acts of dominion over it, and in making the ordinary use of it to which it is adapted, and in taking the profits of which it is susceptible. *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431. The law sets out no particular rules, where the statute of limitations does not prescribe them, which are necessary to constitute acts of dominion. Actual possession is a question of law and fact, and its determination must largely depend upon the situation of the parties, the size and extent of the land, and the purpose for which it is adapted. *Johnston v. City of Albuquerque* (N. M.) 72 Pac. 9, 11.

Actual possession is simply having the property in the immediate control or power of the party. When applied to land, it means the actual entry and occupation thereof. *Omaha & F. Land & Trust Co. v. Parker*, 51 N. W. 139, 140, 33 Neb. 775, 29 Am. St. Rep. 506.

"Actual possession" of part of a tract of land under a bona fide claim and color of title to the whole is possession of the whole, or so much as is not in the adverse possession of others. *Ollinger v. Shepherd* (Va.) 12 Grat. 462, 473.

The term "person in actual possession or occupancy of land," within the meaning of Revenue Law, § 216, providing that, before a purchaser at a tax sale shall be entitled to a deed, he shall serve notice on every person in actual possession or occupancy of such land, does not include a person who is allowed, without payment of rent, to stack hay on a part of the land which is rented to a third person. *Drake v. Ogden*, 21 N. E. 511, 512, 128 Ill. 603.

An answer in an action for trespass, alleging that the "possession" of defendants had been "actual, peaceable, quiet, open, notorious, and adverse," sufficiently alleged that the possession was exclusive and visible. *Keaton v. Sublett*, 58 S. W. 528, 529, 109 Ky. 106.

**Constructive possession distinguished.**

Actual possession means existing in fact, truly and absolutely, as opposed to potential, possible, virtual, or theoretical possession. *Doty v. O'Neil*, 30 Pac. 526, 527, 95 Cal. 244.

Actual possession, in the Spanish and Mexican law, is that which is accompanied with the real and effectual enjoyment of an estate, with the reception of its fruits, and is contradistinguished from imaginary or fictitious possession. *Sunol v. Hepburn*, 1 Cal. 254, 263.

"Actual possession," as a legal phrase, is put in opposition to the other phrase, "possession in law," or "constructive possession." Actual possession is the same as "pedis possessio" or "pedis positio," and these mean a foothold on the land and actual entry and possession in fact, a standing upon it, an occupation of it, as a real, demonstrative act done. It is the contrary of a possession in law, which follows in the wake of title, and is called "constructive possession." *Churchill v. Onderdonk*, 59 N. Y. 134, 136; *Marsh v. Ne-ha-sa-ne Park Ass'n*, 42 N. Y. Supp. 996, 1000, 18 Misc. Rep. 314; *Cutting v. Patterson*, 85 N. W. 172, 173, 82 Minn. 375; *Rosenfeld v. United States (U. S.)* 66 Fed. 303, 304, 13 C. C. A. 450.

"Actual possession," as used in 2 Rev. St. p. 312, § 1, to compel the determination of claims to real property, and which requires the plaintiff to have been in "actual possession" of the property for three years, means a possession in fact, as contradistinguished from that constructive one which the legal title draws after it. The correctness of that construction is apparent. The word "actual," in the statute, is especially significant. It is plainly used in opposition to "virtual" or "constructive," and means an open, visible occupancy. *Cleveland v. Crawford*, 7 Hun, 616, 619.

Constructive possession is a fiction of law; actual possession, a tangible fact. The "actual possession" means the corporeal detention of the property, when used in relation to adverse possession. *Carey v. Cagney*, 33 South. 89, 91, 109 La. 77.

**Acts of ownership.**

To constitute "actual possession" of land, it is only necessary to put it to such use, or exercise such dominion or acts of ownership over it, as in its present state it is reasonably adapted to. *Brand v. United States Car Co.*, 30 South. 60, 128 Ala. 579.

Actual possession of land consists of visible and notorious acts of ownership exercised over the premises, and, while it is not necessary that there should be any fence or inclosure of the land, there must be continuous dominion, manifested by continuous acts of ownership. *New Mexico, R. G. & P. R.*

*Co. v. Crouch*, 13 Pac. 201, 203, 4 N. M. (Johns.) 141.

One who actually entered on land, erected a sawmill, carried on the business of manufacturing timber into lumber and firewood, and exercised acts of ownership generally, some of his employes residing thereon, was in "actual possession." *Fleming v. Maddox*, 30 Iowa, 239, 241.

"Actual possession," when the premises are susceptible of it, must, as a general rule, be by inclosure of the land by a fence or like improvements, so as to make the occupation visible, notorious, continuous, and adverse, and thus constitute notice of the claim and possession of the occupant to the public; but there are exceptions, where the land is not suitable for cultivation, and the occupant exercises dominion over it, which is possession, when accompanied with the necessary requisites, and asserted in an equally positive manner for other purposes. *Green v. Cumberland Coal & Coke Co. (Tenn.)* 72 S. W. 459, 460.

**Cultivation, inclosure, or improvement.**

Possession is always actual when it is an open and visible occupation. The possession may be evidenced by an inclosure. In such case it is ordinarily limited to the inclosure. It may be evidenced by other improvements, or by actual and visible use. In the case of a mill site, the presence of boundary posts is as significant of occupation as an inclosure would be of agricultural land; and where, in addition to the boundary posts, there was a house, stable, and spring constructed to increase the flow of water, and a graded wagon road leading from the mill site to the land of the claim, it was not erroneous to instruct that, to constitute actual possession, it was not necessary that it be inclosed by a fence or that it should be reduced to cultivation. *Valcalda v. Silver Peak Mines (U. S.)* 86 Fed. 90, 94, 29 C. C. A. 591.

A party in possession of land, with improvements and inclosure, holds to the extent of his inclosure by what is termed "actual possession"; and if at the same time he holds under deed or title, he holds to the extent of his deed or title, outside of his actual possession, by what is termed "constructive possession." *Ramirez v. Smith (Tex.)* 56 S. W. 254, 259 (citing *Cunningham v. Frandtzen*, 26 Tex. 34, 35; *Evitts v. Roth*, 61 Tex. 81, 84).

One may gain actual possession of land by fencing it, or by cultivating and improving it, or by building upon it, and then he will have possession of as much as he has fenced or cultivated, and improved or built upon, with some land around and necessary for the buildings. Actual possession—"possession pedis"—can mean no more. *Pendo v. Beakey*, 89 N. W. 655, 657, 15 S. D. 344 (citing *Thompson v. Burhans*, 79 N. Y. 93).

One who resided on lands adjoining mortgaged premises, with only an alley between, the mortgaged premises being inclosed and used as a garden by the mortgagor, was in actual possession and entitled to notice of foreclosure, under Gen. St. Minn. 1894, § 6032. *Cutting v. Patterson*, 85 N. W. 172, 173, 82 Minn. 375.

"Where a man enters upon and improves, fences, and occupies part of another man's tract of land, and has the boundaries of his claim surveyed and marked, including woodland not inclosed, and for 21 years openly and exclusively uses the woodland as his own, in connection with his improvement, and as farmers ordinarily use their woodland, this is not a constructive, but an actual, possession of the woodland, and excludes the constructive possession which the law usually attributes to the title and to the owner's actual possession of the rest of his tract." *Wolf v. Ament's Ex'r* (Pa.) 1 Grant, Cas. 150 151.

An inclosure by an ordinary fence of premises, without residence thereon or improvement or cultivation, or other acts of ownership, is of itself insufficient to constitute "actual possession." *Davis v. Spring Valley Waterworks*, 57 Cal. 543, 545.

The exercise of control over uninclosed timber land, by working on the land at times and prohibiting others from interfering therewith, constitutes actual possession. *Allaire v. Ketcham*, 85 Atl. 900, 901, 55 N. J. Eq. 168.

#### Occupancy or residence.

Actual possession consists in the actual occupancy of the party. *Newcome v. Crews*, 32 S. W. 947, 98 Ky. 339; *Lillianskyoldt v. v. Goss*, 2 Utah, 292, 297.

Actual possession of real estate means such possession as is evidenced by fencing, cultivating, or other unmistakable acts of exclusive custody and control, and it is not necessary that there should be actual residence on the land. *Van Buskirk v. Dunlap*, 2 West. Law Month. 125, 129; *Webber v. Clarke*, 15 Pac. 431, 434, 74 Cal. 11.

By "actual possession," as used in a statement that forcible entry is high-handed invasion of the actual possession of another, is meant that he shall be in actual use and enjoyment of the land for such purpose as it is capable of, and not that the prosecutor shall be actually present at the time. *State v. Newbury*, 29 S. E. 367, 368, 122 N. C. 1077.

"Actual possession," as used in the forcible entry and detainer statute requiring the plaintiff to have been in actual possession when the defendant took wrongful possession of the property, construed not to mean the actual occupancy of the premises at the time; and hence the owner of a store, who locks it up till he can find a tenant, is in actual pos-

session thereof, within the meaning of the statute. *Minturn v. Burr*, 16 Cal. 107, 109.

#### Keeping off trespassers.

Posting notices against trespassers along a part of two of the boundary lines of a tract of 60,000 acres of uninclosed and unoccupied forest land, and employing watchers to keep trespassers off of the same, do not constitute actual possession thereof within statutes making void grants of lands which are in actual possession of a person claiming title adverse to the grantor. *Marsh v. Neha-sa-ne Park Ass'n*, 42 N. Y. Supp. 996, 1000, 18 Misc. Rep. 814.

#### Personal property.

"Actual possession," as used in Code, § 1923, providing that no mortgage of personal property, which is not filed for record, shall be valid as against existing creditors and subsequent purchasers without notice, where the mortgagor retains "actual possession" thereof, means a true, genuine, positive, and certain possession, and not a virtual or theoretical possession. The mortgagor has no "actual possession" when he retains the property under his immediate personal supervision and control, though he employs others to aid in that control; but when the property is intrusted to the custody and control of another, without the immediate supervision of the mortgagor, then "actual possession" is in that other, and not in the mortgagor. *King v. Wallace*, 42 N. W. 776, 777, 78 Iowa, 221.

Within the statute putting on the free list professional books, implements, instruments, and tools of trade, etc., in the actual possession of the person at the time of arriving in the United States, the words "actual possession" mean an open, visible, and present occupancy and possession of the articles imported. The actual possession and the arrival of the owner must be coincident; and thus articles which are brought with the owner in the same vessel are to be deemed in his actual possession at the time of the arriving, though they are in the immediate custody of the carrier. If, however, the articles arrive by a different vessel and at a different time from the owner, they cannot be said to be in his actual possession. *Rosenfeld v. United States* (U. S.) 66 Fed. 303, 304, 13 C. C. A. 450.

"Actual possession," as used in St. 2 Wm. IV, c. 45, § 26, providing that the assignee of a rent charge shall not be registered as an elector, unless he has been in the actual possession of it for six months before the last day of July, is to be construed literally, and means a possession in fact; and hence a receipt for several years by the grantee did not satisfy the statute, on the ground that he might be considered as a trustee for the assignee. *Hayden v. Overseers of Twer-ton*, 4 Man. & G. 1, 7.

**ACTUAL PURPOSES OF NAVIGATION.**

The words "actual and necessary purposes of canal navigation," in a statute exempting the property of a canal company from taxation which is kept and held by the company for the actual and necessary purposes for canal navigation, includes crossings, piers, and basins owned by the company, which are not rented, but which are actually used for conducting the boats engaged in the canal navigation and for the reception of their cargo. *Morris Canal & Banking Co. v. Betts*, 24 N. J. Law (4 Zab.) 555, 556.

**ACTUAL RECORD.**

The actual record of a mortgage, within the statute, is the spreading of a mortgage on the record, and not the filing of it with the clerk. *Benson v. Callaway*, 80 Ga. 230, 4 S. E. 851.

**ACTUAL RESIDENCE—ACTUAL RESIDENT.**

Acts 1835, §§ 8, 11, requiring "actual residence" on a tract of land in order that a person may obtain title thereto by limitation, does not require actual residence on each of two tracts of land claimed; and, though the party claiming title derived that title to different tracts from different sources, yet, if the tracts join each other and are all in one inclosure, and there is no one but the alleged owner residing thereon, such residence is "actual residence" on all the tracts, within the meaning of the act. *Wharton v. Bunting*, 73 Ill. 16, 20.

"Actual residence" as used in Civ. Code §§ 54, 640, relating to divorce, does not mean the usual place of residence, or the place where a person is in fact residing for the time being, but has substantially the same meaning as the term "domicile," having in contemplation a residence of a permanent and fixed character. *Carpenter v. Carpenter*, 2 Pac. 122, 126, 30 Kan. 712, 46 Am. Rep. 108.

**Legal residence distinguished.**

A distinction is recognized between legal and actual residence. A person may be a legal resident of one place and an actual resident of another, and when he goes from the place of his legal residence, intending to return, to reside temporarily at the other place. *Hinds v. Hinds*, 1 Iowa (1 Clarke) 36, 39; *Love v. Cherry*, 24 Iowa, 205; *Bradley v. Fraser*, 54 Iowa, 289, 6 N. W. 293. Legal residence, as distinguished from mere temporary actual residence, is the residence contemplated by the Code, relating to the bringing of actions aided by attachment. *Ludlow v. Szold*, 57 N. W. 676, 678, 90 Iowa, 175.

As contradistinguished from a person's "legal residence," he may have an "actual

residence" in another state or country. He may abide in one country, without surrendering his legal residence in another, if he so intends. His "legal residence" may be merely ideal, but his "actual residence" must be substantial. He may not actually abide at his "legal residence" at all, but his "actual residence" must be his abiding place. Though one may have a "legal residence" in one state, yet, if his "actual residence" is in another state, the latter fact is sufficient to authorize an attachment against his property in the first state upon the ground of nonresidency; and in an action for divorce the mere fact of a plaintiff's "legal residence" within the state, his actual residence being out of the state, would not be sufficient to defeat a motion to compel him to execute a nonresident's bond for costs. Furthermore, a mere "legal residence" in the state with an "actual residence" out of the state, does not satisfy Civ. Code, § 423, requiring that a plaintiff, for a divorce, must have "a residence in the state" for one year before the commencement of the action. *Tipton v. Tipton*, 8 S. W. 440, 441, 87 Ky. 243.

"Actual resident," as used in the Iowa Code, which provides that a person may be sued before a justice of the peace in any county of which he is an "actual resident," includes one who has moved into a county and hired a house there, with the intention of remaining until he had completed a certain job of work, though he did not mean to reside there permanently. A person may be an "actual resident" of one county, and have a legal residence in another. *Fitzgerald v. Arel*, 18 N. W. 713, 714, 63 Iowa, 104, 50 Am. Rep. 733. A partnership, within the meaning of such statute, has an "actual residence" in the county in which it conducts its business, though neither member of the partnership is an "actual resident" of that county. *Fitzgerald v. Gimmell*, 20 N. W. 179, 180, 64 Iowa, 261.

**ACTUAL SEISIN.**

"Actual seisen," means possession of the freehold, by the *pedis positio* of one's self or one's tenant or agent, or by construction of law, as in the case of a commonwealth's grant, a conveyance under the statute of uses, or doubtless, of grant or devise, where there is no actual adverse possession. Seisin in law is a right to the possession of the freehold, where there is no adverse occupancy thereof, such as exists in the heir after descent of land upon him before actual entry by himself or his tenant. *Carpenter v. Garrett*, 75 Va. 129, 135.

Actual seisin, or actual possession, as distinguished from constructive possession or possession in law, has been defined to be one based upon an actual entry on the land, and one which requires or gives an occupation as a demonstrative thing. *Carr v. An-*

derson, 89 N. Y. Supp. 746, 749, 6 App. Div. 6, 10 (citing *Churchill v. Onderonk*, 59 N. Y. 134).

### ACTUAL SERVICE.

See "Actual Military Service."

Actual service of a writ is shown, within the meaning of a statute providing that service of a partner is service on the firm and on the partner actually served, where the partner is a nonresident and there has been a publication of the writ, as provided by law. *Martin v. Burns*, 16 S. W. 1072, 1073, 80 Tex. 676.

"Actual service" is defined in the mechanic's lien law as service by serving a copy on nonresident defendant personally or by leaving it at his residence 10 days before its return. *Smith v. Collopy*, 55 Atl. 805, 807, 69 N. J. Law, 365.

### ACTUAL SETTLER.

"An actual settler upon land belonging to the state is one who establishes himself upon the land, or fixes his residence upon it to effect possession for his exclusive occupancy and use, with a view to acquire title to it by purchase from the state." *Gavitt v. Mohr*, 10 Pac. 337, 338, 68 Cal. 506.

An "actual service of summons" as used in an act providing for the enforcement of claims or liens upon buildings, consists of a personal service on the defendant, or, if he cannot be found in the state, by affixing a copy thereof on such building, or by leaving it at his residence. *Revision N. J. p. 668. Heldritter v. Elizabeth Oil Co.*, 5 Sup. Ct. 135, 136, 112 U. S. 294, 28 L. Ed. 729.

"Actual settlers," within the land laws of California, providing that lands belonging to the state which are suitable for cultivation can only be granted to actual settlers thereon, means actual residents. *Mosely v. Torrence*, 12 Pac. 430, 431, 71 Cal. 318.

Const. art. 7, § 6, providing that actual settlers residing on school lands shall be protected in the prior right of purchasing the same, means a settler residing on the land, and not a settler not residing thereon, though he had fenced the entire tract and cultivated a portion thereof. *Baker v. Millman*, 13 S. W. 618, 619, 77 Tex. 46.

"Actual settlers," as used in Gen. St. p. 109, § 2, requiring that an actual settler on vacant or unappropriated land shall be given notice that another person intends to appropriate such land, does not include one who only makes a small clearing on unappropriated land and cuts a few logs thereon. *McQuady v. Mattingly (Ky.)* 12 S. W. 758.

The term "actual settler," as used in the law authorizing the sale of school lands, requires actual residence on such land, and the person who has done nothing more than to make improvements on the land is not such a settler. He must both have settled upon and improved the land. Probably a person might, by going upon it and making improvements with a bona fide intention of becoming a settler thereon, obtain rights which would date from the first moment of his occupancy. To settle on the land means to fix the owner's place of residence thereon, and a settler of land is one who resides thereon. This is in accordance with all of the definitions of the words "settle," "settler," and "settlement," when applied to a settlement upon land. *Bratton v. Cross*, 22 Kan. 673, 678.

"Actual settler," as used in Act Aug. 12, 1870 (2 Pasch. Dig. art. 7048), requiring a person attempting to acquire rights in public land by pre-emption to be an "actual settler," means a person in the actual occupancy of land, with the intention of making the same his permanent residence, and using the land as his home, as opposed to a mere temporary occupation, which will not constitute a party an actual settler or occupant in good faith within the meaning of the statute. *Turner v. Ferguson*, 58 Tex. 6, 10.

### ACTUAL TIME.

An order by the Governor commuting a penitentiary sentence to imprisonment for nine years of "actual time" in the penitentiary, and providing that, when he shall have served nine years' "actual time" in said penitentiary he shall be entitled to his discharge, construed as requiring a service of nine calendar years, and not to give the prisoner the benefit of having such time commuted by good behavior. *In re Hall*, 51 N. W. 750, 751, 34 Neb. 206.

21 Stat. 346, and 22 Stat. 118, providing that officers in the army shall be entitled to additional pay for length of service, and that the actual time of service in army or navy, or both, shall be allowed all officers in computing their pay, construed as including the time in which an army officer served at West Point as a cadet. *United States v. Watson*, 9 Sup. Ct. 430, 431, 130 U. S. 80, 32 L. Ed. 852; *United States v. Morton*, 5 Sup. Ct. 1, 4, 112 U. S. 1, 28 L. Ed. 613.

### ACTUAL TOTAL LOSS.

An actual total loss is caused by (1) a total destruction of the thing insured; (2) the loss of the thing by sinking or by being broken up; (3) any damage to the thing which renders it valueless to the owner for the purpose for which he held it; or (4) any other event which entirely deprives the owner of the possession at the port of destina-

tion of the thing insured. Rev. Codes N. D. 1899, § 4568; Civ. Code S. D. 1903, § 1914.

As applied to a building, actual total loss means, not that its materials were utterly destroyed, but that the building, though part of it remained standing, has lost its identity and specific character as a building, and instead has become a broken mass, or cannot longer be properly designated as a "building." Absolute extinction is not meant. Where the roof and interior wood-work of a building are destroyed by fire, leaving the walls standing, though somewhat damaged, it is a question for the jury as to whether there was a total destruction of the building or not. *Corbett v. Spring Garden Ins. Co.*, 32 N. Y. Supp. 1059, 1061, 85 Hun, 250, 254.

There is actual total loss when the subject-matter of the insurance is wholly destroyed or lost to the insured, or where there remains nothing of value to be abandoned to the insurer. *Soelberg v. Western Assur. Co. of Toronto (U. S.)* 119 Fed. 23, 29, 55 C. O. A. 601.

An "actual total loss," as the term is used in marine insurance, is a loss where the vessel ceases to exist in specie, but becomes a mere congeries of planks, incapable of being repaired, or where, by the peril insured against, it is placed beyond the control of the insured, and beyond his power of recovery. *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50, 64.

"Actual total loss," as used in a marine insurance policy, occurs when the subject insured wholly perishes, or its recovery is irretrievably hopeless, as where a ship is broken in pieces and dismembered, so that her planks and apparel are scattered on the sea, though the whole or greater part of the fragments reach the shore as wreckage; for in such case the ship, as one, is destroyed. *Burt v. Brewers' & Malsters' Ins. Co. (N. Y.)* 9 Hun, 383, 385.

"Actual total loss," as used in a policy of marine insurance, does not necessarily imply the actual physical destruction of the thing insured, but may occur in cases where the ship remains in specie, but is irretrievably lost to the owner. *Carr v. Providence Washington Ins. Co.*, 17 N. E. 369, 370, 109 N. Y. 504; *Monroe v. British Foreign Marine Ins. Co. (U. S.)* 52 Fed. 777, 780, 3 C. C. A. 280.

The general rule as to what constitutes the total loss of a ship, within a policy of insurance, is defined in *Murray v. Hatch*, 6 Mass. 465, as follows: "If the ship is afloat, or it is practicable to put her afloat, and if she is capable of being repaired at any expense, it is not a total loss, within the meaning and intent of the policy." There is much doubt, at least, of the correctness of the proposition that an insurance on a vessel

against "actual total loss only" covers the case of total loss of value, though the ship remains in the form of a ship, capable of being repaired at some cost, and is not placed, by sale or otherwise, beyond the power of the insured to procure her arrival. But, where a wrecked vessel, insured against "actual total loss only," is allowed by the insurers to be sold to satisfy a claim of salvors employed by the insurers, who had the right so to do, the insured, not being a party to the contract, was entitled to recover as for a total loss. *Carr v. Providence Washington Ins. Co.*, 17 N. E. 369, 370, 109 N. Y. 504.

## ACTUAL USE

### Church.

"Actual use," as used in Act May 14, 1874, exempting churches and regular places of worship from taxation, and providing that all property other than that in "actual use" and occupied for such purposes should be taxed, means exclusively used; and a mere concurrent or alternate occupation by the church does not come within the requirements of the exemption. *City of Philadelphia v. Barber*, 28 Atl. 644, 645, 160 Pa. 123; *Parsonage Taxes*, 25 Pa. Co. Ct. Rep. 570, 572.

Under Const. § 170, exempting from taxation "places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship," and "all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion," a church parsonage, which is not occupied by the minister, but is rented to another, is not exempt, though erected on the church lot, and though the rent is paid to the minister. *Broadway Christian Church v. Commonwealth (Ky.)* 66 S. W. 32, 33, 112 Ky. 448.

### Horse.

A statute exempting from attachment a horse required for farming or teaming purposes, or actual use, includes a horse kept by a commercial traveler, required for use in his business for selling goods by sample, although the horse is only four years old and has never been used. *Towne v. Marshall*, 13 Atl. 648, 64 N. H. 460.

Under a statute exempting a horse in "actual use," the question whether, at the time the horse was attached, it was reasonably necessary for the actual working use of the debtor, was a question of fact for the jury. *Somers v. Emerson*, 58 N. H. 48, 49.

### Iron.

Iron, which at one time formed a part of boiler plates used in the manufacture of boilers, and of rods or beams used in building bridges, but which, in order to fit the

plates, rods, or beams, was cut off as useless and thrown into the scrap heap, was iron which had been in "actual use," within the meaning of Rev. St. § 2504, relating to tariffs, and declaring that nothing should be deemed scrap iron, except waste or refuse iron that had been in "actual use" and only fit to be remanufactured. *Schlesinger v. Beard*, 7 Sup. Ct. 546, 548, 120 U. S. 264, 30 L. Ed. 656.

#### **Wearing apparel.**

Rev. St. U. S. § 2503, exempting from duty wearing apparel in "actual use" of citizens returning to the United States from foreign countries, does not mean a use limited to wearing apparel on the person at the time, but includes any article of wearing apparel bought for use, and appropriated and set apart to be used, by becoming a part of what is ordinarily known as a person's wardrobe, and includes all articles of wearing apparel, in a condition to be worn without further manufacture, owned by a person, and brought with him as a passenger, and intended for the use and wear of himself and his family, who accompanied him as passengers, and not for sale or purchase, or imported for other persons or to be given away, suitable for the season of the year which was immediately approaching at the time of the arrival, not exceeding in quantity, quality, or value what the plaintiff was in the habit of ordinarily providing for himself and his family at that time and keeping on hand for their reasonable wants, in view of their means and habits of life. *Astor v. Merritt*, 4 Sup. Ct. 413, 419, 111 U. S. 202, 28 L. Ed. 401.

#### **ACTUAL VALUE.**

The expressions "actual value," "market value," and "market price," when applied to any article, mean the same thing. They mean the price or value of the article, established or shown by sales, public or private, in the way of ordinary business. *Sanford v. Peck*, 27 Atl. 1057, 1058, 82 Conn. 510; *Murray v. Stanton*, 99 Mass. 345, 348; *Cliquot v. U. S.*, 70 U. S. (3 Wall.) 114, 143, 18 L. Ed. 116.

The "actual value" of lands at the time they were taken by a railway company, which is to be ascertained in case there was no market, so that the market value could not be determined, is the reasonable worth of the land in the hands of a prudent seller at liberty to sell, at a reasonable time for selling, in the usual and reasonable terms and conditions of selling, taking in view the location of the land, and the purposes for which it was held; such value as the same would be determined by a prudent seller or purchaser. *St. Louis, K. & A. Ry. Co. v. Chapman*, 16 Pac. 605, 607, 38 Kan. 307, 5 Am. St. Rep. 744.

The "actual value" of shares of corporate stock is ascertainable from the intrinsic worth of its assets immediately available or unavailable, on its profits or losses covering a fixed period, and the business calculations for the future; and other elements of value besides these, in the mind of the business man, may be taken into account in arriving at a correct conclusion as to the "actual value" of the whole capital stock. *Commonwealth v. Edgerton Coal Co.*, 30 Atl. 125, 129, 164 Pa. 284.

#### **As salable or cash value.**

"Actual value," as used in directions to assessing officers, means the same as salable value and cash value. *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 162, 25 L. Ed. 903.

In determining the "actual value" of property under Tax Law, § 12, the sum for which the property under ordinary circumstances would sell is the criterion, and it is not arbitrary or fanciful to base the finding of value on the rental of property paid by the lessee, because the rent of the property is evidence of the amount for which it will sell. *People v. Feltner*, 77 N. Y. Supp. 218, 220, 38 Misc. Rep. 204.

Under Pol. Code, § 3627, providing that all taxable property must be assessed at its full cash value, a complaint in a suit against an assessor for damages for excessive valuation of lands, which averred that their "actual value for agricultural purposes" never exceeded a certain sum, less than the assessment, did not show an excessive valuation, since the full cash value might not be the same as their "actual value for agricultural purposes." *Ballerino v. Mason*, 23 Pac. 530, 83 Cal. 447.

#### **ACTUAL VIOLENCE.**

An assault with actual violence is an assault with physical force, "put in action, exerted upon the person assailed." "The term 'violence' is synonymous with physical force, and the two are used interchangeably in relation to assaults. Actual is something real, in opposition to constructive or speculative; something existing in the act." Any language which expressly or by necessary implication imports and charges exertion of physical force on the person assaulted charges assault with "actual violence," and hence charging an aggravated battery is sufficient, which by necessary implication includes exertion of physical force upon the person. *State v. Wells*, 31 Conn. 210, 212.

#### **ACTUALLY.**

In a prosecution for manslaughter, it was held not to be prejudicial error to require the jury, in order to acquit on the ground of self-defense, to find that accused "actually believ-



ed" that he was in danger of losing his life or suffering great bodily harm; the word "actually" not being capable of doing more than emphasizing or calling the jury's attention to the fact that defendant was required to believe that he was in immediate danger. *Whiteneck v. Commonwealth (Ky.)* 55 S. W. 916, 917.

"Actually," as used in an affidavit that the amount of money or other property, specified in a certain certificate to have been contributed by each of the special partners to the common stock, had been "actually" contributed and applied, etc., means in fact, really, in truth, paid in, contributed, and applied. *Crouch v. First Nat. Bank*, 40 N. E. 974, 979, 156 Ill. 342.

#### **ACTUALLY COLLECTED.**

Rev. St. 1874, c. 53, art. 10, § 10, providing that the compensation of county officers shall in no instance exceed the fees "actually collected," does not mean only such fees as an officer shall collect otherwise than in pursuance of an appropriation out of the county treasury, but includes all fees received by him, without regard to the mode of collection, though they are paid by the county, since the mode of effecting a collection, when it shall have been successful, can by no possibility affect the fact that money has been actually collected. *Marion County v. Lear*, 108 Ill. 343, 347.

#### **ACTUALLY DANGEROUS.**

"Tolerably safe" and "actually dangerous" are not necessarily conflicting terms. The former often implies the latter. To say that the track of a railroad had been placed in a tolerably safe condition might mean that it was actually dangerous. *Stetler v. Chicago & N. W. R. Co.*, 6 N. W. 803, 307, 49 Wis. 609.

#### **ACTUALLY DWELLS.**

Rev. St. § 1500, subd. 7, declaring that, whenever any territory shall be organized into any town, every person who "actually dwells" therein shall thereafter have a legal settlement in such town, applies to one who actually remains, tarries, or abides for some length of time, and includes one who is boarded or supported at a particular house. *Town of Hay River v. Town of Sherman*, 18 N. W. 740, 742, 744, 60 Wis. 54.

#### **ACTUALLY EMPLOYED.**

Laws 1855, p. 300, authorizing the consolidation of railroad companies, and providing that the corporation organized should continue subject to the same rate of tax, and the amount of its capital and loans thereafter on which such tax should be paid should be such proportion of its capital and

loans as is "actually employed" in the state of Michigan, applies to all the capital stock paid in, and the loans made to the corporation for the purposes authorized by the charter, whether actually expended in building the roads, or on hand for that purpose in the form of money, bills of exchange, or bonds drawing interest. These could hardly be regarded as unemployed, in the sense ordinarily applied to that term by capitalists. Capital specially appropriated, set apart, and devoted to a particular purpose is said to be employed or in use. In this sense the term "actually employed" was used in the statute. *People v. Michigan Southern & N. L. R. Co.*, 4 Mich. 398, 406. The phrase as so used has no reference to the "actual use" of the property, but is merely designed to distinguish the investment in one state from the investment in the other. *Michigan S. & N. L. R. Co. v. Auditor General*, 9 Mich. 448.

#### **ACTUALLY ENGAGED.**

Acts 1863, p. 13, exempting from militia duty in the state persons engaged in certain occupations, so long as they are "actually engaged" therein, cannot be construed to mean that all those persons who are exempted shall continually employ their own personal skill and labor in and about the pursuits or occupations on account of which they are exempted. When we say of a man that he is actually engaged in forming or planning, we mean that he is really or truly engaged, engaged in fact. The words "actually engaged," in common parlance, are the opposite or antithesis of "seemingly," or "pretendedly," or "feignedly engaged." In *re Strawbridge*, 39 Ala. 367, 375.

#### **ACTUALLY OCCUPY.**

St. 1798, c. 20, § 2, makes it an offense for a person to "actually occupy" a place for the purpose of gaming. Held, that defendant did not "actually occupy" a shed, which he had rented for the purpose of gaming, contiguous to a passageway between the shed and his store. *Commonwealth v. Dean*, 18 Mass. (1 Pick.) 387.

#### **ACTUALLY ON DUTY.**

The expression "whilst actually on duty," as used in Metropolitan Police Act, § 34 (Laws N. Y. 1860, p. 446, c. 259), providing that no person holding office under the act shall be liable to military or jury duty, or to arrest on civil process, or to service of subpoenas from civil courts while "actually on duty," is not to be construed to exempt a patrolman from arrest on civil process, or service of subpoenas from civil courts, unless such patrolman is actually on duty; and patrolmen are not to be deemed actually on duty during their fixed and known remission from duty. The superintendent or captains, being constantly charged with the constant operations

of the police force, are deemed always on duty, so that they are exempt at all times during the continuance of their terms of office. *Hart v. Kennedy* (N. Y.) 14 Abb. Prac. 432, 433.

#### ACTUALLY OPEN FOR BUSINESS.

"Actually open for business," as used in a fire policy on a store, requiring its books to be kept in a fireproof safe, except during such time as the store is "actually open for business," includes all the time "when it is lighted up, and the merchant or his clerk is there, ready and desirous of selling goods, or to do anything else which constitutes a part of the work or labor of conducting a mercantile business. A store is as much open for business while the merchant is waiting for customers during his customary business hours as it is when the customers are present." The fact that the door is locked, so that customers have to knock for admission, does not change the conclusion, where such customers are admitted when they knock. *Jones v. Southern Ins. Co.* (U. S.) 38 Fed. 19, 21.

#### ACTUALLY OWING.

Where notes given for wages have been transferred to third parties, the wages are not "actually owing" to the employe, within Laws 1886, c. 283, providing that the wages or salaries "actually owing" to the employes of an assignor at the time of an assignment for the benefit of creditors shall be preferred before any other debt, though he afterwards purchased back such notes. In re Hooper's Estate, 11 N. Y. Supp. 241, 242, 57 Hun, 490.

#### ACTUALLY RECEIVE.

The statute of frauds (St. 29 Car. II, c. 3, § 17), requiring that a buyer of goods must "actually receive" them to make the purchase binding, must be construed to mean acceptance by the party himself, and hence an acceptance by a wharf owner of tea, to be forwarded to the buyer according to the usual course of dealing between the parties, was not an acceptance by the buyer. *Hanson v. Armitage*, 5 Barn. & Ald. 557, 558.

The good will of a business is property, and may have a value independent of any particular locality or any specific tangible property; and stock of a corporation issued for such good will is issued for property "actually received," within the meaning of the New York stock corporation law (Laws 1892, c. 688). *Washburn v. National Wall Paper Co.* (U. S.) 81 Fed. 17, 19, 26 C. C. A. 312.

#### ACTUALLY REMOVING

A statute, providing that an attachment may be levied on the property of a defend-

ant who is "actually removing" out of the county, includes a person, not a resident of the state, who was moving through a county of this state, since he is in and removing out of the county, and the law gives to every nonresident a locus in the county where he is found. *Johnson v. Lowry*, 47 Ga. 560, 561, 15 Am. Rep. 656.

#### ACTUALLY SETTLED.

"Actually settled," as used in Rev. St. tit. 79, c. 9, art. 3939, requiring a person who desires to acquire a homestead to present his application, containing a statement that he has "actually settled" on the land which he claims, is used in the sense of a real, and not a constructive or fraudulent, settlement, being used by the Legislature "for the purpose of securing real bona fide settlers upon the land"; and hence one whose purpose was not to settle upon the land at the time, but to reserve it for future settlement, did not "actually settle" on the land. *Busk v. Lowrie*, 23 S. W. 983, 984, 88 Tex. 128.

#### ACTUALLY SOLD.

Lands are actually sold at a tax sale, so as to entitle the treasurer to his fees, when the sale is completed, and when he has collected from the purchaser the amount of his bid; and a sale to a purchaser who fails to complete, rendering a resale necessary, is not an actual sale. *Miles v. Miller*, 5 Neb. 269, 272.

#### ACTUS.

In England an "actus" was a kind of public way over which the public passed on foot and on horseback. *Boyden v. Achenbach*, 79 N. C. 539, 540.

#### ACUTE BRONCHITIS.

Where the evidence shows that sometimes "acute bronchitis" is used to designate an ordinary cold in the chest, and by other physicians such use would be a misnomer, it is a question for the jury as to whether the person who had suffered with a slight attack of bronchitis or cold had acute bronchitis, so as to make a statement, in an application for life insurance, that he had never had such disease, a misrepresentation. *Billings v. Metropolitan Life Ins. Co.*, 41 Atl. 516, 517, 70 Vt. 477.

#### ACUTE GASTRITIS.

"Acute gastritis" may mean bellyache caused by slight indigestion resulting from overeating, which would be of short duration and in no sense dangerous, so that the failure to state such slight ill in an application for insurance does not constitute a misrepresen-

tation. *Billings v. Metropolitan Life Ins. Co.*, 41 Atl. 516, 518, 70 Vt. 477.

## AD DAMNUM.

Ad damnum means the amount of damages demanded. *Cole v. Hayes*, 7 Atl. 391, 392, 78 Me. 539.

The "ad damnum clause" in a complaint is the claim for damages. *Vincent v. Mutual Reserve Fund Life Ass'n*, 55 Atl. 177, 179, 75 Conn. 650. It may limit the scope and effect of the plaintiff's claim with respect to his title to the special damages laid in the declaration. *Karnuff v. Kelch* (N. J.) 55 Atl. 163, 165.

## AD FILUM AQUÆ.

See "Filum Aquæ."

## AD HOC.

See "Attorney ad Hoc."

See, also, "Curator ad Hoc."

The word "special," as used in relation to the appointment of special curator, has very much the same meaning as the words "ad hoc," which is the original, while the word special is the translation, and in decisions they are used indifferently. *Sallier v. Rosteet*, 32 South. 383, 394, 108 La. 378 (citing *Hansell v. Hansell*, 45 La. Ann. 548, 10 South. 941).

## AD VALOREM.

The term "ad valorem," as used in Const. art. 19, § 27, requiring special assessments on real estate to be ad valorem and uniform, construed to mean a quotient part of the existing value of the property, and not an adjustment of burdens to each individual man in view of his particular gains or damages. *City of Little Rock v. Board of Improvements*, 42 Ark. 152, 162.

## AD VALOREM TAX.

The "ad valorem" system of taxation relates to the assessment and taxation of all property. *Levi v. City of Louisville*, 30 S. W. 973, 974, 97 Ky. 394, 28 L. R. A. 480.

Within Pamph. Acts 1841, p. 51, declaring that an "ad valorem tax" of one-fourth of 1 per cent. shall be assessed and collected on all bank stock subscribed for in any incorporated bank in this state, an ad valorem tax means a tax or duty on the value of the article or thing subject to taxation, and the language used by the Legislature should receive the same construction as if it had declared that there shall be assessed and collected within this state a tax of one-fourth

of 1 per cent. on the value of all bank stock subscribed for any incorporated bank, etc. *Bailey v. Fuqua*, 24 Miss. (2 Cushm.) 497, 501.

An ad valorem tax is a tax of so much per cent. on the invoice or appraised money value of the goods subject to the tax. Ad valorem duties are always estimated on a certain per cent. of the value of the property. A large proportion of the duty on imports are of this description, and so sometimes are many of the taxes which make up the internal revenue. By far the larger proportion of state taxation is also on property by valuation, and effect can only be given to it by means of assessors who value the property and apportion the taxes by their estimate. Pub. Acts 1881, No. 168, provides for the assessment of telegraph and telephone lines at their cash value, and a tax levied thereon at a rate equal to the average of general municipal and local taxes throughout the state during the year previous, in lieu of all other taxes, was held to be an ad valorem tax. *Pingree v. Auditor General*, 78 N. W. 1025, 1026, 120 Mich. 95, 44 L. R. A. 679.

## ADAPTED.

In a claim for a patent describing, what the inventor claims as new, "the pipe box provided with a projection 'adapted' to co-operate with a spring to rock the said pipe box, substantially and for the purpose described," "adapted" is not even approximately synonymous with "combined," so that such claim is for the pipe box with a projection, which projection may be adapted to co-operate with a spring for the purpose of rocking the box, etc. *Brown Mfg. Co. v. Deere* (U. S.) 61 Fed. 972, 977, 10 C. C. A. 208.

"Adapted for coining," as used in Rev. St. c. 127, § 18, providing that any person who shall knowingly have in his possession "any instrument adapted and designed for coining counterfeit money" shall be subject to a punishment, includes an instrument adapted to stamp the impression of only one side of a United States half dollar. *Commonwealth v. Kent*, 47 Mass. (6 Metc.) 221, 223.

## ADD.

"Added," as used in Pol. Code, § 3764, providing that the delinquent tax list must contain the amount of taxes and cost due, with the taxes due on personal property "added" to the taxes on real estate, where the real estate is liable therefor, or the several taxes are due from the same person, does not contemplate a mathematical computation, and is used in the sense of "subjoined" or "appended." *California Loan & Trust Co. v. Weis*, 50 Pac. 697, 700, 118 Cal. 489.

Within the statute authorizing the amendment of a complaint by striking or "adding" new parties, "adding" does not mean substituting a different party altogether, so as to authorize the dismissal of one plaintiff and the substitution of a new one. *Leaird v. Moore*, 27 Ala. 326, 328.

A mortgage of a stock of goods which is to cover additions "added thereto" will be construed not to include goods purchased, "but never received at the place of business or taken possession of for the purposes of the business." *Curtis v. Wilcox*, 13 N. W. 803, 804, 49 Mich. 425.

#### ADDED DAMAGES.

Beyond actual damages, the law gives what is called "added damages." Those grown out of the wantonness or atrocity, so to speak, of the act. They are given where the act was so wanton, or so despotic, or of so oppressive a character, or where it entails such shame, such publicity upon a party, as to have the effect of exciting his feelings more than an act committed under less wanton, less oppressive circumstances. They may be called "exemplary," "punitive," "vindictive," or "compensatory" damages. *Ross v. Leggett*, 28 N. W. 695, 697, 61 Mich. 415, 1 Am. St. Rep. 608.

#### ADDICTED.

"Addicted" means devoted by customary practice; to apply one's self habitually; and a finding of a committee for the investigation of the conduct of the regent of the State University, stating that he was "addicted" to the excessive use of intoxicating liquors, is substantially equivalent to a declaration that he is guilty of habitual intoxication or drunkenness, since drunkenness is the result of addiction to the excessive use of intoxicants; and as Gen. St. Kan. 1819, p. 2519, makes drunkenness a misdemeanor, such finding is sufficient to authorize the removal of the regent. *Rogers v. Morrill*, 42 Pac. 355, 357, 55 Kan. 737.

The words "addicted to the use" in an application for a life policy, in reference to the applicant being addicted to the use of chloral, means habitual, constant use of it. *Rand v. Provident Sav. Life Assur. Soc.*, 37 S. W. 7, 8, 97 Tenn. (13 Pickle) 291.

"Addicted to the use of alcoholic stimulants," in a question in an application for a life policy whether the applicant has ever been addicted to the excessive or intemperate use of alcoholic stimulants, is an inquiry as to his habit in that regard, and not as to whether he used such stimulants at all, but whether he used any of them habitually. *Aetna Life Ins. Co. v. Davey*, 3 Sup. Ct. 331, 332, 123 U. S. 739, 31 L. Ed. 315.

#### ADDITION.

See "In Addition to."

#### Building.

As building, see "Building (In Criminal Law)"; "Building (In Lien Laws)."

The words "additions attached," in a fire policy on furniture contained in a certain brick building and "additions attached," were construed to include furniture in the frame building on the next lot, extending over and against the rear of the brick building two inches, and used in connection with the brick building. The court, in so ruling, says: "It is a fact not to be overlooked that the only building to which the term 'additions attached' can relate is this frame building. The language is therefore surplusage unless it embraces that building, and we must give effect to every part of the policy, if we can do so without obvious violence to the intentions of the parties to it. The structure impinged against the rear of the brick building. It extended onto lot 967 sufficiently to do this, hence it was not wholly on the lot adjoining. The fact that it was upon both the lots is not of sufficient moment to relieve the insurer from liability. Nor was it detached. It was connected as closely to the brick building as the nature of the structure would permit. It is a familiar rule in the interpretation of insurance policies that, where any uncertainty exists in the language, it will be resolved in favor of the insured. The two buildings were occupied by plaintiff, and we are not required to distort the phraseology of the policy in reaching the conclusion that it covered the furniture in the wooden structure." *Maisel v. Fire Ass'n of Philadelphia*, 69 N. Y. Supp. 181, 183, 59 App. Div. 461.

The phrase "additions adjoining and communicating," in an insurance policy on a brick dwelling house, and additions adjoining and communicating, embraces a frame addition adjoining and communicating with the brick building. *Carpenter v. Allemannia Fire Ins. Co.*, 26 Atl. 781, 156 Pa. 37.

A building contract, requiring additional payments for changes, additions, and alterations, will be construed to mean such changes as are incidental to the complete execution of the work as described in the plans and specifications, and therefore of only minor or trifling importance; if otherwise, some different mode of determining what prices should be paid for them would also have been prescribed by the writer. We think any material departure from the plans and specifications with reference to which the contract was made, which resulted in a new and substantially different undertaking, cannot be regarded as within the meaning of this language. *Cook County v. Harma*, 108 Ill. 151, 159.

"Alterations, deviations, or additions," within the meaning of a building contract expressly providing for "alterations, deviations, or additions, and the payment for them," includes extra work on the building, and therefore an order payable out of the amount due on the builder's contract includes the sum due for such extra work. *Dunn v. Stokern*, 3 Atl. 349, 350, 43 N. J. Eq. (16 Stew.) 401.

*Mechanic's Lien Law* (Nix. Dig. p. 487, § 5), declaring that any addition erected to a former building shall be considered a "building for the purposes of the act," will be construed to embrace something which in common parlance would not be designated as a building, or the phraseology would not have been used that such addition should be considered as a building for the purposes of the act. *Whitenack v. Noe*, 11 N. J. Eq. (3 Stockt.) 321, 325.

The expression "erections and additions," as used in a lease obligating the lessees to deliver up the premises and all the future "erections and additions to or upon the same to the lessor at the end of the term," was limited in purpose and effect to new buildings erected or old buildings added to, putting such erections and additions upon the same footing in respect of the obligation to keep in repair the buildings upon the premises at the execution of the lease, and could not be so extended as to deprive the tenants of the right to remove trade fixtures, much less personal property put on the premises by them during the term, such as machinery in a mill. *Holbrook v. Chamberlin*, 116 Mass. 155, 162, 17 Am. Rep. 146.

#### Same—Distinct building.

"Addition" means something added to, so that a building entirely distinct from another and larger than it is will not be covered by an insurance policy insuring the building and addition. *Rickerson v. German-American Ins. Co.*, 82 N. Y. Supp. 1026, 1027, 85 Hun, 266.

The term "additions" in a fire policy on a two-story brick building and additions thereto was construed to mean a building partly occupied by assured's servants, one of the rooms of which was used as a laundry, though such building was not annexed to the brick building, there being no other building in assured's yard which could possibly be claimed as an addition to the brick building. *Phenix Ins. Co. v. Martin* (Miss.) 16 So. 417.

Within the meaning of an insurance policy giving insured authority to make "additions," a new warehouse located 40 feet away from the main building, and connected with it by a bridge and underground passage used for pipes, is not an addition. *Peoria Sugar Refining Co. v. People's Fire Ins. Co. (U. S.)* 24 Fed. 773, 15 Ins. Law J. 52.

Under a policy insuring a "steam power elevator building and additions, with porches and platforms attached," a warehouse standing within 2½ feet of the elevator building, and about the same size as the elevator, and fastened to the elevator by strips of board nailed upon each building, and used exclusively for storing grain, which was first received into the elevator and then spouted into the warehouse through two spouts which extended from one building to the other, and was taken from the warehouse by a conveyor running under the warehouse and elevator, no grain being received into or discharged from the warehouse except through the elevator, and there being no means of entrance into the warehouse except through a window which was reached by a ladder or by cleats nailed onto the side of the building, such warehouse was in effect merely a bin of the elevator building, and covered by the policy. *Cargill v. Millers' & Manufacturers' Mut. Ins. Co.*, 22 N. W. 6, 33 Minn. 90.

The phrase "additions thereto adjoining and communicating" in a fire policy on frame mill building and all additions thereto attached, "which building is occupied by insured as a pail shop," was construed to cover a dryhouse 12 feet from the main building, and between which there was a movable bridge, there being no other building besides these, except a boilerhouse 2 feet from the dryhouse, all of which buildings were connected by steam pipes, and each a necessary part of the plant. "In view of the dependent use of all the buildings in the manufacture of pails, the word 'additions' was not an inappropriate designation of the two smaller ones; and for the same reason the qualifying words 'adjoining and communicating,' though perhaps unnecessary, were evidently intended to designate such additional buildings as were necessary appurtenances to the main building in the manufacture of pails." *Marsh v. Concord Mut. Fire Ins. Co.*, 51 Atl. 898, 899, 71 N. H. 253.

A lease provided that no alteration or "addition" in and to the buildings on the leased premises themselves, or to the premises themselves, should be made without the consent of the lessors. A wooden structure was built on the surface of the soil, and not attached by screws or nails or any other way to the buildings, and which could be taken out whole or in pieces without disturbing the soil or injuring the buildings. It did not exceed 12 feet in height, and its position on the premises did not increase the fire risk or rate of insurance, and it was used as a shop and workroom. Held, that such building constituted an "addition" to the premises within the term of the lease. *Whitwell v. Harris*, 106 Mass. 532, 537.

#### Same—Increase in height.

Nix. Dig. p. 487, providing that a mechanic's lien may be had on buildings erect-

ed, and that an "addition erected to a former building" shall be a building within the meaning of the act, means that the addition must be a lateral one, and must occupy grounds without the limits of the building to which it constituted an addition, so that the lien shall be on the building formed by the addition and the land on which it stands, and the addition, therefore, must be erected alongside of and not under or on top of the former building, and does not include putting a new story on top of an old building. *Updike v. Skilman*, 27 N. J. Law (3 Dutch.) 181, 132.

A deed in which the grantee agreed that if he should make any "addition of building" it should not extend beyond a certain line does not restrict the right of the grantee to raise his building higher, though by so doing he interrupted the access of light and air to the windows of the grantor's house. *Atkins v. Bordman*, 43 Mass. (2 Metc.) 457, 477. 87 Am. Dec. 100.

In Act March 15, 1866, amending the charter of the city of Trenton, providing for making a fair valuation of the real estate in the city, by which the assessors shall be governed, provided that if, after such valuation, any building or "addition" shall be erected on any lot, it shall be the duty of the assessor to assess the same, "addition" means a lateral "addition," one which occupied land without the limits of the original building. Adding to its height or depth or changing any interior structure is merely an alteration, and not an addition, and hence internal improvements in the internal arrangement of a house, changing the roof from a gable to a French roof and erecting a bay window on a side thereof, are not "additions." *Perrine v. Parker*, 34 N. J. Law (5 Vroom) 352, 354.

#### City or town.

Act 1866, providing that, whenever any person or persons shall lay out an "addition" to any city or town in the state before the plat thereof shall be recorded, the lands shall be valued, etc., cannot be construed to mean an addition from territory lying without the corporate limits of the city, and that the statute does not apply in cases where the lands within the city limits are laid out and platted into lots, streets, etc. These words do not import an addition to the territorial limit or boundary of the corporation, for the territory of a city as a municipality cannot be extended by laying out and platting into lots the lands adjacent to its boundary. The "addition" here meant is such as results from the mere act of the proprietor in laying out and platting his lands into lots, streets, etc. The plat of an addition, either to a city or a town, intended by the statute, is an addition to the territory previously laid out into lots, streets, etc., and not an addition to the territory embraced within the limits of the city or town as prescribed in its charter. *Mitchell*

*v. Franklin County Treasurer* 25 Ohio St. 143, 154.

#### Machinery or mill.

"Additions," as used in a lease providing that the lessee should be allowed to retain, out of the first quarter's rent, money expended for repairs and "additions," and that such "additions" should remain at the expiration of the lease as the property of the lessor, refers to repairs and additions necessary to put the leased machinery in condition for operation, but did not include new and independent machinery put in the building by the lessees for the purposes of their trade. *Cook v. Folsom*, 2 Lanc. Law Rev. 185, 186, 2 Del. Co. R. 314, 315.

Where articles of copartnership provided that one of the partners should bear the expense of any "addition" made to a certain mill, but that the repairs should be paid for out of the profits, the word "addition" applied to a foundation placed in the mill for a new engine, it appearing that the old foundation would not have been suitable. *Dunnell v. Henderson*, 23 N. J. Eq. (8 C. E. Green) 174, 178.

"Additions thereto," as used in a contract of sale of a steam saw and grist mill, which provided that the purchase money should be paid in installments, and that on default of any payment the purchaser should forfeit all former payments and surrender possession of the mill, with all "additions thereto," does not include detached articles of personal property purchased to aid in the operation of the mill, such as oxen, carts, blacksmiths' tools, etc., but includes only such personal property as was in fact added to the mill. *Hill v. Townsend*, 69 Ala. 286, 292.

#### ADDITIONAL.

"Additional," as used in Act April 20, 1899 (P. L. 66), declaring it unlawful thereafter to establish or maintain any "additional" hospital in the built-up portions of cities, does not mean in addition to the total number then maintained in the whole city, but refers to new buildings not already established. *Commonwealth v. Charity Hospital of Pittsburg*, 47 Atl. 980, 982, 198 Pa. 270; *Id.*, 48 Atl. 906, 907, 199 Pa. 119.

#### ADDITIONAL ALLOWANCE.

The "additional allowance" which Code Civ. Proc. § 3372, provides may be granted to the prevailing parties in condemnation proceedings, is made by way of an indemnity to the party succeeding in the litigation. The court must fix the amount to be allowed, subject to the limitation in the statute, that the maximum amount shall not exceed 5 per cent., etc. The same will depend upon the proper deductions from the proof submitted as to the indemnity needed for actual expenses in the action, necessarily or reasona-

bly incurred, beyond the taxable costs allowed by statute to the prevailing party. *St. Lawrence & A. R. Co. v. De Camp*, 23 N. Y. Supp. 544, 548.

### ADDITIONAL CONSIDERATION.

An "additional consideration," sufficient to support an agreement to relinquish the residue of a debt after part payment, may consist of anything which would be a burden or inconvenience to one party or a possible benefit to the other. *Chicora Fertilizer Co. v. Dunan*, 46 Atl. 347, 350, 91 Md. 144, 50 L. R. A. 401.

In Laws 1897, p. 134, § 1940, providing that the question of a tax for "additional" school facilities may be submitted to the electors, "additional" means in addition to or beyond those already possessed. It would include apparatus and appliances for teaching, and teachers as well. *State v. Cave*, 52 Pac. 200, 203, 20 Mont. 468.

### ADDITIONAL INSURANCE.

"Additional insurance," as used in an endorsement on an insurance policy that \$700 "additional insurance" would be permitted, means other insurance, and insurance prior to the issuance of the policy must be included, as well as insurance subsequent thereto. *Behrens v. Germania Ins. Co.*, 11 N. W. 719, 58 Iowa, 23.

### ADDITIONAL SECURITY.

Code 1857, p. 461, art. 145, provides that a court may order "additional" security if it has reason to believe that a guardian's bond is insufficient. Held, that the term "additional" embraces the idea of joining or uniting one thing to another so as thereby to form one aggregate whole, and an "additional security" imports a security which, united with or joined to the former, is deemed to make it, as an aggregate, sufficient as a security from the beginning, and hence there is no discharge of the former surety on the giving of "additional security," but his liability continues and is supplemented by the latter; and likewise the "additional security" must be held to stand as an indemnity for a discharge of the duties of the guardianship as a whole, embracing the time before as well as after the date when he signed such security, and therefore liable for antecedent breaches of the bond. *State v. Hull*, 53 Miss. 626, 645, 646.

### ADDITIONAL SERVITUDE.

The building of an electric street railway upon the grade of a street which does no special injury to the fee is not the imposition of a new or additional servitude upon a highway for which the owner of the fee is entitled to compensation. *Birmingham Traction*

*Co. v. Birmingham Ry. & Electric Co.*, 24 South. 502, 505, 119 Ala. 137, 43 L. R. A. 283.

### ADDITIONAL TIME.

An order granting appellant 60 days "additional time" for settling his bill of exceptions must be construed to mean 60 days in addition to the time allowed by the practice. *Marks v. Boone*, 4 South. 532, 533, 24 Fla. 177.

### ADDITIONAL WORK.

The distinction between "extra work" and "additional work" under a contract is that the former is work arising out of and entirely independent of the contract—something not required in its performance; the latter being something necessarily required in the performance of the contract, and without which it could not be carried out. *Shields v. City of New York*, 82 N. Y. Supp. 1020, 1021, 84 App. Div. 502.

### ADDRESS.

See "Accurately Addressed."

The word "address" is defined in the Century Dictionary as "a direction for guidance as to a person's abode; hence the place at which a person resides, or the name or place of destination, with any other details necessary for the direction of a letter or package." The word is synonymous with "residence." *San Diego Sav. Bank v. Goodsell*, 70 Pac. 299, 302, 137 Cal. 420.

### ADDUCE.

To "adduce" "means to bring forward, present, offer, or introduce," and hence, as used in the certificate to the trial court, attached to the testimony, which states that it contains all the evidence "adduced" at the trial of a cause, is not equivalent as a statement that such evidence was introduced, but shows that it includes evidence offered as well as that received. *Tuttle v. Story County*, 9 N. W. 292, 293, 56 Iowa, 316.

The word "adduced," as used in a bill of exceptions stating that certain affidavits contained all the evidence "adduced" for and against a motion, is broader in its significance than the word "offered," and is equivalent to the expression, "This was all the evidence given in the cause." *Beatty v. O'Connor*, 5 N. E. 880, 882, 106 Ind. 81.

A bill of exceptions reciting that it contains all the evidence "adduced," means that it contains all the evidence presented; citing Webster, who gives the synonyms of adduce as "offer," "present," "allege," "advance," "state," and "mention." *Brown v. Griffin*, 40 Ill. App. 558, 559.

**ADEEMED.**

The term "adeemed," as a general rule, may be applied to a legacy, if the estate in or title to the things specifically bequeathed is essentially changed. *Tolman v. Tolman*, 27 Atl. 184, 185, 85 Me. 317.

**ADEMPTION.**

Ademption is the extinction or satisfaction of a legacy by some act of the testator which is equivalent to a revocation of the bequest, or which indicates an intention to revoke. *Kenaday v. Sinnott*, 21 Sup. Ct. 283, 237, 179 U. S. 606, 45 L. Ed. 339; *Burnham v. Comfort*, 15 N. E. 710, 711, 108 N. Y. 535, 2 Am. St. Rep. 462. The rule is applied where the testator is the parent of the legatee or stands in loco parentis, and the question of its application depends on the declared or presumed intention of the grantor. The rule of ademption is predicable of legacies of personal estate, but is not applicable to devises of realty. *Burnham v. Comfort*, 15 N. E. 710, 711, 108 N. Y. 535, 2 Am. St. Rep. 462.

Ademption is the extinction or satisfaction of a legacy by some act of the testator which is equivalent to a revocation of the bequest or indicates the intention to revoke, and the rule is applied where the testator is a parent of the legatee or stands in loco parentis. In *re Turflier's Estate*, 23 N. Y. Supp. 135, 139, 1 Misc. Rep. 58, 64.

Ademption is a revocation or cancellation of a legacy by some act of the testator, although it is not necessarily an express revocation, the intent being frequently gathered by implication. *Strother's Adm'r v. Mitchell's Ex'r*, 80 Va. 149, 154.

"Ademption" is used to describe the act by which a testator pays to his legatee in his lifetime a general legacy which by his will he had proposed to give him at his death. *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, 34.

"Where a parent or other person in loco parentis bequeaths a legacy to a child or grandchild, and afterward, in his lifetime, gives a portion or makes a provision for the same child or grandchild, without expressing it to be in lieu of the legacy, if the portion so received or the provision made be equal to or exceed the amount of the legacy; if it be certain, and not merely contingent; if no other distinct object be pointed out, and if it be ejusdem generis—then it will be deemed an ademption of the legacy." *Clendening v. Clymer*, 17 Ind. 155, 158; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, 34; *Trimmer v. Bayne*, 7 Ves. 507, 513; *Clark v. Jetton*, 37 Tenn. (5 Sneed) 229, 234. "It is founded on the presumption that a bequest by the father is intended as a portion to the child, and so of the after gift, and the presumption will be that a double portion was not intended when nothing else appears, and therefore it will be

taken that the gift was intended as a satisfaction of the legacy, when it is of equal value." *Clark v. Jetton*, 37 Tenn. (5 Sneed) 229, 234.

A total "ademption" by acts of a testator occurs in two cases only: (1) When he gives in his lifetime to a legatee what he had left him in his will, or (2) when before his death he so deals with the subject of the bequest as to render it impossible to effect the transfer or payment which the will directs. *Connecticut Trust & Safe Deposit Co. v. Chase*, 55 Atl. 171, 174, 75 Conn. 683.

Slight or immaterial changes in the form of the property bequeathed will not work an ademption. The general rule is that, when the chattel specifically bequeathed by a testator is sold or conveyed by him during his life, the legacy is adeemed. *Harvard Unitarian Soc. v. Tufts*, 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390. But the rule does not apply to general legacies. In *re Frahm's Estate*, 94 N. W. 444, 446, 120 Iowa, 85.

**Advancement.**

An advancement will not be considered an "ademption" where the devise is of real estate. *Bouvier, Law Dict.* The doctrine of ademption applies only to legacies. *Burnham v. Comfort* (N. Y.) 37 Hun, 216, 219.

**Satisfaction distinguished.**

Ademption is only predicable of a specific legacy, and takes place when the thing that is the subject of the legacy is taken away, so that when the testator dies, though the will purports to bestow the legacy, the thing given is not to be found to answer the bequest; and ademption does not depend on the intention of the testator. A satisfaction, on the other hand, is predicable of a general as well as a specific legacy, and it takes place when the testator in his lifetime becomes his own executor and gives to his legatee what he had intended to give by will, and unlike redemption, satisfaction is primarily a question of intention. *Beck v. McGillis* (N. Y.) 9 Barb. 35, 56, 57.

Although the words "ademption" and "satisfaction," and the corresponding words "adeem" and "satisfy," are frequently used by judges and text-writers as convertible terms having the same signification, yet, as Mr. Justice Harris (*Beck v. McGillis*, 9 Barb. 56) has truly observed, each, in its technical application to the provisions of a will, has a distinct and appropriate meaning; ademption in its strict sense being predicable only of specific, and satisfaction of general, legacies. *Langdon v. Astor's Ex'rs*, 10 N. Y. Super. Ct. (3 Duer) 477, 541.

**Of general legacy.**

When a general legacy is given of a sum of money out of the testator's general assets, without regard to any particular fund, inten-



tion is the very essence of ademption. If a testator, after having made his will containing a general bequest to a child or stranger, makes an advance, or does other acts which can be shown by express proof to have been intended by the testator as a satisfaction or discharge of or a substitute for the legacy given, it shall be deemed in law to be an ademption of the legacy. *Richards v. Humphreys*, 82 Mass. (15 Pick.) 133. Thus, where a testator in his lifetime paid a sum of money to a general legatee, and takes from him a receipt for the money in full discharge of the legacy and all rights in the testator's estate, by will or otherwise, the advancement is an ademption of the legacy. *Cowles v. Cowles*, 13 Atl. 414, 415, 56 Conn. 240.

#### **Of specific legacy.**

Specific legacies are said to be adeemed when in the lifetime of the testator the particular thing bequeathed is lost, destroyed, or disposed of, or it is changed in substance or form so that it does not remain, at the time the will goes into effect, in specie to pass to the legatee. *Starbuck v. Starbuck*, 93 N. C. 183, 185; *Ford v. Ford*, 23 N. H. (3 Fost.) 212, 215.

When applied to specific legacies of stock, or money, or securities for money, the term "ademption" must be considered as synonymous with the word "extinction." For it should be observed that, if stock, securities, or money so bequeathed be sold or disposed of, there is a complete extinction of the subjects, and nothing remains to which the words of the will can apply; for, if the proceeds from such sale or disposition would be substituted and permitted to pass, the effect would be to convert a specific into a general legacy. *Weston v. Johnson*, 48 Ind. 1, 8.

The term "ademption" literally means "removal" or "extinction." It applies originally to specific legacies. Where a testator gives or bequeaths a specific article, such as a bale of wool or a piece of cloth, and such article does not exist at the time of his death, there is an "ademption" of the testamentary bequest. The thing bequeathed may be lost or destroyed during the lifetime of the testator, or he may have sold the same or otherwise disposed of it, or changed the form so as to destroy its identity. Hence it has been said that a legatee will have no title to a specific legacy unless the thing bequeathed remains in specie as described in the will at the testator's death. So, also, if the testator specifically bequeaths a debt which is due to him, and before his death he receives payment of the debt from the debtor, the bequest or legacy is adeemed, and this is true whether the payment is enforced by the testator or is made voluntarily by the debtor. Citing 2 Williams, Ex'rs, 632; 3 Pom. Eq. Jur. § 1131. A bequest to a son of a certain sum, payable out of the shares of

a daughter's children, and providing that on such payment the son shall surrender an agreement of the daughter to pay him the amount of such legacy, is a bequest for a particular purpose, and hence is adeemed by payment by the testator, during his life, of the daughter's debt to the son. *Tanton v. Keller*, 47 N. E. 376, 378, 167 Ill. 129.

A specific legacy of a chattel or a particular debt or parcel of stock is held to be adeemed when the testator has collected the debt or disposed of the chattel or stock in his lifetime, whatever may have been the motive or intent of the testator in so doing. *Cowles v. Cowles*, 13 Atl. 414, 415, 56 Conn. 240.

"It is a well-established rule of law that when the thing which is the subject of the legacy is taken away, so that when the testator dies, though the will purports to bestow the legacy, the thing meant is not to be found to answer the bequest, ademption takes place. It has been extinguished, if a specific debt, by having been paid to the testator himself; if an article of property, by its sale or conversion. This, to quote the court in the case of *Beck v. McGillis* (N. Y.) 9 Barb. 35, 57, is ademption; whether or not it has taken place is a conclusion of law, and does not depend upon the intention of the testator. When the question is settled, and it is determined that the testator intended to give a specific thing and not a general legacy, then the intention of the testator has nothing further to do with the question of ademption. This is entirely a rule of law, and the rule is that the legacy is extinguished if the thing given is gone. It is true, of course, that ademption relates only to a specific legacy, but no reason suggests itself why a different rule should apply to a specific devise of real estate. So, in *Philson v. Moore* (N. Y.) 23 Hun, 152, 155, it is said that the law is well settled that, if a testatrix devise real estate and sell the same before the will takes effect, the proceeds of the will becomes personal, and no court can substitute the money received by testatrix for the land devised." Thus a taking of land by eminent domain before the death of testator, and after the execution of the devise of such land and the receipt of money therefor by the testator, constitutes an ademption, and the devisee is not entitled to the money received by testator for such land. *Ametrando v. Downs*, 70 N. Y. Supp. 833, 835, 62 App. Div. 405.

#### **Of specific and general legacies distinguished.**

The satisfaction of a general legacy depends on the intention of the testator as inferred from his acts, but the ademption of a specific legacy is effected by the extinction of the thing or fund bequeathed, and the intention that the legacy should fail is presumed. *Kenaday v. Sinnott*, 21 Sup. Ct. 233, 237, 179 U. S. 606, 45 L. Ed. 339.

Ademption of a specific and a general legacy depends on different principles. A specific legacy of a chattel or a particular debt or parcel of stock is held to be adeemed when the testator has collected the debt or disposed of the chattel or stock in his lifetime, whatever may have been the motive or intention of the testator in doing so; but when the general legacy is given of a sum of money out of the testator's general assets, without regard to any particular fund, the intention becomes the very essence of ademption. If he pays a legacy in express terms during his lifetime, it will operate by way of ademption, although the terms "payment," "satisfaction," "release," or "discharge" were not used, since the legacy created no obligation on the testator during his lifetime, or any interest in the legatee which could become the subject of payment, release, or satisfaction. If, therefore, a testator, after having made his will containing general bequests, makes an advance or does other acts which can be shown to have been intended by the testator as a satisfaction or discharge of or a substitute for the legacy given, it shall be deemed in law to be an ademption of the legacy; and hence, if a father has given his child a legacy, and on the event of the marriage of the child or other similar occasion the father makes an advance to such child, though in a smaller amount than the legacy, it will be deemed a substitute for the provision contemplated by the will, and an ademption of the whole legacy. This is founded on the consideration that the duty of a father to make a provision for his child is one of imperfect obligation and voluntary, and that his power of disposing of his property is entire and uncontrolled, and that he is the best and sole judge both of his ability to provide for his child and of the amount which it is proper for him to appropriate. An ademption of general legacies takes effect, not from the act of the legatee in releasing the legacy or receiving satisfaction of it, but solely from the will and the act of the testator in making a payment or satisfaction or a substitute or a different act of bounty; and, if the portion subsequently given in the lifetime of the testator is less than the legacy, it operates as an ademption of the whole legacy, not because a smaller sum can constitute a payment of a larger, but because it manifests the will and intent of the testator to reduce the amount of the provision provided in his will. *Cowles v. Cowles*, 13 Atl. 414, 415, 56 Conn. 240.

With respect to general legacies not given as portions, the rule respecting ademptions depends upon different considerations than with respect to specific legacies. The intention of the testator is immaterial in the ademption of a specific legacy, because, the subject being extinct at the death of the testator, there is nothing upon which the will

can operate; but it is otherwise in regard to general legacies, which are payable out of the general personal estate; there the question whether any advancement by the testator in his lifetime to the first legatee shall be considered an ademption, or in substitution of the bounty given by the will, must depend entirely on the fact that such was the testator's intention. "A specific legacy cannot be adeemed in the lifetime of the testator, nor can a specific devise of land be adeemed by an advancement." *Weston v. Johnson*, 48 Ind. 1, 8.

## ADEQUATE.

"Adequate," when used as an adjective qualifying provocation, is a synonym with "legal," "lawful," and "reasonable." *State v. Bulling*, 15 S. W. 367, 371, 105 Mo. 204.

The words "adequate" and "suitable" are not equivalent. That which is adequate must be suitable, but that which is suitable may not be adequate. *St. Anthony Falls Water Power Co. v. Eastman*, 20 Minn. 277, 295 (Gil. 249, 255).

## ADEQUATE CARE.

Adequate care is such care as a man of ordinary prudence would himself take under similar circumstances to avoid accident. That care is proportionate to the risk to be incurred. *Wallace v. Wilmington & N. R. Co.*, 18 Atl. 818, 819, 8 Houst. 529.

## ADEQUATE CAUSE.

"Adequate cause" in the definition of manslaughter as voluntary homicide committed under the immediate influence of sudden passion arising from an "adequate cause," but neither justified nor excused by law, is that which would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. *Pen. Code 1895*, art. 700. *Gardner v. State*, 48 S. W. 170, 171, 40 Tex. Cr. R. 19; *Farrar v. State*, 15 S. W. 719, 720, 29 Tex. App. 250; *Rutherford v. State*, 15 Tex. App. 236, 247; *West v. State*, 2 Tex. App. 460, 476; *Bonner v. State*, 15 S. W. 821, 822, 29 Tex. App. 223; *Williams v. State*, 7 Tex. App. 396, 397; *Sargent v. State*, 33 S. W. 364, 366, 35 Tex. Cr. R. 325; *Spearman v. State*, 4 S. W. 586, 587, 23 Tex. App. 224; *Boyd v. State*, 12 S. W. 737, 788, 28 Tex. App. 137; *Stell v. State* (Tex.) 58 S. W. 75, 76. Any condition or circumstance which is capable of creating and does create sudden passion, as anger, rage, resentment, or terror, rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not. *Stell v. State* (Tex.) 58 S. W. 75, 76; *Williams v. State*, 15 Tex. App. 617, 623; *Sargent v. State*, 33 S. W. 364-366, 35 Tex.

Cr. R. 325; *Hawthorne v. State*, 12 S. W. 603, 604, 28 Tex. App. 212; *Orman v. State*, 6 S. W. 544, 545, 24 Tex. App. 495; *Blanco v. State* (Tex.) 57 S. W. 828, 829; *Wadlington v. State*, 19 Tex. App. 266, 274; *Cockran v. State*, 13 S. W. 651, 652, 28 Tex. App. 422. Insulting words or gestures, or an assault and battery so slight as to show no intention to inflict pain or injury, or an injury to property unaccompanied by violence, are not "adequate causes," as the term is there used. *Boyett v. State*, 2 Tex. App. 93, 100. But an assault and battery causing pain and bloodshed is a sufficient cause. *Cochran v. State*, 13 S. W. 651, 652, 28 Tex. App. 422.

"Adequate cause or sudden passion," as the phrase is used to reduce a homicide from murder to manslaughter, means that the provocation must arise at the time of the commission of the offense, and that the passion is not the result of former provocation; that the act must be directly caused by the passion arising out of the provocation, it not being sufficient that the mind is merely agitated by passion arising from some other provocation or a provocation given by some other person than the party killed, and the passion intended must be either of the emotions of the mind known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection. *Boyett v. State*, 2 Tex. App. 93, 100; *West v. State*, 2 Tex. App. 460, 476.

The following are deemed adequate causes: (1) Adultery of the person killed with the wife of the person guilty of the homicide, provided the killing occurred as soon as the facts of an illicit connection is discovered; (2) insulting words or conduct of the person killed towards the wife of the party guilty of the homicide, provided the killing takes place immediately upon the happening of the insulting conduct; (3) any condition or circumstance which is capable of creating, and which does create, in the mind of the person guilty of the homicide, such a degree of anger, rage, sudden resentment, or terror as to render it incapable of cool reflection. (Definition given in approved instruction.) *Brown v. State* (Tex.) 75 S. W. 33.

#### ADEQUATE COMPENSATION.

"Adequate compensation," as used in the Constitution of Texas, providing that no person shall be deprived of property without adequate compensation being made, means that private property shall not be taken without payment of its just value being made in money. The owner of land taken for public use is entitled to the intrinsic value of the land so taken, without reference to the profit or advantage that he may derive from the construction of the improvement for which it is taken. *Buffalo Bayou, B. & C. R. Co. v. Ferries*, 26 Tex. 588, 601, 603.

#### ADEQUATE PROVOCATION.

"Adequate provocation" is synonymous with legal, lawful, and reasonable provocation, and is an assault or personal violence. *State v. Bulling*, 15 S. W. 367, 371, 105 Mo. 204.

#### ADEQUATE REMEDY.

Judiciary Act 1789, c. 20, § 16, declaring that suits in equity shall not be sustained in either of the courts of the United States in any action where a plain, adequate, and complete remedy may be had at law, is merely affirmative of the general doctrine of courts of equity, and was not intended to narrow the jurisdiction of such courts, and depends on what was a proper subject of equitable relief in the courts of equity of England, the great reservoir from which we have extracted our principles of jurisprudence; and, as there are many cases in which courts of law and equity exercise concurrent jurisdiction, the judiciary act was never intended to disturb that jurisdiction, and in such cases it must be supposed that the remedy at law is not adequate and complete for all purposes for which the plaintiff may claim relief. *Bean v. Smith* (U. S.) 2 Fed. Cas. 1143, 1150.

"An adequate remedy" at law, the existence of which will preclude proceedings in equity, means either the same remedy as chancery would give, or one clearly adequate against the same parties. *Beardsley v. Bennett* (Conn.) 1 Day, 107, 109.

"Adequate remedy at law," means a remedy vested in the complainant to which he may at all times resort at his own action, fully and freely, without let or hindrance. *Wheeler v. Bedford*, 7 Atl. 22, 24, 54 Conn. 244.

The term "adequate remedy at law" means a remedy which is plain and complete, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Keplinger v. Woolsey* (Neb.) 93 N. W. 1008, 1009.

Adequate remedy is a remedy which is equally beneficial, speedy, and sufficient; not merely a remedy which at some time in the future will bring about a revival of judgment of the lower court complained of in certiorari proceedings, but a remedy which will bring relief to petitioner from the injurious effects of that judgment and the acts of the inferior court or tribunal. *State v. Guinotte*, 57 S. W. 281, 286, 156 Mo. 513, 50 L. R. A. 787.

The rule that equity will not grant extraordinary relief, as specific performance, mandamus, and the like, where there is an "adequate remedy at law," means a specific, adequate legal remedy competent to afford relief on the very subject-matter made the foundation of the prayer for equitable relief. An applicant for mandamus to require

a public officer to perform a duty imposed on him by law has not an "adequate remedy at law," unless such legal remedy will require the officer to perform in effect the specific act which the law requires him to do. *Babcock v. Goodrich*, 47 Cal. 488, 508.

An "adequate and specific remedy" which will be a bar to mandamus is a legal remedy that will afford the relief to which the party is entitled, and the existence of possible equitable remedies does not affect the jurisdiction of courts of law, and the courts have held that by a legal remedy such as will bar relief by mandamus is meant a remedy at law, as distinguished from a remedy in equity, and that the mere existence of an equitable remedy is not of itself a conclusive objection to the exercise of the jurisdiction, although it may and should influence the court in the exercise of its discretion in the particular case. The principle involved is that whenever a legal right exists the party is entitled to a legal remedy, and when there is no other legal remedy mandamus will lie. *State v. Sneed*, 58 S. W. 1070, 1075, 105 Tenn. 711.

An "adequate legal remedy" is one which secures absolutely and of right to the injured party relief from the wrong done; so that an act authorizing a railroad company, if it thinks that rates for freight as fixed by a board of transportation are unjust and unreasonable, to bring an action in the Supreme Court, and authorizing the Supreme Court, in the event it finds such rates unjust or unreasonable, to direct that board of transportation in its discretion to allow the railroad company to raise its rates, does not afford an adequate legal remedy, the decision of the court not being compulsory on the board. *Ames v. Union Pac. Ry. Co.* (U. S.) 64 Fed. 165, 172.

Within the rule for a writ of prohibition, it will not issue where the applicant has a plain, speedy, and "adequate remedy" at law. The adequacy of a remedy is not to be tested by the convenience or inconvenience of the parties to a particular case. Thus, for instance, the mere fact that, in order to appeal from a judgment, the appeal bond required is beyond the power of an appellant to secure, does not prevent an appeal from being an adequate remedy in such case. *Willman v. Dist. Court*, 35 Pac. 692, 4 Idaho, 11.

The term "adequate remedy," as used in Const. La. art. 11, providing that every person, for injury done him in his rights, lands, goods, person or reputation, shall have an "adequate remedy" by due process of law, "means complete satisfaction of the judgment without restriction. This remedy is distinct from due process, as it is to be by due process. The process will vary with the nature of the remedy and the character of

the debtor." "The plaintiff is not only entitled to due process, but, in addition thereto, he is guaranteed a remedy entirely adequate." *United States v. City of New Orleans* (U. S.) 17 Fed. 483, 491.

An "adequate remedy" which will prevent the issue of a writ of certiorari is a remedy which is equally beneficial, speedy, and sufficient; not merely a remedy which at some time in the future will bring a revival of the judgment of the lower court complained of in the certiorari proceedings, but a remedy which will promptly relieve the petitioner from the injurious effects of that judgment and the acts of the inferior court or tribunal. *State v. Guinotte*, 57 S. W. 281, 286, 156 Mo. 513, 50 L. R. A. 787.

The expression "adequate, complete, prompt or efficient remedy," as used in Laws 1899, c. 5, conferring upon the circuit court jurisdiction pertaining to the settlement of estates of deceased persons in cases where the county court cannot afford a remedy as adequate, complete, prompt, or efficient as the circuit court, was manifestly intended to put prior judicial rules on the subject into statute law, and furnish a definite legislative guide in the administration of justice. In doing so the broadest possible view, so to speak, of the effect of the decisions of the Supreme Court was taken. The judgment of the circuit court on the question of the propriety of its taking jurisdiction of any such controversy would not be disturbed unless manifestly wrong. Mere economy of time alone is not sufficient to warrant the circuit court to take jurisdiction of controversies which are within the jurisdiction of the county court, but such element, with circumstances rendering speedy settlement of the controversies of more than ordinary importance, is sufficient. *Becker v. Chester*, 91 N. W. 87, 92, 115 Wis. 90.

#### ADEQUATE SECURITY.

Code, §§ 2637, 2638, providing that letters testamentary shall not be granted, unless on the filing of a sufficient bond, to any person named as executor whose circumstances are such that they do not afford adequate security for the due administration of the estate, was construed "only to authorize the refusing of letters whenever, under all the circumstances of the case, the surrogate should be of the opinion that such a course was proper for the protection of the rights and interests of the beneficiaries under the will. The statute was by no means designed to restrict a person named as executor from acting as such, even without a bond, simply because the testator was a richer man than himself. Thrift, integrity, good repute, business capacity, and stability of character, for instance, are circumstances which may be properly considered in determining the ques-

tion of adequate security." *Martin v. Duke*, (N. Y.) 5 Redf. Sur. 597, 600.

Adequate security, and circumstances mentioned in Code Civ. Proc. § 2638, to be considered by the surrogate in issuing letters testamentary, do not relate primarily or exclusively to the pecuniary responsibility of the executor, but to his moral qualification. The question presented to the court is: Is it safe to put this estate in the hands of the person named as executor. Can he be trusted to administer it faithfully and honestly, as directed by the will? In *re Wischmann*, 80 N. Y. Supp. 789, 791, 80 App. Div. 520.

#### ADEQUATELY.

An instruction, in a personal injury case, stating that defendant owed the duty of keeping certain machinery in an "adequately safe" condition for use, means, simply, kept sufficiently safe for the particular purpose. *Pennsylvania & N. Y. Canal & R. Co. v. Mason*, 109 Pa. 296, 299, 58 Am. Rep. 722.

#### ADHERE.

"Adhere," as used in Const. art. 3, § 3, making it treason to levy war against the United States or to adhere to its enemies, construed to "include every act which, with regard to a domestic rebellion, would constitute a levying of war." *United States v. Great-house* (U. S.) 26 Fed. Cas. 18, 21.

Adhering to the King's enemies must of necessity be against the King, and therefore if an Englishman assist the French, being at war with them, and fight against the King of Spain, who is an ally of the King of England, this is treason, as adhering to the King's enemies against the King. Cruising is a sufficient overt act of adhering, as if Englishmen would list themselves and march. This is sufficient without going to battle. In *re Vaughan*, 2 Salk. 634, 635.

#### ADIT.

Gen. Laws, p. 630, in reference to mines, and providing that an "adit" of at least 10 feet in and along the lode from the point where the lode may be in any manner discovered shall hold such lode the same as if a discovery shaft had been sunk, means a horizontal excavation in and along the lode, and refers to mining lodes so situated that they can be reached by means of horizontal excavations. *Electro Magnetic M. & D. Co. v. Van Auker*, 11 Pac. 80-82, 9 Colo. 204.

The term "adit" in Gen. Laws, p. 630, means the entrance and passage to the opening by which the mine is entered or by which water and ores are carried away, and, whether it extends to a depth of 10 feet or not, is equivalent to a discovery shaft. *Gray v. Truby*, 6 Colo. 278, 280.

#### ADJACENT.

The word "adjacent" is defined by Webster and other lexicographers to mean "to lie near"; "close, or contiguous." It is sometimes said to be synonymous with "adjoining," "near," "contiguous." In some decisions courts have held it to mean "in the neighborhood or vicinity of"; in others "adjoining or contiguous to." *People v. Keechler*, 62 N. E. 525, 527, 194 Ill. 235.

The word "adjacent," even in its strictest sense, means no more than lying near, close or contiguous, but not actually touching. There are degrees of nearness, and, when you want to express the idea that a thing is immediately adjacent, you have to say so. *Hanifen v. Armitage* (U. S.) 117 Fed. 845, 851.

"Adjacent," as used in an insurance policy permitting the keeping of gasoline in certain quantities on premises "adjacent" to the property insured, means near, close, in proximity, and applies to the gasoline and its relation to the building insured. *Hanover Fire Ins. Co. v. Stoddard*, 73 N. W. 291, 292, 52 Neb. 745.

The words "south of and adjacent to the right of way" of the M. railroad, in a petition for the location of a public highway, to designate the starting point thereof, are too indefinite to answer such purpose, and the petition is therefore insufficient. The words "adjacent to" are relative, and have different meanings under different circumstances. *McDonald v. Wilson*, 59 Ind. 54, 55.

The terms "abutting or adjacent property" and "property butting on," as used in the chapter relating to cities under special charters, shall be held to include the easement and right of way of any railroad company located along any street, or on lands abutting on or adjacent thereto, in all cases where no property of any person, firm, or corporation, except a municipal corporation, intervenes between such easement or right of way and the traveled portion of such street or highway. Code Iowa 1897, § 968.

The charter of the Brooklyn Heights Railroad Company authorized it to construct a cable road from Court street through Montague street to Wall Street Ferry, and to erect necessary power and car houses in streets adjacent to Montague street west of the hill, in locations to be approved by the commissioner of city works. The conformation of the ground was such that the grant was valueless unless the company should be permitted to erect its power house in one of the streets parallel to and in the vicinity of Montague street. Held, there being no streets touching Montague street west of the crest of the hill, that the word "adjacent," so used, must be construed to mean the neighboring parallel streets.

**Brooklyn Heights R. Co. v. City of Brooklyn,** 18 N. Y. Supp. 876, 877.

"Adjacent," as used in a statute providing for a petition for a ditch by "adjacent" owners, properly includes lands over which the ditch passes, as well as those lying near to the ditch. **Kent v. Perkins**, 36 Ohio St. 639, 641.

#### **As abutting or contiguous.**

"Adjacent" does not at all times mean "adjoining" or "abutting," but it is many times so used, and the purposes of its use are to be known from the context. Synonyms of the word are "abutting," "adjoining," "attached," "beside," "bordering," "close," "contingent," "neighboring," "next," and "nigh." When used in Code 1893, tit. 10, c. 2, requiring a petition for the construction of a drain to be signed by a majority of persons owning land adjoining it, such improvement will not be held to mean owners of land not abutting on the improvement. **Wormley v. Wright County Suprs**, 78 N. W. 824, 825, 108 Iowa, 232.

In a statute providing that the amount and cost of work done "adjacent" to certain lots shall be assessed against them, the word "adjacent" has reference to the work done on a street within a certain length, which is to be levied as a tax upon the abutting property. **Clapton v. Taylor**, 49 Mo. App. 117, 125.

"Adjacent," as used in Act 1832, declaring that the owners of all the lots "adjacent to and fronting a part of the street open under the provisions of this law should be assessed for the respective portion of benefit derived from the improvement," etc., is synonymous with the word "contiguous." **Municipality No. 2 v. White**, 9 La. Ann. 446, 448.

"Adjacent," as used in an ordinance locating the line of a railroad immediately adjacent to and parallel with an alley between certain streets, means lying near, or close to but not actually touching, and, when qualified by the adverb "immediately," it means the same as "contiguous" or "touching" the whole of one side. It is a contradiction in terms to say that a right of way on both sides of a given line, and located over and above it, and which includes the line and touches it upon both sides, is "adjacent" to such line, and hence the ordinance did not entitle the railway to condemn 25 feet on one side of the alley and 6 feet on the other side. **Tudor v. Chicago & S. S. R. T. R. Co. (Ill.)** 27 N. E. 915, 917.

#### **As adjoining.**

"Adjacent," in penal statutes, has sometimes been construed very properly as meaning "near by though not adjoining," but, in the statute requiring that a change of venue

should be made to an "adjacent" county, the word evidently means "adjoining." **Miller v. Cabell**, 81 Ky. 178, 184.

"Adjacent," as used in a statute authorizing the boards of trustees of townships in which the school district or school districts affected lie to organize a new school district out of territory belonging to two or more districts "adjacent to each other," means so united or bound together as to form a compact district. It does not require that the districts affected adjoin each other. **People v. Keechler**, 62 N. E. 525, 528, 194 Ill. 235.

"Adjacent," as used in a statute providing for the annexation to a borough of adjacent land, if it means that each and all of the several lots or other particular tracts of land proposed to be annexed must adjoin the borough, would limit the intent of the Legislature unreasonably, and the annexation of lots contiguous to each other, but not all contiguous to the borough, would have to be accomplished by a series of proceedings which would lead to confusion and delay. The word must be used in its primary and obvious meaning as "adjoining" or "contiguous," as it cannot be conceived that the Legislature would annex to a borough a section of land or village wholly severed by the intervening land of a township, so as to establish two entirely separate villages in one municipality. In **re Sadler**, 142 Pa. 511, 517, 21 Atl. 978.

#### **Adjoining distinguished.**

Adjoining, synonymous, see "Adjoining."

The word "adjacent" is not inconsistent with the idea of something intervening. The word "adjoining" implies a closer relation, its primary meaning, to "lie next to," "to be in contact with," excluding the idea of any intervening space. **Yard v. Ocean Beach Ass'n**, 24 Atl. 729, 731, 49 N. J. Eq. (4 Dick.) 306; **Peeverly v. People**, 3 Parker, Cr. R. 59, 69.

As used in charter providing for improvement of city streets and permitting an assessment against abutting and "adjacent" property, "adjacent" signifies lying near, close to, or contiguous, but not actually touching, and the distinction between "adjacent" and "adjoining" is that the former implies that the two bodies are not widely separated, though they may not actually touch, while "adjoining" indicates that they are so joined or united that no third body intervenes. **Hennessey v. Douglas County**, 74 N. W. 983, 985, 99 Wis. 129 (citing **Massing v. Ames**, 37 Wis. 651, 652).

#### **As bordering on river.**

Act April 10, 1850, § 13a, prohibiting a grant of lands under water in a certain river to "any person other than the proprietor of

the adjacent land," restricts "the grant to the owners of the land bordering upon or adjoining the water covering the subject of the proposed patent." The interpretations given to the word "adjacent" by Walker are "lying close," "bordering upon something," and hence the owner of land coming to a point on the river "has no extent adjacent to the water, according to the principle applicable to such cases." The owners "cannot be entitled to a patent for anything but a perpendicular line into the river." *People v. Schermerhorn* (N. Y.) 19 Barb. 540, 556.

"Adjacent owners," as used in a statute authorizing a purchase of land under water by adjacent owners, construed to mean "persons whose lands were bounded by the river." *City of New York v. Hart* (N. Y.) 16 Hun, 380, 388.

#### **As in neighborhood of.**

"Adjacent," as used in a grant, does not mean adjoining, but signifies convenient, near to, or in the neighborhood. *Henderson v. Long* (U. S.) 11 Fed. Cas. 1084.

"Adjacent" does not mean adjoining, but in the neighborhood of, or convenient, or near to the place specified, and a grant of land adjacent to the military boundary line of North Carolina will sustain a survey from 10 to 15 miles distant. *Henderson's Lessee v. Long*, 3 Tenn. (Cooke) 128, 129, 11 Fed. Cas. 1084.

"Adjacent," as used in Laws 1886, c. 642, authorizing a street railway company to construct a cable road from C. street through M. street to W. street, and to erect necessary power houses in streets "adjacent" to M. street, west of the hill, must be construed to mean "neighboring" streets, or those near to M. street, west of the hill, where there are no streets touching the road to M. street at any point west of the hill. *Brooklyn Heights R. Co. v. City of Brooklyn*, 18 N. Y. Supp. 876, 877.

Laws 1885, c. 145, declares that any district sections, or parts of sections, which have been platted into lots and blocks, also the lands "adjacent" thereto, said territory containing a resident population of not less than 175, may become incorporated as a village. Held, that by the term "lands adjacent thereto," was meant only those lands lying so near and in such close proximity to the platted portion of the city as to be suburban in their character, and to have some unity of interest with the platted portion in the maintenance of a village government. It was never designed that remote territory having no natural connection with the village, and no adaptability to village purposes, should be included. *State v. Village of Minnetonka*, 59 N. W. 972, 974, 57 Minn. 526, 25 L. R. A. 755.

Laws 1888, c. 63, § 1, authorizing the consolidation of two cities lying "adjacent" to each other, construed not to require that the cities should actually join each other at the time of the consolidation. "It is enough if they were 'adjacent,' and that term has been defined by Webster as 'lying near to, but not actually touching.'" *State v. Kansas City*, 31 Pac. 1100, 1103, 50 Kan. 508.

"Adjacent" means lying close or near to, and where a turnpike act provides that if any person shall turn off or pass the gates on ground "adjacent thereto," etc., if he turns off at a place little more than one half a mile from the gate it is turning off on ground adjacent to the gate, within the meaning of the act. *Carrier v. Schoharie Turnpike Road* (N. Y.) 18 Johns. 56, 57.

Laws 1871, vol. 1, p. 328, rendering a railroad company liable only to "adjacent occupants or proprietors" for losses to stock resulting from failure to fence its right of way, does not include the owner of property situate a quarter of a mile from the railroad. *Continental Imp. Co. v. Phelps*, 11 N. W. 167, 168, 47 Mich. 299.

#### **As the next antecedent.**

"Adjacent," in the ordinary construction, and where nothing in the context suggests a different one, applies to the next antecedent. *Regina v. Brown*, 17 Q. B. 833, 839.

#### **To railroad in grants of timber.**

"Adjacent," as used in Act March 3, 1875, c. 152, § 1, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], authorizing railroad companies to take materials for the construction of its road from lands adjacent to its right of way, construed not to include any land save such as by "its proximity to the line of the road" is directly and materially benefited by its construction. *United States v. Chaplin* (U. S.) 31 Fed. 890, 896.

"Adjacent," as used in 13 Stat. 365, granting to a certain railroad the right to take timber, etc., from the public lands adjacent to the line of said road, construed not to be limited to land contiguous to or adjoining the line of its railroad. *United States v. Lynde* (U. S.) 47 Fed. 207, 300; *United States v. Northern Pac. R. Co.* (U. S.) 29 Alb. Law J. 24. The word sometimes has a meaning given it which is synonymous with the word "adjoining," but it is often applied in a more extended sense, as in the vicinity or the neighborhood of. Congress having selected from several synonymous words the one having, as applied to the subject in the section in which it is used, the broadest meaning and most extended signification, must be held to have intended the broadest rather than the most restricted signification to be given to it in the interpretation of said section, and therefore to

hold that this section restricted the defendant to lands adjoining or contiguous to the line of the road would be contrary to all rules of interpretation, while, if we apply the usual rules, we must hold at its rights or extended by this section, be on lands adjoining or contiguous to this line of road to lands anywhere in the vicinity or neighborhood of its said line, though large tracts of land intervene. *United States v. Northern Pac. R. Co.* (U. S.) 29 Alb. Law J. 24.

"Adjacent," as used in act of Congress granting the right to the railroad company to take, from public lands "adjacent" thereto stones, earth, and water required for the construction of the railway, will not be held to include lands beyond the tier of townships lying on either side of the townships through which the railroad runs. *United States v. Batchelor*, 48 P. 310, 311, 9 N. M. 15 (reversed in *Batchelor v. United States* [U. S.] 33 Fed. 986, 987, 28 O. C. A. 246, holding that "adjacent" does not confine the privilege to particular townships or sections lying along the right of way, but that the proper test as to whether the timber is taken from public lands adjacent to the line is whether the timber is within reasonable hauling distance by wagons).

The phrase, "adjacent lands," in Act June 8, 1872, c. 354 (17 Stat. 339), which granted to the Denver & Rio Grande Railroad Company the right to take timber, etc., from public lands adjacent to its right of way, means lands on which the timber, etc., was within reasonable hauling distance by wagon. *Denver & R. G. R. Co. v. United States* (U. S.) 124 Fed. 156, 160, 59 C. C. A. 579.

"Adjacent," as used in Act March 3, 1875, c. 152, § 1, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], means "contiguous" or "adjoining," and does not refer to the government subdivisions lying next to the right of way, and confers the right to take timber only from such lands as may be reached by ordinary transportation by wagons, and not otherwise. *United States v. Denver & R. G. R. Co.* (U. S.) 31 Fed. 886-888.

Lands lying within three miles of the track of the Denver & Rio Grande Railroad Company are "adjacent" lands within the meaning of Act Cong. June 8, 1872, 17 Stat. 339, and March 3, 1877, 19 Stat. 405, allowing the railroad to use timber on adjacent lands. *United States v. Denver & R. G. R. Co.* (N. M.) 66 Pac. 550, 551.

Act March 3, 1875, c. 152, § 1, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], granting to railroad companies the right to take from the public lands "adjacent" to the line of the road timber necessary for its construction, does not authorize the taking of timber 50 miles distant from the road. *Stone v. United States* (U. S.) 64 Fed. 667, 673, 12 C. C. A.

451; *Id.*, 17 Sup. Ct. 778, 783, 167 U. S. 178, 42 L. Ed. 127.

The grant in the Act March 3, 1875, c. 152, § 1, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], of a right to take timber adjacent to the right of way of a railroad company, implies no limitation as to the place of use, so that the company may transport timber thus taken for use on any part of its road, however remote. *United States v. Denver & R. G. R. Co.*, 14 Sup. Ct. 11, 14, 150 U. S. 1, 37 L. Ed. 975.

### ADJACENT PREMISES.

"Adjacent premises," as used in Rev. St. 1874, c. 43, § 2, providing that whoever, not having a license to keep a dramshop, shall sell any intoxicating liquor in any quantity to be drank upon the premises, or in or upon any "adjacent premises," shall be punished, etc., must be construed to include a street or alley adjoining the place where sold. *Bandalow v. People*, 90 Ill. 218, 220.

### ADJOINING.

Additions adjoining and communicating, see "Addition."

"Adjoining," as used in a written agreement in which defendant agreed to sell plaintiff one-half acre of land "adjoining" K's lot on the east, and running due east, does not necessarily imply that the western line of defendant's lot would extend along the whole length of K's lot, but would be equally well satisfied if the western line of land intended to be conveyed extended only a part way on K's lot, and the description was fatally defective, as it did not fix the base line. *Sherer v. Trowbridge*, 135 Mass. 500, 502.

In considering the question as to whether two pieces of property situated about one mile from each other can be considered as in the vicinity or neighborhood of each other, or as constituting adjoining premises, within the meaning of the rule that the keeping of gunpowder upon private premises may be a nuisance when, in case of explosion, it would be liable to injure persons or property of those residing in the vicinity, neighborhood, or upon adjoining premises, the court says that where property is injured directly and without any intervening cause by the force of an explosion it is legally within the neighborhood or vicinity of the scene of the explosion, and that "adjoining premises" may in contemplation of law, be defined in the same way. *St. Mary's Woolen Mfg. Co. v. Bradford Glycerine Co.* (Ohio) 7 O. C. D. 582, 585.

Const. art. 19, § 27, provides that nothing in the Constitution shall be construed to prohibit the General Assembly from author-



izing assessments on land for local improvements in towns and cities, "to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected." Held, that "property adjoining the locality to be affected" is any property adjoining or near the improvements which is physically affected, or the value of which is commercially affected directly by the improvement to a degree in excess of the effect on the property in the town or city generally. *Little Rock v. Katzenstein*, 12 S. W. 198, 199, 52 Ark. 107.

#### **As adjacent.**

Adjacent distinguished, see "Adjacent."

In Laws 1893, c. 73, art. 7, § 2, providing that territory outside of limits of any city or town "adjoining" thereto may be attached to such city or town for school purposes on application by a majority of the electors of such adjacent territory, "adjoining," being used in connection with the word "adjacent," will be held to be used with the same meaning, and as so used will be territory contiguous to, though not necessarily actually touching, the limits of such city. *School Dist. No. 74 v. Long*, 37 P. 601, 603, 2 Okl. 460 (citing *Territory v. Clark* [Okl.] 85 Pac. 882).

"Adjoining" means close to or near to; contiguous. The term may be of the same meaning as "adjacent," conveying the idea merely of nearness, and not of immediate proximity. In *Matthews v. Kimball*, 66 S. W. 651, 653, 70 Ark. 451, the Supreme Court of Arkansas construed the provisions of Const. art. 19, § 27, authorizing special assessments for local improvements in cities and towns under such regulations as may be prescribed by law, to be based upon the consent of the majority in value of the property holders owning property "adjoining" the locality to be affected, and holds that the use of the term "adjoining" does not limit the power of the municipality to make a special assessment for park purposes to the property which actually touches park grounds. *Matthews v. Kimball*, 66 S. W. 651, 653, 70 Ark. 451.

#### **As along.**

"Adjoining," as used in *Wag. St.* p. 310, § 43, requiring every railroad to maintain good and substantial fences on the sides of the road where the same passes through, along, or "adjoining" inclosed or cultivated fields or uninclosed prairie lands, making them liable for damages caused by failure to maintain such fences, is synonymous with the word "along," which is manifest from the immediate context, and from the use of the word "along," in the same connection, in a subsequent part of the same section, without the word "adjoining"; both words as used imply contiguity, or contact. *Walton v. St. Louis, I. M. & S. Ry. Co.*, 67 Mo. 56, 58.

#### **As appertaining or belonging.**

A deed conveyed certain land, and the "lands adjoining," which were composed of an island in a stream, and separated from the first lands by the main channel. It was held that the expression "lands adjoining" was equivalent to the expression "and all lands thereto appertaining." The words "adjoining" and "appertaining" are not synonymous as descriptive words in a deed. "Adjoin" usually imports contiguity; "appertaining," use, occupancy. One thing may appertain to another without adjoining or touching it. Proof that a piece of land adjoined would not be proof that one appertained to the other. Neither in literal meaning nor as used in deeds are they equivalent. Under the rules of construction applicable to deeds in an action of trespass, the term "lands adjoining" was not to make the grant extend beyond the medium flum of the main channel of the river. The term cannot be construed literally, as there is no limit to "adjoining" land. *Miller v. Mann*, 55 Vt. 475, 478.

Gen. St. c. 178, § 46, prescribing a punishment for a person in a house of correction who should escape from said house or the inclosed yard and work shops "adjoining," includes the inclosed yard belonging to the house of correction, which was situated across the street and cultivated by the convicts as a garden, and it is not required that the yard shall be immediately connected with the house itself, for if it is a place entirely devoted to the purposes of the house, and sufficiently secure and suitably protected from all persons without, it is "adjoining," within the meaning of the statute. *Commonwealth v. Curley*, 101 Mass. 24, 25.

#### **As contiguous or touching.**

"Adjoining," as used in a will devising all testator's messuage or dwelling house and premises, with a piece of land thereto "adjoining," means contiguous. *Josh v. Josh*, 5 O. B. (N. S.) 454, 465.

In Act March 6, 1877, authorizing railroad corporations to condemn lands "adjoining" their right of way, "adjoining" means touching or in contact with, and cannot be construed to mean near, and the lands condemned as adjoining the right of way must be contiguous to the right of way. *Akers v. United New Jersey R. & Canal Co.*, 43 N. J. Law (14 Vroom) 110, 112.

"Adjoining," as used in a conveyance describing property as "adjoining" the ocean, construed as meaning that the property conveyed is in actual contact with the ocean. *Yard v. Ocean Beach Ass'n*, 24 Atl. 729, 731, 49 N. J. Eq. (4 Dick.) 306.

Within the description of a deed providing that a line shall run due west a given distance "adjoining to Egg Harbor Inlet," "adjoining" means touching. *McCullough v*

Absecom Breach Land & Improvement Co., 21 Atl. 481, 488, 48 N. J. Eq. (3 Dick.) 170, 187.

Two localities that are at every point separated from each other by the interposition of a third would not, commonly or aptly, be described as "adjoining." Village of South Orange v. Whittingham, 35 Atl. 407, 408, 58 N. J. Law (29 Vroom) 655.

"Adjoining," as used in a fire insurance policy on a frame mill building and all additions thereto "adjoining" and communicating, appropriately describes an addition built onto the main building. Marsh v. New Hampshire Fire Ins. Co., 49 Atl. 88, 70 N. H. 590.

"The literal meaning of the word 'adjoining,' when used in a contract or statute, does not exclude all other evidence of intention and of the subject-matter involved. If it is apparent it was used in its literal and restricted sense, or if there is no evidence indicating its use in a different sense, the court would not be justified in giving it some other or more comprehensive meaning. In a criminal statute, the meaning of 'adjoining' may properly be determined by the legislative purpose requiring a strict construction, such as was applied in State v. Downs, 59 N. H. 320. See, also, Rex v. Hodges, Moody & M. 841. But when it is apparent from the context that its literal meaning would defeat the intended purpose it must be assumed that the word was used in a different sense. Moore v. Phoenix Fire Ins. Co., 6 Atl. 27, 64 N. H. 140, 10 Am. St. Rep. 384; Shaw v. McGregory, 105 Mass. 96, 100." Thus buildings within a few feet of and next to a mill building, and used in common with it, are "additions adjoining," within the terms of an insurance policy. Marsh v. Concord Mut. Fire Ins. Co., 51 Atl. 898, 899, 71 N. H. 253.

"Adjoining," as used in a statute punishing any person for setting fire to a building "adjoining" a dwelling house, is a synonym for adjacent to or contiguous; and where an outbuilding to which the defendant set fire did not touch the dwelling house, but was separated from it at the base by four inches, and at the top by about three feet, it was not adjacent or contiguous to the dwelling house, within the meaning of the statute. State v. Downs, 59 N. H. 320, 321.

So, in Peverelly v. People, 3 Parker, Cr. R. 59, 70, a warehouse not in contact with an inhabited dwelling but four or five feet distant, was held not to be adjoining such dwelling.

#### **Curtilage or message synonymous.**

St. 1804, c. 143, making it a felony to break or enter any shop or office not "adjoining to or occupied with a dwelling house," in the nighttime, and steal therein, includes all shops and outhouses not so "adjoining to

and occupied" as to be taken as a part of any mansion or dwelling house. Devoe v. Commonwealth, 44 Mass. (8 Metc.) 316, 327.

A deed conveyed a hotel "and land adjoining it, being two or three acres, more or less." Held, that the words "lands adjoining" are not synonymous with "messuage or curtilage," and, even if they were synonymous, would not convey an island located in a river back of the land on which the hotel stood. Miller v. Mann, 55 Vt. 475, 479.

In a statute making it burglary to break into and enter any building "adjoining to or occupied with a dwelling house" means "something more than adjoining or contiguous"; the phrase refers to the common-law definition of burglary, and means "a breaking into out houses within the same inclosure adjoining to the dwelling and occupied as part thereof." People v. McGra, 1 Mich. N. P. 27, 29.

#### **As fronting.**

"Adjoining," as used in City Charter, Sp. Laws 1875, c. 6, § 3, subd. 8, authorizing the assessment of lots "adjoining" sidewalks built by the city, construed to mean contiguous thereto or fronting thereon; and hence the charter is not in conflict with the constitution providing for assessment of lands fronting on sidewalks. Scott County v. Hinds, 52 N. W. 523, 524, 50 Minn. 204.

Laws 1868, c. 844, § 8, authorizing the widening of a street in Brooklyn, and directing the expenses of the improvement to be assessed on "adjoining property," does not authorize an assessment on the property which fronted on another street, and which was separated from the avenue in question by the land of others, but the assessment must be limited by property which adjoins the avenue, since the word "adjoin" in its etymological sense means touching or contiguous, as distinguished from lying near or adjacent, and the same meaning must be given it when used in statutes. In re Ward, 52 N. Y. 395, 397.

#### **As near or next to.**

"Adjoining" may mean, as used in charters or statutes, near to or next to. Truax v. Pool, 46 Iowa, 256, 258.

In common parlance "adjoining" is sometimes used for near; and whether it was so used in a deed is a question for the jury, where one description in the deed mentions the property as adjoining a certain lot, and another gives a different description. Massey v. Bellisle, 24 N. C. 170, 182.

#### **Separation by right of way or street.**

Buildings are adjoining so as to be subject to a mechanic's lien, even though they are divided by a private way. Lehmer v. Horton (Neb.) 93 N. W. 964, 966 (citing Fitzpatrick v. Allen, 80 Pa. [30 P. F. Smith] 292).

The charter of a dock company, authorizing it to purchase and hold any lands "adjoining" or near certain tracts of land which the corporation was authorized by its charter to improve, does not authorize the dock company to purchase and hold land which was separated from the land mentioned in the charter by a strip belonging to a railway company, and which was essential to the use of such company for railway purposes. *American Dock & Improvement Co. v. Trustees for Support of Public Schools*, 39 N. J. Eq. (12 Stew.) 409, 435.

"Adjoining property," as used in St. 1887, c. 348, providing that a fence of certain dimensions, erected or maintained to annoy the owners of "adjoining property," shall be deemed a private nuisance, etc., means properties where such fence would be a boundary fence between the two tracts of ground, and does not embrace properties between which is a street which separates the tracts. *Spaulding v. Smith*, 39 N. E. 189, 162 Mass. 543.

#### ADJOINING COUNTY.

Gen. St. 1878, c. 80, § 23, authorizing an application for a writ of habeas corpus in certain cases to be made to some officer having authority, residing "in any adjoining county," authorizes an application for the writ in the nearest or most accessible county, though it may not be actually adjoining. Were the rule otherwise, under the conditions named in the statute, the applicant, in case there was no one capable of acting in the counties actually adjoining, would either fail to get the writ, or be at liberty to go from his own county to the remotest county, passing over all the intervening courts and judges. *In re Doll*, 50 N. W. 607, 608, 47 Minn. 518.

#### ADJOINING STATES.

"Adjoin" means "to lie or be next in contact; to be contiguous"; so that Code Civ. Proc. § 948, providing that a transcript of a judgment of a justice of the peace in an "adjoining" state may be received in evidence in New York, authorizes only those of contiguous states, and will not be applicable to Ohio. *Bent v. Glaenger*, 40 N. Y. Supp. 657, 658, 17 Misc. Rep. 569, 570.

The definition of the word "adjoining" is to lie or be next to or in contact. *Webst. Dict.*; *Crabbe, Eng. Synonyms*; *Fernald, Eng. Synonyms*. The state of Washington is not "adjoining" to Alaska, within the meaning of that word as used in Rev. St. §§ 601, 637 [U. S. Comp. St. 1901, pp. 484, 519], providing for the transfer by a district court of a cause in which the judge is interested to the next circuit court for the district; and if there be no circuit court therein, to the next circuit court in the state; and if there be no circuit

court in the state, to the next circuit court in an "adjoining" state. *Lewis v. Johnson* (U. S.) 90 Fed. 673, 674.

#### ADJOINING TOWNS.

"Adjoining," as used in a statute giving jurisdiction to a justice of the peace to try an action either in the county where the plaintiff resided or before some justice of another town in the same county next "adjoining," should be construed to mean that where the corners of four towns met at one point the diagonal towns adjoined each other at the corner. *Holmes v. Carley*, 31 N. Y. 289 (cited in *Eldert v. Long Island Electric R. Co.*, 51 N. Y. Supp. 186, 188, 28 App. Div. 451).

The words "adjoining towns," as used in the section, relating to the organization of town insurance companies by persons residing in adjoining towns, shall be held to mean not only the towns immediately adjoining the town in which the business office of the corporation is located, but the towns which adjoin these also contiguously, or at their corners. *Gen. St. Minn. 1894, § 3231*.

#### ADJOURN—ADJOURNMENT.

The word "adjourn" means precisely the same thing as to postpone, or put off, or delay. *Bispham v. Tucker*, 2 N. J. Law (1 Penning.) 253, 254 (citing *Ormsby County v. State*, 6 Nev. 283, 287).

In its primary signification "adjourn" means to put off and defer to another day specified; but it has also acquired the meaning of suspending business for a time, defer, delay, and, when used in reference to a sale under a judgment and foreclosure or any judicial proceeding, it properly includes the fixing of the time to which the postponement was made, and the failure to specify at the time of the adjournment the day to which the postponement of the sale was made would invalidate the sale on the day postponed, unless the postponement was necessitated by the wrongful interference of the defendant. *La Farge v. Van Wagenen* (N. Y.) 14 How. Prac. 54, 58.

An "adjournment" is not more than a continuance of the session from one day to another, as the word signifies. Commissioners before whom a petition to divide a borough into wards is tried need not give notice of an adjourned meeting when the adjournment is public and a matter of convenience, of which all the parties must take notice. *In re Division of Lansford Borough*, 21 Atl. 503, 504, 141 Pa. 134.

A town meeting adopted a resolution to adjourn to another house in the town, to which the officers and electors proceeded, and continued the business of the meeting. On contesting the validity of such proceedings it was insisted that there can be no

adjournment of a town meeting, or of the meeting of any other assembly or body, from one hour to another in the same day. In answering this objection the court said: "It cannot be very material whether the formal suspension of or putting off the business of the town meeting for a sufficient length of time to enable the presiding officers to go to the place selected was an 'adjournment' or a 'recess,' or whether it was called in the motion made and carried either the one or the other." An "adjournment" is defined as the putting off until another time or place. *People v. Martin*, 5 N. Y. (1 Seld.) 22, 28.

#### Of court.

The definition is given in *Bouvier* as "to put off, to dismiss till an appointed day, or without any such appointment." If an adjournment is had without fixing any time for the subsequent convening of the court, the law determines the time to be at the beginning of the next term. No person can be held to have notice of the convening of a term of court unless such notice is given by law or by order of the court. To control the time at which his court shall convene the judge must at each adjournment specify a time certain as the date when his court will again meet, or lose the power to hold any further sessions until the time as fixed by law. *Irwin v. Irwin*, 37 Pac. 548, 551, 2 Okl. 180.

"Webster says that the word 'adjourn,' both in England and this country, is applied to all cases in which public bodies separate for a brief period with a view to meet again. As applied to a justice's court, it signifies, we think, not only that the justice ceases to exercise his functions in the particular case for the time being, but that he and the parties, witnesses, jurors, and officers in attendance separate from the place of trial, so that there remains no court at such place." *French v. Ferguson*, 45 N. W. 817, 818, 77 Wis. 121.

The word "adjourn," as used in statute providing that justices of the peace before whom a suit is instituted may, to prevent fraud or surprise or on reasonable cause, adjourn the trial to any time not exceeding 15 days on return of the summons, is used in the same sense as the word "postpone," and means that the justice may "delay" or "put off" the trial for any time not exceeding 15 days. *Bispham v. Tucker*, 2 N. J. Law (1 Penning.) 253, 254.

An adjournment is an act, not a declaration. In the proper order of procedure the announcement of the crier of the court precedes, and does not follow, adjournment. It is but a proclamation to those in attendance of the time to which the court intends to adjourn, and gives notice of the formal act of adjournment. But adjournment is the act of separation and departure, and until

this had fairly taken place the act is incomplete. Just as the crier had finished announcing the adjournment, and the judges had risen to their feet, but were still on the bench, the counsel being present, the jury returned with their verdict, which was received by the court. Held, that the receipt of the verdict, whether objected to or not, was good, and the order to adjourn might be recalled. *Person v. Neigh*, 52 Pa. (2 P. F. Smith) 199, 200.

There is an obvious distinction between the "adjournment" of the court on the first day or any subsequent day of the term and the adjournment of the term, in advance of the appointed time, to another day. In the first place the term has already commenced, and the effect of the adjournment is a prolongation of the term; in the latter case, the term being postponed by adjournment before it commenced, the return day thereof is also adjourned, and it dates its beginning from the time to which it is adjourned. So a transcript of a record required to be filed in the appellate court on or before the first day of the term, where the term was adjourned before such day to a subsequent day, was properly filed on the adjourned day. *Wilson v. Lott*, 5 Fla. 302, 304.

The term "within thirty days from the adjournment of the court," as used in Civ. Code, § 5539, providing that the bill of exceptions shall be tendered to the presiding judge within that time, manifestly means from the final adjournment of the term during which the case was tried. *Loud v. Pritchett*, 30 S. E. 870, 871, 104 Ga. 648.

#### Same—Recess.

In Code Cr. Proc. § 415, providing that the jury must at each adjournment of the court be admonished, "adjournment" means an adjournment from day to day or for a longer time, and not a recess taken during a single day's session. An "adjournment," says *Blackstone*, is no more than a continuance of the session from one day to another, as the word itself signifies; and hence taking a recess for dinner was not an adjournment requiring an admonition to the jury. *Peoper v. Draper*, 1 N. Y. Cr. R. 138, 141.

The term "adjournment," as used in Rev. St. § 3574, subd. 5, requiring a justice of the peace to enter every adjournment in his docket, cannot be construed to include a recess occurring during a trial of a cause. *French v. Ferguson*, 45 N. W. 817, 818, 77 Wis. 121.

#### Of legislature.

Const. art. 3, § 22, declares that if a bill or joint resolution shall not be returned by the governor in 3 days after presentation to him (Sundays excepted) it shall have the same force and effect as if he had signed it unless the General Assembly by their ad-

jourment prevents its return. Held, that the word "adjournment," as used in such article, meant an adjournment by the concurrent action of both houses of the General Assembly. *Corwin v. Comptroller General*, 6 S. C. (6 Rich.) 390, 394.

"Adjournment," as used in Const. art. 5, § 16, declaring that every order or resolution in which the concurrence of both houses of the General Assembly may be necessary, save on questions of "adjournment," shall be presented to the Governor and approved by him before it shall take effect, means any "continuance of the session from one day to another"; and hence a concurrent resolution extending the session 10 days beyond the time that it would ordinarily extend by law required the approval of the governor to render such extension valid. *Trammell v. Bradley*, 37 Ark. 374, 379.

The term "adjournment," in the constitutional provision that if a governor fail to return a bill within five days of its receipt it shall become a law, unless the general session by adjournment shall prevent its return, means final adjournment at the close of the session, not adjournment for the day or for several days during the session. *State ex rel. State Pharmaceutical Ass'n v. Michel*, 27 South. 565, 567, 52 La. Ann. 936, 49 L. R. A. 218.

#### ADJOURNED BY CONSENT.

See "Consent."

#### ADJOURNED TERM.

An "adjourned term" is but a continuation—a part—of the regular term. Giving the district court power to hold an adjourned term gives it power, not to adjourn from day to day, but to adjourn over a length of time—over intervening obstacles to the holding of court. In *re Dossett*, 37 Pac. 1066, 1073, 2 Okl. 369; *Kingsley v. Bagby*, 41 Pac. 991, 2 Kan. App. 23.

An "adjourned term" is not an original term. The definition of the word "adjourn" precludes it. There must be either a regular or special term in session, and the business of that term delayed, postponed, or put off until some more convenient time. This more convenient time would be an "adjourned term," and a continuation of the regular term. *Kingsley v. Bagby*, 41 Pac. 991, 2 Kan. App. 23.

The act providing that courts of the District of Columbia shall be invested with the same power of holding "adjourned sessions" that are exercised by the courts of Maryland does not purport to vary the character of the session, or make an adjourned session a distinct session; and hence an adjourned term was a continuance of the term at which the adjournment was taken, and

did not constitute a distinct term. *Mechanics' Bank of Alexandria v. Withers*, 19 U. S. (6 Wheat.) 106, 108, 5 L. Ed. 217.

The expression "adjourned terms," as used in Acts 1833, § 1, providing that the "judges of the Supreme Court may hold 'adjourned terms' of said court for the trial of such cases as the counsel on both sides thereof may agree to set at such adjourned term," manifestly imports but a continuation of the previous term, and although it is continued for the trial of the cause in a particular division it by no means follows that the power of the court over the business which has been done and the entry made is taken away. It is the same term prolonged, and although prolonged for purposes specified in the order, and although the court as a matter of justice would not take up any cause not set for trial at such "adjourned term," yet as its session or term has not finally closed it has power over its record to make it conform to the truth, and see that injustice is not done by allowing an erroneous judgment to stand, but should *mero motu* vacate it, and set down the cause for a rehearing at the regular succeeding term. If the term is not closed, and the court is still in session, it is not concluded by its previous order, but has power to rescind it. It is not like the case of a special, distinct term, held after the regular term has been brought to a final close. In such case the court would be concluded by the final adjournment. In order to conclude the court and exclude its power from the record of the term, the term must have closed their session by an adjournment *sine die*, or by lapse of time, so as to be closed by the coming on of the regular term. *Van Dyke v. State*, 22 Ala. 57, 59.

#### ADJUDGE.

See "Duly Adjudged"; "Thing Adjudged."

The word "adjudged" means "adjudicated," and "adjudicated" means judicially determined; so that as used in section 60 of the Code of Civil Procedure, providing that a judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense, the word "adjudged" means judicially determined; and therefore a court should not set a judgment aside until, after a hearing of the appellant's evidence, the court finds and decides that such applicant has made out a *prima facie* valid defense or cause of action. *Western Assur. Co. v. Klein*, 67 N. W. 873, 874, 48 Neb. 904.

#### As convicted.

The word "adjudged," as used in Rev. St. art. 2, p. 68, § 1, declaring that every person who shall willfully swear falsely shall, on conviction, be "adjudged" guilty of perjury, and shall not thereafter be received

as a witness in any cause, is synonymous with "convicted"; and hence a verdict finding one guilty of perjury does not disqualify him as a witness until sentence has been pronounced thereon. *Blaufus v. People*, 69 N. Y. 107, 111, 25 Am. Rep. 148.

#### Judgment of court implied.

The words "adjudge," "determine," and "award," as used by arbitrators in their award, do not necessarily carry with them the idea of a judgment according to law, so as to enable one of the parties to have the award set aside for errors of law. *Patton v. Garrett*, 21 S. E. 679, 682, 116 N. C. 847.

While sometimes used together with "considered," "ordered," "determined," "decreed," etc., as one of the operative words of a final judgment, the word "adjudged" is also applicable to interlocutory orders and adjudications of the court. It is not synonymous with "decided," "determined," etc. An allegation that the court "adjudged" that defendants should pay, etc., is not equivalent to an allegation of the rendition of judgment. *Edwards v. Hellings*, 33 Pac. 799, 99 Cal. 214.

Act March 11, 1862, § 8, providing that in case a tax title is "adjudged" invalid the purchaser shall have the lien of the state for taxes chargeable against such property, etc., construed to only mean a judgment entered by a court of competent jurisdiction. *Webb v. Bidwell*, 15 Minn. 479, 484 (Gil. 394, 399).

The words "convicted and adjudged," as used in Act May 5, 1892, c. 60, § 4, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], providing for the imprisonment and deportation of any Chinaman convicted and adjudged to be not lawfully entitled to remain in the United States, is to be construed as meaning that he is found by the commissioner to be unlawfully within the United States, and does not require conviction in the courts. *United States v. Hing Quong Chow* (U. S.) 53 Fed. 233, 234.

## ADJUDICATE—ADJUDICATION.

See "Former Adjudication"; "Time of Adjudication."

Act March 14, 1844, § 4, providing that on taking the bill as confessed on the coming in of the answers the court shall proceed to ascertain and "adjudicate" the rights and interests of the parties, meant to determine in the exercise of judicial power; that is, a solemn or deliberate determination by the judicial power. It constituted a direction to the court to adjudicate the rights and interests of the parties involved on the issues made by the pleadings and on the evidence to be taken and submitted according to the usual methods of procedure in chancery, and constituted nothing less than a direction to

decide and decree what were the respective rights of the parties as they might appear from the law and the testimony. There was nothing in the act requiring a court of chancery to ascertain what the verdict of a jury might be on the facts, but it merely requires the court to ascertain and decide the rights and interests of the parties on the evidence before it. *Street v. Benner*, 20 Fla. 700, 713.

Act July 8, 1886, referring certain claims to the court of claims for adjudication according to law on the proofs, and requiring that court to report the same to Congress, construed to require complete, final, and conclusive judgment by the court of claims. *United States v. Irwin*, 8 Sup. Ct. 1033, 1035, 127 U. S. 125, 32 L. Ed. 99.

"'Adjudication' means a solemn or deliberate determination of an issue by the judicial power, after a hearing in respect to the matters claimed to have been adjudicated." Where the court, in a mandamus proceeding to reinstate a public servant after wrongful discharge, declines to try the question of damages, there is not an adjudication of such question which will preclude a subsequent suit to recover the damages. *Sans v. City of New York*, 64 N. Y. Supp. 681, 81 Misc. Rep. 559.

"Adjudication," as used in relation to the division of property owned in indivision between a father and his minor children, means an assignment by judgment; the adjudging of the ownership of all things by a court; and to constitute such an adjudication something more is required than a recommendation of a family meeting that the adjudication be made; than the appraisal of the property by experts, and an order of the court homologating and approving the proceedings of the family meeting. *Succession of Burguierea*, 28 South. 883, 885, 104 La. 46.

## ADJUDICATION OF BANKRUPTCY.

The expression "adjudication of bankruptcy," as used in Rev. St. § 5069, providing that when the bankrupt is bound, as drawer, indorser, surety, bail, or guarantor, on any bill, bond, note, or other specialty, but his liability does not become absolute until after the "adjudication of bankruptcy," the creditor may prove the same after such liability becomes fixed, means the commencement of proceedings in bankruptcy, and the proceedings are commenced at the time of the filing of the petition in bankruptcy. In *re Morse* (U. S.) 17 Fed. Cas. 846, 847.

An adjudication of bankruptcy is not a judgment establishing a lien, but is generally of an opposite character, and usually operates to prevent the acquisition of liens; and hence is not a "judgment," as the word is used in Rev. St. 828 [U. S. Comp. St. 1901, p. 635], authorizing the clerks of the federal

courts to make a charge of 15 cents for every search for any particular judgment or other lien required by statute to be made. In re Clerk's Charges (U. S.) 5 Fed. 440, 442.

An "adjudication of bankruptcy" is a certificate or order made by an authorized officer to the effect that the petitioner became a bankrupt by the filing of his petition. In re Patterson (U. S.) 18 Fed. Cas. 1315, 1318.

"Adjudication," as used in the bankruptcy act, shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or, if such decree is appealed from, then the date when such decree is finally confirmed. U. S. Comp. St. 1901, p. 3418.

#### ADJUDICATION OF INSOLVENCY.

A "petition in insolvency" and an "adjudication of insolvency" are two entirely and essentially different things. There can be no adjudication of insolvency without a petition, either voluntary or involuntary; but there may be a petition without an adjudication. While it is true that the relation relates back, for certain purposes, to the date of the petition, yet the two things are distinct events, that may happen after a considerable interval of time. Wages earned within three months anterior to a petition for insolvency do not come within Code, art. 47, § 15, giving preference to wages contracted not more than three months anterior to an adjudication of insolvency. *Roberts v. Edie*, 36 Atl. 820, 822, 85 Md. 181.

#### ADJUST.

"Adjust" is to settle or bring to a satisfactory state, so that parties will agree in the result, as to adjust accounts. *Flaherty v. Continental Ins. Co.*, 46 N. Y. Supp. 934, 935, 20 App. Div. 275, 277. Nevertheless the constitutional provision making it the duty of the state auditor "to adjust claims" did not authorize him to issue a warrant for the full sum as called for in an act of the Legislature appropriating a certain amount for the relief of a county to reimburse it for expenses incurred in a murder trial. *State v. Moore*, 59 N. W. 755, 758, 40 Neb. 854, 25 L. R. A. 774.

To "adjust" an unliquidated claim is to determine what is due; to settle; to ascertain; and when losses under policies of insurance are adjusted they are ascertained or determined. *Miller v. Consolidated Patrons' & Farmers' Mut. Ins. Co.*, 84 N. W. 1049, 1050, 113 Iowa, 211 (citing *Ruthven v. American Fire Ins. Co.*, 102 Iowa, 550, 71 N. W. 574).

To "adjust" an unliquidated claim is to determine what is due, and such definition is applicable to losses arising under policies of insurance; hence a person authorized to

"adjust" a claim under an insurance policy has power to determine what is due, and settle or bring to a satisfactory state, so that the parties are agreed in the result, and may waive formal proofs. *Ruthven v. American Fire Ins. Co.*, 71 N. W. 574, 578, 102 Iowa, 550.

"Adjust," as used in Act March 10, 1871, § 7, providing that the state board of equalization shall thereupon proceed "to adjust" and equalize the aggregate valuation of the property of each one of the railroad companies liable to taxation, means to fit, to make accurate, or to determine the exact relation which the property bears to a money standard, and requires the court to determine, on comparison of the extent and amount of the business of one railroad company with another, whether any have assumed a higher or smaller standard of valuation than the others. *Washington County v. St. Louis & I. M. R. Co.*, 58 Mo. 372, 376.

The distinction between adjusting the amount of damages done by a fire and the sum for which the insurance company is liable is very apparent. In the first place, there would be a recognition of the extent of the damage done by the fire; in the latter, a recognized liability, properly adjusted by the parties; but the mere fixing of the amount of loss by the fire is not of itself an admission on the part of the insurer that any liability existed against it upon such policy, and does not raise an implied promise to pay. *Wilmington v. St. Paul German Ins. Co.*, 68 Minn. 373, 375, 71 N. W. 272.

#### As agreement to pay.

"Within certain limitations in ordinary use, the words 'adjust and settle' have different meanings. They are not infrequently used in the sense of pay; they are synonymous, and in some of their uses are equivalent, to fixing, to arrange; in others, to determine, to establish, to regulate. So that under an agreement that, if a committee did not settle and adjust a claim, defendant would 'adjust' it, a finding by arbitrators that defendant agreed to pay will not be disturbed. *Lynch v. Nugent*, 46 N. W. 61, 63, 80 Iowa, 422.

#### Unliquidated demands implied.

Const. art. 4, § 19, requires that the comptroller shall "adjust and settle" all public accounts and demands, except grants and orders of the General Assembly. Held, that since, with regard to liquidated demands, the word "adjust" would be synonymous with "settle," and would therefore be unnecessary, and render the sentence tautological, such word must be construed to refer to unliquidated claims, and as so used require the comptroller to adjust between the parties unliquidated demands against the state, in which he is required to use his discretion

and judgment; and the word "settle" applying to demands liquidated, and requiring the payment of such claim. *State v. Staub*, 23 Atl. 924, 927, 928, 61 Conn. 553.

### ADJUSTABLE DOCK.

A contract to construct an "adjustable dock" does not require a dock which is automatically adjustable, but one which is adjustable by cutting away and filling in its gates so that they will conform to the contour of the hull of the vessel; especially where the term is treated as a technical one, and the experts agree upon that definition of it. *International Bow & Stern Dock Co. v. United States* (U. S.) 60 Fed. 523, 527.

### ADJUSTER.

An "adjuster" is one who determines the amount of a claim, as a claim against an insurance company. *First Nat. Bank v. Manchester Fire Assur. Co.*, 66 N. W. 136, 138, 64 Minn. 96.

An adjuster is a person who makes any adjustment or settlement, so that an insurance adjuster would be empowered and authorized to adjust and settle a loss, and his authority would be sufficient to enable him to take any and every step which he deemed necessary or proper to facilitate an adjustment; hence a declaration that the company will not pay the claim is binding on the company. *Flaherty v. Continental Ins. Co.*, 40 N. Y. Supp. 934, 936, 20 App. Div. 275.

The "adjuster" of a fire insurance company, as to the settlement of losses, is the representative of the company, and his acts are the acts of the company. *Roberts v. Insurance Company*, 72 S. W. 144, 145, 94 Mo. App. 142.

### ADJUSTMENT.

See "Final Adjustment."

#### In insurance.

Ordinarily an "adjustment of loss" in fire insurance is equivalent to a promise to pay the loss so determined; for ordinarily an adjustment implies a liability for the loss and consequent promise to pay. But an adjustment does not necessarily imply liability, and accordingly it may be made under a reservation of the question of liability. An adjustment made subject to the terms and conditions of the policy, which relieves the insurer from liability in case certain conditions or stipulations are not fulfilled by the insured, means simply that the company will pay the loss as fixed under the terms and conditions of the policy, if under them the insured is entitled to payment. *Whipple v. North British & Mercantile Fire Ins. Co.*, 11 R. I. 139, 140 (cited in *Fournier v. German-American Ins. Co.*, 49 Atl. 98, 99, 23 R. I. 36).

In the law of insurance, "adjustment" means to settle or bring to a satisfactory state, so that the parties are agreed in the result. The preliminary proofs are to be acted on by negotiation, by statements on the one side, demands for correction or addition on the other, by compliance with such request, until the parties agree. If they do not agree, there is not an adjustment. *City of New York v. Hamilton Fire Ins. Co.*, 39 N. Y. 45, 47, 10 Am. Dec. 400.

The term "adjustment" in a marine policy, providing that the loss shall be paid sixty days after proof and adjustment thereof, implies that the loss has been adjusted between the parties, and does not contemplate a statement made by the person employed by the assured alone, though he may be called by himself and by them an adjuster. *Taber v. China Mut. Ins. Co.*, 131 Mass. 239, 251.

Where in an insurance policy the sum to be paid as indemnity in case of losses is not fixed in the contract, but is left open to be proved by the claimant or to be determined by the parties, this determination is called an "adjustment" of the loss. *Fire Ins. Ass'n v. Miller* (Tex.) 2 Willson, Civ. Cas. Ct. App. § 332.

#### In machines.

In a claim for a patent an "adjustment" of the retractile force of an automatic circuit breaker, "adjustment" was construed to mean the "mechanical means of making the adjustment." *Page v. Holmes Burglar Alarm Telegraph Co.* (U. S.) 1 Fed. 304, 319.

### ADJUTAGE.

An "adjutage" is a tube, conical in form, intended to be applied to an aperture through which water passes, whereby the flow of the water is greatly increased. *Schuylkill Nav. Co. v. Moore* (Pa.) 2 Whart. 477, 492.

### ADMINISTER.

#### Drug, liquor, or poison.

The primary definition of the word "administer" is to give. The word is not a word having a strict legal and technical import. It is a word in general use, with a commonly accepted meaning, and where a person is charged with administering noxious medicine it is the same as charging him with giving such medicine. *State v. Jones* (Del.) 53 Atl. 858, 861.

"Administering is defined to be giving, dispensing; hence, where defendants furnished and gave liquor to a woman, even though at one time she asked for it, they were guilty of administering liquor within a statute making it rape to have carnal knowledge of woman by administering any liquid which shall prevent resistance." *People v. Quin* (N. Y.) 50 Barb. 128, 134.



Within the provision that whoever prescribes or administers to any pregnant woman, or to any woman who he supposes to be pregnant, any drug, medicine, or substance whatever, with intent to procure a miscarriage of such woman, shall, if the woman miscarries and dies in consequence thereof, be fined, etc., the word "administer" does not signify merely the manner of administering the drug, medicine, or substance, but it has a wider meaning. Among the definitions of the word are the following: To furnish, to give, to administer medicine; to direct or cause to be taken; to supply, furnish, or provide with; and, as used in said section, the word "administer" was clearly intended to cover the whole ground named, making it an offense to give, furnish, supply, provide with, or cause to be given, furnished, supplied, or provided or taken any such drug, medicine, or substance, etc. *McCaughy v. State*, 59 N. E. 169, 170, 156 Ind. 41.

A statement charging a woman with "administering" to her daughter "pills to drive off a child," in their natural meaning charges her with attempting to procure an abortion on her daughter. This is the natural import of the words spoken, and they convey to the minds of ordinary persons the charge of a crime. *Filber v. Dautermann*, 26 Wis. 518, 520.

Cr. Act, § 1, making the felonious administering of poison criminal, construed to include the act of compelling a person to take poison by acts of violence. "Neither deception nor breach of confidence is a necessary ingredient in the act. It matters not whether the poison be put into the hand or into the stomach of the party whose life is to be destroyed by it. If the poison reaches the stomach or body of the deceased and does its work of death there, it is immaterial whether force or fraud was the means by which the guilty agent effected his object. We think counsel are wrong in assuming that the word 'administer' always and necessarily implies service. If it does, it often implies service to a very unwilling master. Such is the case when the law is administered to a criminal. The word 'minister' is said to be derived from the same root as the Latin word 'manus'—the hand. Etymologically, therefore, the word 'administer' would seem applicable to anything that could be done by the hand to or for another." *Blackburn v. State*, 23 Ohio St. 146, 162.

In 2 Rev. St. 666, § 37, making it a felony to administer, or cause and procure to be administered, any poison to any human being with intent to kill, "administer" will be construed to embrace every mode of giving it or causing it to be taken, as putting poison in bread which was so placed that it would be taken by the intended victim. *La Beau v. People*, 34 N. Y. 223-233.

In 2 Rev. St. 666, § 37, providing that every person who shall be convicted of having

administered any poison to any human being with intent to kill such being, and which shall have been actually taken by such being, whereof death shall not ensue, shall be punishable by imprisonment for not less than 10 years, "administer" means to direct and cause medicine to be taken; and placing poison in coffee which was intended for immediate use, and which was immediately used, was an administering within the meaning of the statute.—*Le Beau v. People* (N. Y.) 33 How. Prac. 66, 69.

Acts 1855, p. 23, § 4, providing that if any person who shall "administer poison" to another, with intent to deprive him or her of life, shall be deemed guilty of a felony, construed not satisfied by an attempt to "administer poison" by putting it in food, but to require that the poison be taken into the stomach. *Sumpter v. State*, 11 Fla. 247, 256.

Administering of drugs contrary to a statute prohibiting such act is shown by evidence that defendant procured the drug and mailed it to another, who took the drug in pursuance of defendant's advice, though the drug was mailed in a different state than the place in which it was taken. *State v. Morrow*, 18 S. E. 853, 859, 40 S. O. 221.

"Administering," as used in Act Feb. 10, 1887, providing that the act shall not be considered to prevent regularly licensed and practicing physicians from "administering" certain prohibited liquors whenever they deem it necessary, means to give as a dose, to direct or cause to be taken as medicine; and the giving by the physician of an order for a quart of whisky on a drug store in which he himself was a partner, without more, is not the administering of medicine, but an illegal sale of spirituous liquors. *Brinson v. State*, 8 South. 527, 528, 89 Ala. 105.

#### Estate.

See "Fully Administered"; "Not Administered."

An administrator's bond, conditioned that he should well and faithfully "administer," meant to fulfill the functions and perform the duties of an administrator. *Lanier v. Irvine*, 21 Minn. 447, 448.

The word "administer," as used in a bond given by an executor conditioned that he would faithfully "administer" the estate, means the collection of moneys due the estate and the raising of money to pay claims due from it. *Sparhawk v. Buell's Adm'r*, 9 Vt. 41, 56.

In an executor's bond conditioned that he will faithfully administer the estate of the testator, the word "administer" implies no more than a faithful discharge of the duties of the executor in relation to those having claims against the estate, and implies no obligation to pay those entitled to distribution.

*Moore v. Waller's Heirs*, 8 Ky. (1 A. K. Marsh.) 488, 491; *Barbour v. Robertson's Heirs*, 11 Ky. (1 Litt.) 93, 95.

An executor's bond, requiring him to well and truly "administer" an estate, construed to include the duty to pay over to a legatee for life personal property, and the interest and dividends received thereon by the executor. *Sanford v. Gilman*, 44 Conn. 461, 464.

A will providing that the executors named in the will, or those "administering" on testator's estate, should hold a fund in trust for certain purposes, means the administrator with the will annexed, appointed after the death of the executors named. *In re Baker* (N. Y.) 26 Hun, 626, 631.

Within Gen. St. 1899, § 5583, providing that, when a person shall be imprisoned under a sentence of imprisonment for life, his estate, property, and effects shall be "administered" as if he were naturally dead, by the use of the word "administered" it was the intention of the lawmakers to restrict the administration to the control and disposition of personal property for the benefit of creditors, to the end that all debts of the convict may be speedily paid, administration having relation to personal property, and only where the personality is sufficient in value to pay the debts of the decedent does the administrator exercise any control over the real estate; and hence in such imprisonment the descent of the real property of the prisoner is not cast upon his heirs. *Smith v. Becker*, 64 Pac. 70, 62 Kan. 541.

The assets of an estate are not regarded as administered until they have been collected and applied as required by law or the will of the testator. *American Surety Co. v. Piatt* (Kan.) 72 Pac. 775, 776 (citing *Slagle v. Entekin*, 10 N. E. 675, 676, 44 Ohio St. 637).

Where money belonging to an estate was mixed by the administrator with his own funds and converted by him, it was thereby, technically speaking, administered, and could not be recovered by an administrator *de bonis non*, who was entitled only to such goods as remained unadministered in specie, which would include money received by the former administrator in his character as such and kept by itself. *Reed v. Hume*, 70 Pac. 998, 1000, 25 Utah, 248.

#### ADMINISTRATION.

See "Ancillary Administration"; "Due Administration"; "Due Administration of Justice"; "Letters of Administration"; "Special Administration."

"The administration of government means the practical management and direction of the executive department, or of the public machinery or functions, or of the operations of the various organs of the sov-

eign. The term 'administration' is also conventionally applied to the whole class of public functionaries, or those in charge of the management of the executive department." *People v. Salisbury* (Mich.) 96 N. W. 936, 941.

"Administration" is the act of administering or conducting the office, and in connection with the courts is the execution of the powers and duties of the courts named—the administering of the laws by those courts in their application to particular persons or cases. *Wenzler v. People*, 58 N. Y. 516, 536.

An "administration" is defined to be a change, alteration, or conversion of the goods of a testator or intestate. *Gregory v. Harrison*, 4 Fla. 56, 57.

"Administration," as used with reference to the estate of a deceased person, "is a very comprehensive term, and means the settlement of an estate, whether by an administrator or an executor." *Crow v. Hubbard*, 62 Md. 560, 565.

The term "administration," as used in Revision 1860, § 2357, providing that administration shall not be originally granted after the lapse of five years from the death of decedent, or from the time his death was known in case he died out of the state, means "the management of the estate of a decedent, and expresses the jurisdiction assumed by the proper probate court over it. This jurisdiction is assumed by the appointment of the administrator; when that is done, administration is said to have been granted. It does not refer simply to the act of appointment of the administrator, although that act is included in the thought expressed." *Crossan v. McCrary*, 37 Iowa, 684, 685.

When used with reference to the duties of an administrator in chief, the term "administration" includes more than the collection of assets and the payment of debts and legacies and distribution to the next of kin, and involves anything which may be done rightfully in the preservation of the assets of the estate, and which may be done legally by the administrator in his dealings with creditors, distributees, or legatees, or which may be done by them in securing their rights. *Martin v. Ellerbe's Adm'r*, 70 Ala. 326, 339.

Administration of assets implies such a complete disposition of them as not only to collect them from the debtor of the estate, if they are in that condition, but finally to place them in the hands of the creditor, legatee, or distributee to whom, after undergoing a process of administration, they finally belonged. *Walton v. Walton* (N. Y.) 4 Abb. Dec. 512, 518.

Const. art. 4, in providing that probate courts shall have jurisdiction in all "matters testamentary and of administration," meant matters appertaining to proceedings in an orphan's court in supervising and directing ex-

ecutors and administrators in the discharge of their duties, and did not confer on the probate court jurisdiction of an action to partition the land of a deceased person among his heirs without sale. *Herndon v. Moore*, 18 S. C. 339, 351.

#### **Curatorship distinguished.**

A "curatorship" differs from an "administration" in that the latter continues in full force until a final settlement occurs, and meanwhile the executor or administrator represents the heirs and creditors of the decedent, but, when the minor comes of age, the event terminates the curatorship as to all things except the settlement between the minor and the incumbent curator. *State ex rel. Scott v. Greer*, 74 S. W. 881, 883, 101 Mo. App. 669.

#### **ADMINISTRATIVE.**

The function of the election board of a town in receiving votes and announcing the result is "administrative." *People v. Austin*, 46 N. Y. Supp. 526, 527, 20 App. Div. 1.

An "administrative officer" is frequently classed as a ministerial officer, and vice versa. And, Law Dict. defines "administrative" to mean to dispose, direct the application of, as to administer the law. Bouvier speaks of "administrative" as synonymous with "executive"; a ministerial duty; one in which nothing is left to discretion. *People v. Salsbury* (Mich.) 96 N. W. 936, 940.

#### **ADMINISTRATOR.**

See "Ancillary Administrator"; "De Facto Administrator"; "Foreign Executors and Administrators"; "General Administrator"; "Special Administrator."

An administrator "is a person lawfully appointed to manage and settle the estate of a deceased person who has left no executor." *Smith v. Gentry*, 16 Ga. 31, 32.

Administrators receiving their appointment from the court are officers of the courts whose appointment they bear. *Rothschild v. Hasbrouck* (U. S.) 65 Fed. 283, 285.

An executor or administrator is to a certain extent an officer of the law, clothed with a trust to be performed under prescribed regulations. *Shewell v. Keen* (Pa.) 2 Whart. 332, 339, 30 Am. Dec. 266; *Pace v. Smith*, 57 Tex. 555, 558.

"Administrators, executors, and guardians" are quasi public trustees, with duties prescribed by law, which every one is obliged to know, and notice of whose character is notice of the limitation of their power. In *re Hinds' Estate*, 38 Atl. 599, 601, 183 Pa. 260.

An administrator is a person to whom letters of administration—that is, an authority to administer the estate of a deceased person—has been granted by the proper court. "An administrator takes only such powers as are conferred by law, and those who deal with him have notice of his duties and powers and of all limitations thereon. He is merely an agent or trustee acting immediately under the direction of the law regulating his conduct and defining his authority. *Collamore v. Wilder*, 19 Kan. 67, 78; *Lafferty v. People's Sav. Bank*, 43 N. W. 34, 36, 76 Mich. 35.

An administrator of an insolvent estate must be regarded as being emphatically the representative of the creditors, and it is his duty to take possession of all the estate, to the exclusion of the heirs, and apply it to the payment of the debts. *Starr v. Estey*, 45 Atl. 590, 69 N. H. 619.

An administrator, under a statute authorizing him in certain contingencies to take possession of real estate, is virtually but the agent of the owners to care for the estate, collect rent, and do other acts for their benefit under the direction of the court. The devolution of the title is in no way interrupted or affected thereby, nor by his right to sell or mortgage for the payment of debts, and each may transfer a definite portion subject thereto. *Herriott v. Potter*, 89 N. W. 91, 92, 115 Iowa, 648.

The word "administrator" is descriptive only of the person who has taken upon himself the responsibilities of administering the estate of a deceased person. As to the property of the deceased, the administrator stands in his place, to dispose of it as the law directs. When the heirs or creditors desire to reach it, it can be done only through himself, and, whenever it is found that a devastavit has been committed, his own property can alone be reached through the same channel. So that he is the common medium through which his effects and those of the deceased are accessible to the parties who are legally interested therein. Therefore the subtle distinctions in which the administrator and the person who bears that title are treated as two separate legal entities are the mere inventions of astute and ingenious lawyers, that embarrass rather than facilitate the attainment of the ends of justice. *Allen v. Leach*, 44 Atl. 800, 802, 7 Del. Ch. 232.

Administrators are of two kinds, general and special. *Clemens v. Walker*, 40 Ala. 189, 198.

Where plaintiff sued on a note payable to bearer, and commenced his petition, "A. B., administrator to C. D., deceased," etc., held, that the words "administrator," etc., should have been treated as a mere descriptive personæ, in no way militating

against plaintiff's right to a judgment in his own name. *Rider v. Duval*, 28 Tex. 622, 624.

The words "executors, administrators, and assigns," as used in a fire policy issued to the insured, his "executors, his administrators, or assigns," operate to vest the right of action upon the policy, on the death of insured, in his personal representatives. *Wyman v. Wyman*, 26 N. Y. 253, 255.

The word "administrator" may include every person to whom the administration of an estate or the execution of a will may be granted. Pub. St. N. H. 1901, p. 620, c. 188, § 1.

#### **Administrator with will annexed distinguished.**

An administrator differs from an administrator with the will annexed, not in respect to his right to collect debts due the estate, but only in respect to the disposition of assets. Each represents the estate in all controversies with its debtors. *Fidelity & Casualty Co. of New York v. Freeman* (U. S.) 109 Fed. 847, 851, 48 C. C. A. 692, 54 L. R. A. 680.

#### **As assigns.**

See "Assigns."

#### **Executor included.**

Although in name there is a difference between "administrator" and "executor," yet in fact and in law they are really the same, for each has control over the personal estate and the distribution thereof. In re *Murphy*, 39 N. E. 691, 692, 144 N. Y. 557.

The term "administrator," as used in a right of entry to foreclose a mortgage, in which an executor describes himself as "administrator," construed to include executor, and to be a sufficient description. *Sheldon v. Smith*, 97 Mass. 34, 35.

A notice to an executor notifying him of his appointment is sufficient though the notice recites that he has been appointed as "administrator." *Finney v. Barnes*, 97 Mass. 401, 402.

The term "administrator," when used in statutes, includes executor, where the subject-matter justifies such use. Code Iowa 1897, § 43, subd. 21; Rev. St. Utah 1898, § 2408; Pub. Gen. Laws Md. 1888, p. 2, art. 1, § 4.

#### **Foreign administrator included.**

The term "administrator," as used in Gen. St. 1878, c. 53, § 16, providing that all actions which are pending against a deceased person at the time of his death may, if the cause of action survives, be prosecuted to final judgment, and the executor or administrator may be admitted to defend the same, included foreign as well as domestic

administrators, or any species of administrators recognized by statute as having authority to act as such. *Brown v. Brown*, 28 N. W. 238, 35 Minn. 191.

#### **As legal representative.**

See "Legal Representative."

#### **As next of kin.**

Executors and administrators are not by their nature calculated to describe next of kin, but, on the contrary, executors are persons selected by the testator, and administrators are those named by the ecclesiastical court, and, generally speaking, the expressions "executor" and "administrator" cannot be intended to mean next of kin. *Bulmer v. Jay*, 3 Myl. & K. 196, 199.

#### **As owner.**

See "Owner."

#### **As personal representative.**

See "Personal Representative."

#### **Receiver.**

The terms "administrators" and "receivers" are not convertible terms. Though their duties and incidental powers in some respects may be similar, yet they are officers having different functions to perform, and appointed for different purposes. *The Willamette Valley* (U. S.) 62 Fed. 293, 303.

#### **As representative.**

See "Representative."

#### **Residuary legatee included.**

Gen. St. c. 95, § 5, providing that "no executor or administrator" shall be sued by any creditor of deceased within two years from the time of giving bond for the discharge of their trust, includes one who, being also a residuary legatee, has given a bond to pay debts and legacies, as well as the ordinary bond. *Jenkins v. Wood*, 134 Mass. 115, 117.

#### **Special administrator included.**

The term "administrators," as used in Code, § 1825, relative to the compensations of executors and administrators, embraces special administrators. *Wright's Adm'rs v. Wilkerson*, 41 Ala. 267, 272.

#### **As trustee.**

See "Trustee."

### **ADMINISTRATOR CUM TESTAMENTO ANNEXO.**

As executor, see "Executor."

An administrator differs from an administrator with the will annexed, not in respect to his right to collect debts due the es-

tate, but only in respect to the disposition of assets. Each represents the estate in all controversies with its debtors. *Fidelity & Casualty Co. of New York v. Freeman* (U. S.) 109 Fed. 847, 851, 48 C. C. A. 692, 54 L. R. A. 680.

### ADMINISTRATOR DE BONIS NON.

An administrator de bonis non is an administrator appointed where there is a vacancy in the administration by the resignation, removal, or death of the administrator in chief before a final accounting and discharge. *Sims v. Waters*, 65 Ala. 442, 443.

An administrator de bonis non is an administrator appointed to administer a portion of the estate remaining unadministered after the death of a former administrator. *Clemens v. Walker*, 40 Ala. 189, 198. "One who administers upon the unadministered effects of the deceased." *Barkman v. Duncan*, 10 Ark. (5 Eng.) 465, 466; *Beall v. New Mexico*, 83 U. S. (16 Wall.) 535, 541, 21 L. Ed. 292. He has all the powers of a common administrator. *Clemens v. Walker*, 40 Ala. 189, 198.

An administrator d. b. n. is one appointed to administer the goods of an estate which has been partially administered by a former executor or administrator. This is but a continuance of the original administration by another hand, under a separate responsibility, but by the same authority, the effect of which is to subrogate the substituted administrator to the common-law and statutory rights of creditors, next of kin, and legatees for the benefit of all interested in the fund. *Tucker v. Horner* (Pa.) 10 Phila. 122, 125.

An administrator de bonis non administratis, in general, is the successor of the executor; nevertheless he derives his title directly from the testator, and not from the executor, and on his appointment there vests in him title only to the unadministered property of the testator in trust for those to whom it belongs; and therefore, in the absence of any statutory provision to the contrary, he has no recourse against his official predecessor for devastavit or maladministration, such remedy being reserved to creditors, legatees, and distributees; and the executor is responsible to the successor only for the goods, effects, and credits which remained unadministered. *Waterman v. Dockray*, 3 Atl. 49, 50, 78 Me. 139; *Beall v. New Mexico*, 83 U. S. (16 Wall.) 535, 541, 21 L. Ed. 292.

An "administrator de bonis non" takes the estate where his predecessor left it, and, in respect to the time of limitation to sell real estate, as well as in many other respects, his administration is a mere continuation of that commenced by the latter, otherwise the

rights of heirs, devisees, purchasers, and creditors would be uncertain and indefinite. *In re Kingsland*, 14 N. Y. Supp. 495, 497, 60 Hun, 116 (citing *Slocum v. English*, 62 N. Y. 494).

An "administrator de bonis non" takes possession of the goods and chattels of the testator or intestate which remain in specie and unadministered. He is appointed to finish what is left unfinished, and for no other purpose. *Gregory v. Harrison*, 4 Fla. 56, 57.

### ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEKO.

An administrator de bonis non cum testamento annexo is "an administrator appointed to wind up the affairs of an estate which has already been partially administered by a previous executor or administrator who is either dead or incapable of further action." *Conklin v. Egerton's Adm'r* (N. Y.) 21 Wend. 430, 432; *Clemens v. Walker*, 40 Ala. 189, 198.

### ADMINISTRATOR PENDENTE LITE.

An administrator pendente lite is an administrator whose powers are terminated by the termination of the suit for the purposes of which he is appointed. *Cole v. Wooden*, 18 N. J. Law (2 Har.) 15, 20.

An "administrator pendente lite" is an administrator during litigation. *Whart. Law Dict.* "Lis" means a suit, action, controversy, or dispute, and "dispute" is a conflict or contest, while "controversy" is a disputed question, a suit at law. A "lis pendens" is a pending suit, so that, as long as the lis continues pendens, so long does the administrator appointed during litigation remain a provisional administrator. The pendens of the lis is not disturbed nor in any manner affected by the fact of an appeal from the circuit court to an appellate. The litigation or contest still goes on, and the power of the temporary administrator still remains, unaffected by the varying fortunes or vicissitudes of the pending controversy. *State ex rel. Hamilton v. Guinotte*, 57 S. W. 281, 283, 156 Mo. 513, 50 L. R. A. 787.

"An administrator pendente lite is an officer of the court whose duty is limited to filing an inventory, taking care of the assets, and collecting and paying debts. His authority does not extend to payment of legacies or making distribution of the estate." *In re Ellmaker's Estate* (Pa.) 4 Watts, 34, 36 (quoting *Commonwealth v. Mateer* [Pa.] 16 Serg. & R. 416; *Adams v. Shaw*, 1 Schoales & L. Rep. 254). These views find support in the opinion in *Ex parte Worthington*, 54 Md. 361. So that such an administrator has power to discharge the debts of the decedent, though without power to make distribution of the residue. *Baldwin v. Mitchell* (Md.) 38 Atl. 775, 776.

**ADMINISTRATOR'S BOND.**

"Looking only to the penalty of the bond, it certainly is an instrument for the payment of money; but when we come to the condition, which is usually regarded as the substantial part, there is no provision for paying any sum to any one. The bond may be a security for the payment of money, as where goods of the estate have come to the hands of the administrator, and money has been obtained therefrom, and the county court has distributed the funds. But that is in the due administration of the estate for which the bond is a security, and not because of any express provision of the instrument. A suit on an administrator's bond is not a suit on a written instrument or writing, for the direct payment of money, and a writ of attachment in aid of such suit cannot be allowed under Code Colo. § 95, subd. 14, regulating attachments." *People of Colorado v. Boylan* (U. S.) 25 Fed. 594, 595.

**ADMIRALTY.**

As court of record, see "Court of Record,"

Common law distinguished, see "Common Law."

"The admiralty courts were originally established in England and other maritime countries of Europe for the protection of commerce and the administration of the venerable law of the sea, which reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations, and which is founded on the broadest principles of equity and justice, deriving, however, much of its completeness and symmetry, as well as its modes of proceeding, from the civil law, and embracing altogether a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world." *New England Marine Ins. Co. v. Dunham*, 78 U. S. (11 Wall.) 1, 23, 20 L. Ed. 90.

A court of admiralty has no equity jurisdiction, though it is not governed by professional or technical rules or modes of procedure, and acts with the spirit of purest equity and good conscience; but it cannot change the legal relation of the parties to property, as a court of chancery can, and even in the execution of its judgments, if it encounters an impediment which requires the action of a court of equity, it must pause until some other court with suitable powers has acted. *The Albert Schultz* (U. S.) 12 Fed. 156.

The "admiralty" is a court of very high antiquity. It has been distinctly traced as early as the reign of Edward I. If it be not of immemorial antiquity, as Lord Coke sup-

poses, it is almost certain that its origin may be safely assigned to some anterior age. There is a strong probability of its existence in the reign of Richard I, since the laws of Oleron, which were compiled and promulgated by him on his return from the Holy Land, have always been deemed the laws of admiralty, and could not have been fully enforced in any other court. What was originally the nature and extent of the jurisdiction of the admiralty cannot now with absolute certainty be known. It is involved in the same obscurity which rests in the original jurisdiction of courts of common law. It seems, however, that at a very early period the admiralty had cognizance of all questions of prize, of torts, and offenses, as well in ports within the ebb and flow of the tide as upon the high seas; of maritime contracts and navigation; and also of the peculiar custody of the rights, prerogatives, and authorities of the crown in the British seas. The forms of its proceedings were borrowed from the civil law, and the rules by which it was governed were, as is everywhere avowed, the ancient laws, customs, and usages of the sea. In fact, there can scarcely be the slightest doubt that the admiralty of England and all other maritime courts were formed upon one and the same common model, and that their jurisdiction included the same subjects as the consular courts of the Mediterranean. The most venerable monument of admiralty jurisdiction is the Black Book of the Admiralty, which has always been deemed of the highest authority, and, besides containing the laws of Oleron at large, it contains an ample view of the crimes and offenses cognizable in the admiralty, and, among other things, it prohibits suing merchants and mariners and others at common law for anything appertaining to the marine law of ancient right, and expressly affirms the jurisdiction of the admiralty over all contracts made abroad and within the flood mark. It cannot be denied that before and in the reign of Edward III the admiralty exercised jurisdiction, first, over matters of prize and its incidents, second, over torts, injuries, and offenses in ports within the ebb and flow of the tide and on the high seas, third, over contracts and other matters regulated and provided for by the laws of Oleron and other special ordinances, and, fourth, over maritime causes in general. *De Lovio v. Boit* (U. S.) 7 Fed. Cas. 418, 420, 2 Gall. 398.

Admiralty is constructed of inferior jurisdiction, being bounded and circumscribed by certain lines and stated rules, and is subject to the control of the temporal courts. *Respublica v. Le Caze* (Pa.) 1 Yeates, 55, 56 (citing 1 Bac. 558).

**ADMIRALTY JURISDICTION.**

The nature and extent of the admiralty jurisdiction conferred on the United States

courts by the Constitution is to be determined by the laws of Congress and the decisions of the Supreme Court, and by usage prevailing in the state courts when the Constitution was framed, and is not coextensive or limited by the admiralty jurisdiction of England at the time of the formation of the Constitution, or governed by the civil law or the practice or usage of Continental Europe. *Ex parte Easton*, 95 U. S. 68, 70, 24 L. Ed. 373; *Cope v. Vallette Dry-Dock* (U. S.) 10 Fed. 142, 143.

Act Cong. Feb. 26, 1845, providing that the district courts of the United States shall have and possess jurisdiction in matters of contract and tort arising in or on or concerning steamboats employed in navigation or commerce on the high seas or tide waters within the "admiralty jurisdiction" of the United States, does not constitute a regulation of commerce, and it would be inconsistent with the plain and ordinary meaning of the words "admiralty and maritime jurisdiction" to construe them as meaning a regulation of commerce, since the jurisdiction to administer the existing laws on matters of contract and tort arising on steamboats navigating the high seas is not a regulation within the meaning of the Constitution, and the act of Congress merely creates a tribunal to carry such laws into execution, but does not prescribe the laws, and to support the constitutionality of the law as a regulation of commerce would impute to the Legislature an exercise of the power which it has not claimed under the clause of the Constitution conferring on Congress the power to regulate commerce, nor can the admiralty jurisdiction of the courts of the United States be made to depend on the regulation of commerce, as they are entirely distinct things and have no necessary connection with each other, and are conferred in the Constitution by separate and distinct grants. *The Genesee Chief v. Fitzhugh*, 53 U. S. (12 How.) 445, 452, 13 L. Ed. 1053.

#### Subject-matter.

In all the great maritime nations of Europe, the term "admiralty jurisdiction" is uniformly applied to the courts exercising jurisdiction over maritime contracts and concerns. *De Lovio v. Boit* (U. S.) 7 Fed. Cas. 418, 441, 2 Gall. 398.

The "admiralty and maritime jurisdiction" given by Const. art. 3, § 2, to the courts of the United States, "manifestly embraces those subjects, whether of contract or tort, which were then under the general maritime law, or appropriate subjects of the jurisdiction of courts of admiralty." *Scott v. The Young America* (U. S.) 21 Fed. Cas. 851, 852, Newb. Adm. 101.

"The principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures *jure belli*, and

seizures on water for municipal and revenue forfeitures." *The Belfast v. Boon*, 74 U. S. (7 Wall.) 624, 637, 19 L. Ed. 286.

In *Ex parte Easton*, 95 U. S. 68, 72, 24 L. Ed. 373, Mr. Justice Clifford quotes from 2 Story, Const. § 1666, approvingly as follows: "Admiralty jurisdiction embraces all contracts, claims, and services which are purely maritime, and which respect rights and duties appertaining to commerce and navigation;" and then just as Clifford said, maritime jurisdiction of the admiralty courts in cases of contract depends chiefly upon the nature of the service or engagement, and is limited to such subjects as are purely maritime, and have respect to commerce and navigation. A maritime lien is not essential to give the courts of the United States admiralty jurisdiction, and a charter party in which there is complete contract for maritime services to be rendered is a maritime contract within the jurisdiction of the United States courts. *Maury v. Culliford* (U. S.) 10 Fed. 388, 391.

The English rule conceding jurisdiction to admiralty, with few exceptions, only to contracts made upon the sea and to be executed thereon (making the locality a test), is entirely inadmissible, the true criterion being the nature and subject-matter of the contract, as whether it was a maritime contract having reference to maritime service or maritime transactions, and hence admiralty jurisdiction extends to a contract of maritime insurance. *New England Marine Ins. Co. v. Dunham*, 78 U. S. (11 Wall.) 1, 24, 20 L. Ed. 90.

The true criterion of "admiralty jurisdiction" with respect to contracts is the nature and subject-matter of the contract, as to whether it was a maritime contract having relation to maritime service or maritime jurisdiction. A contract made near the close of the season of late navigation for the shipment of a cargo of grain from Chicago to Buffalo, the grain to be stored in the vessel at Buffalo, is not maritime in character, so as to give admiralty jurisdiction of a suit for damage to the grain. *The Richard Winslow* (U. S.) 71 Fed. 426, 428, 18 C. C. A. 344.

"Admiralty and maritime jurisdiction," according to the generally accepted and received use of the term, extends to all things done upon and relating to the sea, to transactions relating to commerce and navigation, to damages and injuries upon the sea, and all maritime contracts, torts, and injuries; but as applied to this country, with its immense lakes and numerous navigable rivers, the doctrine in modern times has extended it wherever ships, freight, and navigation successfully aid commerce, whether internal or external. Admiralty and maritime jurisdiction belongs exclusively to the courts of the United States. Hence Rev. St. c. 91, § 8, which provides that whoever furnishes labor

or materials for a vessel after it is launched or for its repair has a lien on it therefor, to be enforced by attachment, etc., in so far as it authorizes proceedings in rem in the state courts for the enforcement of a lien on domestic or foreign seagoing vessels, is invalid. *Warren v. Kelley*, 15 Atl. 49, 50, 80 Me. 512.

Admiralty and maritime jurisdiction extends to all things done upon and relating to the sea, to transactions relating to commerce and navigation, and to damages and injuries upon the sea, and all maritime contracts, torts, and injuries. Charter parties, affreightments, marine hypothecations, contracts for marine service in the building, repairing, supplying, and navigating ships, are, among other things, embraced with the term "maritime contracts." *Bird v. The Josephine*, 39 N. Y. 19, 22.

The jurisdiction of admiralty in matters of prize is not confined to captures at sea. Prize jurisdiction does not depend on locality, but on the subject-matter. Admiralty not only takes cognizance of all captures at sea, in havens, and rivers, but also of all captures made on land, where the same have been effected by a naval force or in co-operation with a naval force. *Brown v. United States*, 12 U. S. (8 Cranch) 110, 139, 3 L. Ed. 504 (citing *Key & Hubbard v. Pearse*, cited in *Le Caux v. Eden* [Eng.] Doug. 606; *Lindo v. Rodney* [Eng.] Doug. 613, note; *The Stella del Norte* [Eng.] 5 C. Rob. Adm. 349; *The Rebeckah* [Eng.] 1 C. Rob. Adm. 227).

If the business or employment of a vessel appertain to travel, trade, or commerce on the water, it is subject to admiralty jurisdiction, whatever be its size, form, capacity, or means of propulsion. *The General Cass* (U. S.) 10 Fed. Cas. 169, 171, *Brown*, Adm. 334.

The admiralty court has jurisdiction and power to try all maritime cases; of everything done on the water below the low-water mark the admiralty court has sole and absolute jurisdiction. It is said to be no court of record in 3 Bl. Comm., and in many other books; but it does not follow, nor is it anywhere laid down, that, because the court of admiralty is said not to be a court of record, it is therefore an inferior court. *Lacaze v. State* (Pa.) 1 Add. 58, 80, 81.

#### Territory.

Courts of admiralty are of great antiquity, and have been distinctly traced as early as the reign of Edward I, and there is a strong probability of their existence in the reign of Richard I. It seems that at a very early period the admiralty had cognizance of all questions of prize, of torts, and offenses, as well in ports within the ebb and flow of the tide as upon the high seas, of maritime contracts and navigation, and also the peculiar custody of the rights, prerogatives, and authorities of the crown in the

British seas. The forms of its proceedings were borrowed from the civil law. Lord Hale explicitly asserts that in ancient times the common law exercised jurisdiction concurrent with the admiralty over crimes committed even on the narrow seas or coasts, though it were high sea, and that this jurisdiction did not cease until about the 38 Edward III. *De Lovio v. Boit* (U. S.) 7 Fed. Cas. 418, 2 Gall. 398.

The admiralty jurisdiction given to the United States courts by the Constitution extends over all public navigable waters, without regard to their being influenced by the tide. *The Eagle v. Fraser*, 75 U. S. (8 Wall.) 15, 20, 19 L. Ed. 365.

In the Constitution, declaring that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction," and the judiciary act of September 24, 1789, conferring on district courts "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction," the term "admiralty jurisdiction" is not used in the limited sense in which it is used in English law, which confined the jurisdiction of admiralty to the high seas, and entirely excluded it from transactions arising on waters within the body of a country, such as rivers, inlets, and arms of the sea as far out as the naked eye could discern an object from shore to shore, as well as all transactions arising on the land, though relating to marine matters; but it "extends not only to the main sea, but to all navigable waters of the United States or bordering on the same, landlocked or open, salt or fresh, tide or no tide." *The Genesee Chief v. Fitzhugh*, 53 U. S. (12 How.) 443, 454, 13 L. Ed. 1058 (citing *New England Marine Ins. Co. v. Dunham*, 78 U. S. [11 Wall.] 1, 24, 20 L. Ed. 90).

The repair of a vessel used to navigate tide water, although used partly on inland navigation, is a maritime contract, and the mechanics and materialmen may proceed in the federal courts. *McLelland v. The Robert Morris* (U. S.) 16 Fed. Cas. 293, 294, 1 Wall. Jr. 83.

The test of the jurisdiction of courts of admiralty in respect to torts was whether the place of alleged injury was on the water. A bathhouse moored to shore, but wholly floating in the water, and so arranged that the tide flowed through it, access to the house being had by means of planks from the shore, was injured by being run into by a steamer. Held, that the accident was on the water, and hence within the jurisdiction of admiralty. *The M. R. Brazos* (U. S.) 17 Fed. Cas. 951, 10 Ben. 435.

#### ADMIRALTY LIEN.

"Admiralty lien" is a privilege. a "jus in re," perfect where there has never been possession, or where it has been lost or re-



linquished. To this familiar and well-established doctrine the lien for freight is an exception, but that for salvage is not. *The Missouri (U. S.)* 17 Fed. Cas. 484, 490, 1 Spr. 280.

### ADMIRALTY PROCEEDING.

As civil suit, see "Civil Action—Case—Suit—etc."

Proceedings to confiscate real estate under the act of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels," etc., are not proceedings in admiralty, although the act declares that they shall be in rem and conform as near as may be to proceedings in admiralty and revenue cases. *Ex parte Graham*, 77 U. S. (10 Wall.) 541, 19 L. Ed. 981.

### ADMISSION.

The term "admission," as used in an act transferring to the orphans' court the powers and duties formerly exercised by the ordinary relative to the "admission" of guardians, does not include the power of revocation, and hence does not authorize the orphans' court to revoke letters of guardianship. *Tenbrook v. McCollm*, 10 N. J. Law (5 Halst.) 383, 335.

The word "admission," relating to the admission of an attorney, means something more than merely permitting the appearance of persons who may present themselves in proper cases, without the right to practice. It is to be understood with reference to the long-established custom of admitting and licensing attorneys, not for a single occasion, but generally. *In re Graduates (N. Y.)* 11 Abb. Pr. 301, 336.

### ADMISSION (In Evidence).

See "Solemn Admission."

An "admission" is the statement of a fact against the interest of the party making it; but it is not essential, to constitute it an admission, that the fact should have come under the personal observation of the declarant. *Wasey v. Travelers' Ins. Co.*, 85 N. W. 459, 461, 126 Mich. 119 (citing *Sparr v. Wellman*, 11 Mo. 230).

An "admission" is a voluntary acknowledgment by a party of the existence of truth of certain facts. Statements contained in deeds are competent evidence against the parties executing them. *Roosevelt v. Smith*, 40 N. Y. Supp. 381, 383, 17 Misc. Rep. 323.

"An admission is a statement suggesting any inference as to any fact in issue, or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceedings. *Chase, Steph. Dig. Ev. (2d*

*Ed.)* p. 57." Statements made by a witness to a party, derogatory to the latter, were held not admissions on the part of defendant. *People v. Bushnell*, 71 N. Y. Supp. 253, 254, 35 Misc. Rep. 452.

The word "admission," as used in an instruction, in the action on the contract of a father to convey or devise land to his son, that the jury might consider the "admission" made by the father during his lifetime as to any agreement with the son regarding the land described, was used synonymously with "declaration," and was not, therefore, error. *Jamison v. Jamison*, 84 N. W. 705, 706, 113 Iowa, 720.

With regard to admissions by one partner to bind his copartner, there is no distinction between the admission of an account and the admission of the fact; the same consequence follows from either admission. The admission of the fact determines the amount of liability which attaches to the other partner with as much certainty as if the partner had admitted the amount of the proceeds of property in the hands of the firm. *Baker v. Stackpoole (N. Y.)* 9 Cow. 420, 434, 18 Am. Dec. 508.

Admission, in a criminal trial, is a fact which may be proved as relevant to any fact in issue. It is not testimony; it is a fact to be proved by testimony, and cannot of itself support a conviction. *State v. Willis*, 41 Atl. 820, 824, 71 Conn. 293.

### As agreement or promise.

"Admissions" are concessions or acknowledgments made by a party of the existence or truth of certain facts. It does not include a promise or an agreement to pay money, that being a fact to be proved like any other issuable fact. An "admission" may be made of this fact or concerning it, but the admission is not a fact. *Thomas v. Paul*, 58 N. W. 1031, 1032, 87 Wis. 607.

An admission of indebtedness contained in a statement that the account rendered is correct is not a contract, so as to give a right to a writ of attachment. *Ordenstein v. Bones (Ariz.)* 12 Pac. 614, 615.

A payment is treated as such an "admission" of the indebtedness as will remove the bar of the statute of limitations. *Burr v. Williams*, 20 Ark. 171, 183.

### Admissions by acts.

The word "admission," as used in Gen. St. c. 73, § 8, as amended by Gen. Laws 1877, c. 40, providing that it shall not be competent for any party to an action to give evidence therein of any conversation or "admission" of a deceased or insane party, construed only to refer to "admissions" by words, and not to such acts as have the force and effect of "admissions." *Chadwick v. Cornish*, 1 N. W. 55, 57, 26 Minn. 28.

**Admissions in writing.**

The usual meaning attached to the word "admission" is broad enough to include written as well as oral admissions. Every written contract or statement in writing is in one sense of the word an admission made by each party who may sign it. *Jackson v. Ely*, 49 N. E. 792, 794, 57 Ohio St. 450.

**Confession distinguished.**

The term "admission" is usually applied to civil transactions and to those matters of fact in criminal cases which do not involve criminal intent, while the term "confession" is generally restricted to acknowledgments of guilt. *People v. Velarde*, 59 Cal. 457, 461; *Colburn v. Town of Groton*, 28 Atl. 95, 96, 66 N. H. 151, 22 L. R. A. 763; *State v. Porter*, 49 Pac. 964, 966, 32 Or. 135.

A "confession" in criminal law is the voluntary declaration made by a person who has committed a crime or misdemeanor of the agency or participation which he had in the same. The term "admission" is usually applied to civil transactions, and to those matters of fact in criminal cases which do not involve criminal intent. The word "confession" relates to the acknowledgment of guilt, and "admission" relates to the acknowledgment of facts. Thus, where the evidence merely shows an admission of facts from which a conclusion of guilt might in a certain instance be drawn, the use of the word "confession" in a charge was erroneous. *State v. Heidenreich*, 45 Pac. 755, 29 Or. 381. Thus, where there is an admission of a fact or a bundle of facts from which guilt is directly deducible, or which within and of themselves import guilt, it may be denominated a "confession." But not so with an admission of a particular act or acts on circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. But the statement of a person showing that he intentionally killed deceased is a confession, though his statements embraced the narration of acts designed to present an excuse for the killing. *State v. Porter*, 49 Pac. 964, 966, 32 Or. 135.

The term "admission" is usually applied to civil action, and "confession" to acknowledgment of guilt in criminal prosecution. Where statements are made by a defendant to an officer, they may be received as an admission against interest, even though they might be regarded as a confession in a criminal court. *Notara v. De Kamalaris*, 49 N. Y. Supp. 216, 219, 22 Misc. Rep. 387.

In an instruction in a criminal case that if the jury should find that defendant intentionally misstated material facts they might consider misstatements as "admissions" of guilt, the term "admissions" was not used as meaning "confessions," but as signifying admission by conduct from which guilt might

be inferred, so that the instruction was not erroneous. *Commonwealth v. Devaney*, 64 N. E. 402, 404, 182 Mass. 83.

**Conversation distinguished.**

See "Conversation."

**Offer to buy peace distinguished.**

A distinction is taken between admission of particular facts and an offer of a sum of money to buy peace, for it must be permitted to men to buy their peace, without prejudice to them if the offer should not succeed. An offer to pay money is evidence when the party making it understands it to be and makes it as an admission of his liability. It is not evidence when he makes it for the purpose of averting litigation, not intending to admit his liability. *Colburn v. Town of Groton*, 28 Atl. 95, 96, 66 N. H. 151, 22 L. R. A. 763.

**ADMISSION (In Pleading).**

An admission in pleading dispenses with proof, and is equivalent to proof. In an action against a town for the expense of supporting an insane pauper at the state hospital, an admission in the answer that defendant had paid for one year's support of the pauper in such hospital is evidence of an admission of liability. *Connecticut Hospital for the Insane v. Town of Brookfield*, 36 Atl. 1017, 1018, 69 Conn. 1.

An "admission" in pleading is evidence against the party making it on the trial of the particular issue to which the admission relates, but an admission in one count of a declaration is not evidence against the plaintiff under any other count. *Starkweather v. Kittle* (N. Y.) 17 Wend. 20, 22.

An admission, in the language of the rule of the district court that plaintiff has a good cause of action as set forth in his petition, except so far as it might be defeated by the facts in the answer constituting a good defense, must be construed to mean that defendant admits every fact alleged in the petition which it is necessary for plaintiff to establish in the first instance to enable him to recover, but does not admit allegations in the petition which merely deny matter, alleged in the answer, the burden of proof of which is upon the defendant. *Joy v. Liverpool, London & Globe Ins. Co. (Tex.)* 74 S. W. 822, 823 (citing *Smith v. Traders' Nat. Bank*, 74 Tex. 541, 12 S. W. 221).

**ADMISSION TO BAIL.**

Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon the taking of bail. *Comp. Laws Nev.* 1900, § 4460; *Ann. Codes & St. Or.* 1901, § 1492.

Laws 1878, p. 142, defining "admission to bail" as an order of a competent court

or magistrate that the defendant be discharged from actual custody on bail, does not mean the discharge itself, but the order of the court for the persons discharged, and hence an allegation in an action on an appeal bond that the accused was admitted to bail did not constitute an averment that the person was discharged from custody. *People v. Solomon*, 15 Pac. 4, 5 Utah, 277.

In an action on a bail bond, where the complaint alleged that the accused was "admitted to bail," such phrase meant the order of a court or magistrate for the prisoner's discharge, and not the discharge itself. *People v. Solomon*, 15 Pac. 4, 5 Utah, 277.

"Admitted to bail," as used in a petition, in an action to recover the penalty of a criminal bond, which alleges that the defendant is "admitted to bail," construed to mean that he was discharged on his own recognizance. *Shelby County v. Simmonds*, 33 Iowa, 345, 347.

## ADMIT.

"The word 'admit' is defined thus: To permit; to suffer; to tolerate." *Gregory v. United States (U. S.)* 10 Fed. Cas. 1195, 1198, 17 Blatchf. 325.

A fact is not admitted or undisputed simply because a witness has so testified and the statement has not been directly contradicted, especially when it plainly appears that the court did not credit the statement. *City of New Haven v. New York, N. H. & H. R. Co.*, 44 Atl. 31, 33, 72 Conn. 225.

### As grant.

"Admitted," as used in equity rule 88, declaring that a rehearing shall not be "granted" after the lapse of the term at which the final decree is entered, and providing that in nonappealable cases a petition for rehearing may be "admitted" before the end of the next term after final decree, should be construed as synonymous with the word "granted," and hence the effect of the rule is to deprive the court of the power to grant a rehearing in any case after the lapse of the term next succeeding the entry of a final decree. *Glenn v. Dimmock (U. S.)* 43 Fed. 550, 551.

### As tolerate.

In an instruction that if the facts relating to the sale of the property in question "admit" of two constructions, one rendering it fraudulent and the other honest and valid, the latter must be accepted, "admit" is the synonym of "tolerate." A paraphrase of the sentence would be that, unless the testimony tending to prove the fraud is so clear as to admit of no other conclusion, then the jury must find the conveyance valid. *Pollak v. Searcy*, 4 South. 137, 139, 84 Ala. 259.

"Admit," as used in instruction to the effect that, if the facts relative to an alleged sale of property admit of two constructions, the one rendering it fraudulent and the other honest and valid, the latter must be accepted and acted upon, is synonymous with "tolerate." *Skipper v. Reeves*, 8 South. 804, 805, 93 Ala. 332.

## ADMITTED TO BAIL.

See "Admission to Bail."

## ADMIXTURE.

The use of the words "admixture or addition," in Act May 5, 1899 (P. L. 241), making it unlawful to manufacture or sell oleomargarine which shall be but an imitation of yellow butter, etc., indicates that the intention of the Legislature is to prohibit the imitation of yellow butter by any "admixture or addition" to oleomargarine during or after manufacture. *McCann v. Commonwealth*, 48 Atl. 470, 471, 198 Pa. 509.

## ADM'R.

The abbreviation "Adm'r" will be judicially presumed to mean "administrator." *Moseley's Adm'r v. Mastin*, 37 Ala. 216, 221.

## ADOPT—ADOPTION.

To "adopt" means to take or receive as one's own what is not so naturally; to select and take and approve. The record of a city council showing that a report was "received and filed" does not show an adoption. *City of Dallas v. Beeman*, 45 S. W. 626, 628, 18 Tex. Civ. App. 335.

County Government Act, § 25, subd. 9, giving the county board the power to cause a jail to be erected, but providing that such building shall not be erected or constructed until plans and specifications have been made therefor and "adopted" by the board, construed not to require an unconditional adoption by the board, but to be satisfied if adopted on condition that a responsible party may bid on the building for a sum not exceeding a certain amount. *Hall v. Los Angeles County*, 16 Pac. 313, 314, 74 Cal. 502.

### Of child.

Webster defines "adopt," to take a stranger into one's family as son or heir; to take one who is not a child and treat it as one. *People v. Norton (N. Y.)* 59 Barb. 169, 195; *Cofer v. Scroggins*, 13 South. 115, 117, 98 Ala. 342, 39 Am. St. Rep. 54.

"Adoption" means an assumption of the relationship of parent and child, with all the consequences of that relationship. *State v. Thompson*, 13 La. Ann. 515, 518.

The adoption of child "is an act by which a person appoints as his heir the child of another (Rep. & L. Law Dict.); to receive and to treat as a son one who is the child of another (Worcester Dict.); to take into one's family as son and heir; to take and treat as a child, giving a title to the privileges and rights of a child (Webster Dict.) The Imperial Dictionary (England) employs substantially both the definitions of Worcester and Webster." *Russell v. Russell*, 3 South. 900, 84 Ala. 48.

Adoption is the taking into one's family the child of another as son and heir, conferring on it the title to the privileges and rights of a child; an act, in other words, by which a person appoints as his heir the child of another. The right in Alabama is purely statutory; it has never been recognized by the rule of the common law. *Abney v. De Loach*, 4 South. 757, 759, 84 Ala. 393.

Adoption is the act by which the relations of paternity and affiliation are recognized as legally existing between persons not so related by nature. Adoption was not recognized by the common law of England, and exists in the United States only by special statute; but among many of the continental nations it has been practiced from the remotest antiquity. It appears to have been a necessary concomitant of the type of archaic society when the family constituted the unit of the community, and was an important factor in developing society into the broader community called "the state." Maine, in his work on Ancient Law, says: "We must look on the family as constantly enlarged by the absorption of strangers within its circle, and we must try to regard the fiction of adoption as so closely simulated or related to kinship that neither law nor opinion makes the slightest difference between the real and adoptive connection." Adoption flourished and was regulated by law in both of the classical nations of antiquity. In Greece, in the interests of the next of kin whose rights were affected by adoption, it was provided that the registration should be attended with certain formalities, and that it should take place at a fixed time, the festival of Thargelia. In Rome the system was in vogue long before the time of Justinian, and the ceremonies to accomplish the result were cumbered with much formality, and he reduced the statement to a code which simplified the proceedings, from which modern legislation on the subject has derived its principles. Justinian's Code either required an imperial rescript or a proceeding before a magistrate to accomplish an adoption, and if resort was not had to an imperial rescript, and the person to be adopted was *alieni juris*, the parties appeared before a magistrate and executed a deed in his presence declaring that the person giving the child and the person receiving it were personally present and con-

sented to the adoption; but it was sufficient if the consent of the party adopted were expressed by his not declaring his assent, "*non contradicenti*." The effect of adoption was to cast the succession on the adopted, in case the adopted father died intestate, and created the relation of paternity and affiliation not before recognized as legally existing, and the change of name was more an incident than the object of the proceedings. In *re Sessions' Estate*, 38 N. W. 249, 253, 70 Mich. 297, 14 Am. St. Rep. 500.

"To adopt" means to take a stranger into one's family as son and heir; that is, to take a child into one's family and to treat it as one's own, giving it the privileges and rights of a natural child. Adoption was unknown to the common law, but is familiar to the civilian, and under the Roman law the person adopted entered into the family and came under the power of the person adopting him, and the person adopted stood not only himself in relation of child to him adopting, but his children became the grandchildren of such person. The French law also admitted of adoption, and the adopted succeeded to the inheritance of the adoptor. Code Napoleon, art. 350. It was also known to the Spanish, and the person adopted succeeded as heir to him who adopted him (title 16, 4th Partidas). Therefore, by the common acceptance of the word, "adoption" means the relation of parent and child, with all the consequences of that relationship, and it cannot be said that the Legislature used the word in a more restrained sense. *Vidal v. Commagere*, 13 La. Ann. 516, 518.

Adoption was unknown to the common law, but was recognized under civil law jurisprudence. Its effect was to make a stranger the son and heir of the person adopting him. The person adopted entered the family and came under the power and head of the family. He stood in the relation of a child to his adopter, and his children became the grandchildren of such person. By the Spanish law the person adopted succeeded as heir to the one adopting him. According to the law as it existed in Mexico while Texas was under the dominion of that government, no person having a legitimate child living could adopt a stranger as coheir with his child. *Eckford v. Knox*, 2 S. W. 372, 373, 67 Tex. 200, 204.

"Adoption" is defined as to take or bring into relationship and confer the privileges belonging to that relation; to accept, receive, or choose as one's own, make one's own, accept from some one else. In other words, it is the act of the person who receives, not that of the person who gives. It is defined by the adoption statute as the legal act whereby an adult takes a minor into the relation of a child, and thereby acquires the rights and incurs the responsibilities of parent in respect to such minor.

Thus, under a statute authorizing charitable institutions to bind out children by adoption with some suitable person by a written statement of adoption, the act of the corporation from whose custody the child is taken in entering on a book that such child was adopted by such persons does not constitute an "adoption." *Smith v. Allen*, 53 N. Y. Supp. 114, 117, 82 App. Div. 374.

The statutes relative to adoption have never given to the word "adoption" the broad and unrestricted meaning, in so far as relates to the person adopted, that it had during early periods of the public law, when the adoptant was entitled to the property of the son, and exercised towards him all the rights and privileges of a father; in short, when the relationship was to all intents and purposes the same as existed between natural father and son, when persons brought into a family by adoption obtained the same rights as if they had been born in that family, and when, on the other hand, persons who passed out of a family by adoption, which brought them under a new *patria potestas*, lost all which had been theirs by birth. And under the statute the adoptant does not acquire any right over the minor's property. *Succession of Unforsake*, 19 South. 602, 48 La. Ann. 546.

Where illegitimate children lived with their mother and were supported by the insured, who was their father, the fact that in his application he used the term "adopted children" could not have deceived the insurer. Statutory adoption changes the name of children to those of the adopted parents. In the case in issue, their names remained as that of the mother. *Hanley v. Supreme Tent Knights of Maccabees*, 77 N. Y. Supp. 246, 88 Misc. Rep. 161.

#### **Same—As affecting inheritance.**

"Adoption" is the act by which a person appoints as his heir the child of another. *Bray v. Miles*, 54 N. E. 446, 448, 23 Ind. App. 482.

"To adopt a child implies of itself, with-out more, that the child adopted possesses a right to inherit from the adopted parent." *Fosburg v. Rogers*, 21 S. W. 82, 84, 114 Mo. 122, 19 L. R. A. 201.

Laws 1873, c. 830, defines "adoption" as the legal act whereby an adult person takes a minor into the relation of child, and thereby acquires the rights and incurs the responsibilities of parent in respect to such minor. Under this definition the ability of an adopted child to inherit is distinct and apart from all the substantial elements entering into the relation by adoption. The meaning of adoption is that the child shall be adopted and treated in all respects as the parent's own lawful child should be treated, while the matter of inheritance is entirely

between the child and the state. *Dodin v. Dodin*, 40 N. Y. Supp. 748, 749, 17 Misc. Rep. 85.

The word "adopt," as used in an instrument containing the provision that, although the present instrument binds the above-named child strictly as an apprentice, it is nevertheless the true intention of the parties that said apprentice be received as an "adopted" child, is a broad term, and of great significance. Webster's Dictionary defines "adoption" to be the act of adopting or the state of being adopted; the taking and treating of a stranger as one's own child. The *Encyclopædia Britannica* defines it to be "the act by which the relations of fraternity and affiliation are recognized as legally existing between persons not so related by nature." An adopted child is entitled to inheritance in the estate of its adopted parents. *Simmons v. Burrell*, 8 Misc. Rep. 388, 402, 23 N. Y. Supp. 625, 633.

"Adoption" of children was a thing unknown to the common law, but was a familiar practice under the Roman or civil law, and our modern statutes of adoption are taken from the latter, and so far modify the rules of common law as to the succession of property. *Butterfield v. Sawyer*, 58 N. E. 602, 604, 187 Ill. 598, 52 L. R. A. 75, 79 Am. St. Rep. 246.

Adopted children "are not children of the person by whom they have been adopted," though the right to inherit from the adopting parent is made complete, since the identity of the child is not changed. "One adopted has the rights of a child without being a child," and hence an adopted child of one to whom a life estate is given, with a contingent remainder to her children, takes no interest in the remainder. *Schafer v. Eneu* (Pa.) 4 Smith, 304, 306.

An "adopted child" by the event of adoption becomes the legal child of the adopting parent, and stands as to the property of the adopting parent in the same right as a child born in lawful wedlock, save in so far as the exceptions, in the statute authorizing the adoption declare otherwise. And, when the statute authorizes a full and complete adoption, the child adopted thereunder acquires all of the legal rights and capacities, including that of inheritance, of a natural child, and is under the same duties. *Virgin v. Marwick*, 55 Atl. 520, 521, 97 Me. 578.

#### **Same—As legitimation.**

The term "adopts," as used in Civ. Code, § 230, providing that the father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such into his family, and otherwise treating it as if it were a legitimate child, thereby "adopts" it as such, should be construed in the sense of "legitimates"; and the acts of the father of an illegitimate child, if filling the measure re-

quired by the statute, would result, strictly speaking, in the legitimation of such child, rather than in its adoption. "Adoption," properly considered, refers to persons who are strangers in blood, and is not synonymous with "legitimation," which refers to persons where the blood relation exists. *Blythe v. Ayres*, 31 Pac. 915, 916, 96 Cal. 532, 19 L. R. A. 40.

The expression "adopted into his family," as used in Comp. St. c. 23, § 31, providing that no illegitimate child shall be allowed to claim any part of the estate of his father or mother unless he is by the parent "adopted into his family," means taken in, given the family name, and treated and currently recognized as a child. *Morton's Estate v. Morton*, 87 N. W. 182, 184, 62 Neb. 420.

#### Of constitution.

The expression "adoption by the people," as used in article 6 of the Constitution of the state, which took effect January 1, 1870, providing that the act shall take effect on its "adoption by the people," meant that it should take effect when the result of the submission to the people was declared by the state board of canvassers. *Real v. People*, 42 N. Y. 272, 282; *People v. Gardner*, 45 N. Y. 812, 813.

As used in an amendment to the Constitution providing that "the existing county courts are continued and the judges thereof in office at the 'adoption' of this article shall hold their offices until the expiration of their respective terms," the word "adoption" means when the amendment should become of force as part of the organic law, and not a time prior to that, when it could have no voice or force or effect whatever, when the electors decided that it should form part of their Constitution and become of force at a future day. *People v. Norton* (N. Y.) 59 Barb. 169, 191.

The word "adoption," as used in reference to the adoption of a state Constitution, means the time the territory was admitted as a state, and not the final passage of the Constitution by the convention, nor the time of its subsequent ratification by a vote of the people, since it was not until the territory was admitted as a state that the proposed Constitution became actual and effective, and only after such time did it constitute a real subsisting Constitution, possessing the force of law. *Board of Crook County Com'rs v. Rollins Inv. Co.*, 27 Pac. 688, 685, 3 Wyo. 470.

#### Of contract or act.

In reference to the "adoption" and ratification of a contract, there is in their primary signification a manifest difference between the two. The one signifies to take and receive as one's own that with reference to which there existed no prior relation, ei-

ther colorable or otherwise; while the other is a confirmation, approval, or sanctioning of a previous act, or an act done in the name or on behalf of the person ratifying without sufficient or legal authority; that is to say, the confirmation of a voidable act. But as relating to contracts, some lexicographers treat them as synonymous. Thus, when a person affirms a voidable contract, or ratifies a contract made by his agent beyond his authority, he is said to adopt it. And a corporation will be bound by contracts made on its own behalf by promoters before organization, if, after it is organized, with full knowledge of all the facts, it assumes the contract and agrees to pay the consideration, or accepts and retains the benefit, whether such act is called adoption or ratification. *Schreyer v. Turner Flouring Mills Co.*, 48 Pac. 719, 720, 29 Or. 1.

The terms "adopt and ratify" are properly applicable only to contracts made by a party acting or presuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal or agent. *Ellison v. Jackson Water Co.*, 12 Cal. 542, 551; *Shepardson v. Gillette*, 31 N. E. 788, 789, 133 Ind. 125. Hence, a board of trustees of a civil town having no authority to levy a tax for a special school fund, such unauthorized levy for such purpose by it cannot be legalized by ratification by the board of trustees of the school town. *Shepardson v. Gillett*, 31 N. E. 788, 789, 133 Ind. 125.

The term "adoption," as used in reference to the adoption of a contract by a person not a party thereto, "implies assent to the contract as it is. Adoption cannot imply the insertion of a new party to the contract, or any additional obligation arising from it as it stands." *Barker v. Berry*, 8 Mo. App. 446, 449.

The adoption by a corporation of a contract of its promoter is, in legal effect, the making of the contract by the corporation as of the date of the adoption, and not as of some former date. *McArthur v. Times Printing Co.*, 51 N. W. 216, 217, 48 Minn. 319, 31 Am. St. Rep. 653.

"Adopted" is properly applied only to contracts made by a party assuming to act for another. It is frequently used in reference to confirmation or renewal of contracts of infants and of persons of unsound mind, but not properly in their technical sense. It is not a correct expression to say that a person "adopts" his own act. That which is his own is already so, and needs no adoption. The word "adoption" implies that some other person has acted other than the person who adopts it. *Minnich v. Darling*, 86 N. E. 173, 175, 8 Ind. App. 539.

The use of the term "adoption" in an instruction on the question of the "adoption" of a bank in the illegal act of its cashier so as to bind the bank and render it liable for the cashier's act, without expressly defining the term "adoption," was not objectionable, since the word was not a word of rare use, nor was it also a technical term applicable to any branch of learning or science, but was a word in common use and commonly understood, and is applicable to the case, and, as used in the instruction, it was used in its usual and ordinary acceptation to mean "acceptance," etc. *Iowa State Sav. Bank v. Black*, 59 N. W. 283, 284, 91 Iowa, 490.

#### Of resolution.

The term "adoption," as used in the charter of a city, regulating the "adoption" of resolutions for the imposition of taxes, means a passage of the resolution by both boards of the city council. In *re Douglass* (N. Y.) 58 Barb. 174, 176.

#### Of text-books.

Under the general school law providing that when text-books shall be once adopted they shall not be changed for five years, books are "adopted" when such action as the statute provides is taken, and not when every other book then in use has been removed and a new one substituted. *Attorney General v. Board of Education* (Mich.) 95 N. W. 746, 749.

#### ADOPTED CHILD.

See "Adopt—Adoption."  
As child, see "Child—Children."

#### ADOPTED CITIZENS.

Within the meaning of Act Cong. May 2, 1890, providing that executions on judgments of other than Indian courts shall not be valid for sale of improvements on land owned by the Indian nation, and, on return of nulla bona on an execution on a judgment against an "adopted citizen" of any Indian tribe, such improvements may be subjected to the payment of the judgment by decree of the court rendering the judgment, by the phrase "adopted citizen" is meant all citizens not of the blood; that is, those who have been adopted by the nation, either by treaty or by act of the Indian Legislature. Those who have been adopted by treaty are intermarried white men, and negroes who were slaves to an Indian, and their descendants. *Hampton v. Mays* (Indian Ter.) 69 S. W. 1115, 1116.

#### ADOPTED HEIR.

The term "adopted heir" may properly be used to designate a child by adoption, who is "in a limited sense made an heir, not by the law, but by the contract evidenced by the deed of adoption." In *re Sessions' Es-*

*tate*, 38 N. W. 249, 254, 70 Mich. 297, 14 Am. St. Rep. 500.

#### ADRIFT.

"Adrift" is properly applied to the condition of seaweed which has not been deposited on shore, but which during flood tide is moved by each rising and receding wave, although the bottom of the mass may touch the beach, and hence, under the Massachusetts statutes, such seaweed did not vest in the riparian proprietor. *Anthony v. Gifford*, 84 Mass. (2 Allen) 549, 550.

#### ADS.

The word "ads" means *ad sectam*, which means "at the suit of." *Bowen v. Wilcox & Gibbs Sewing Mach. Co.*, 86 Ill. 11, 12.

#### ADULT.

As children, see "Child—Children."

"Adult," as used in Pen. Code, art. 490, subd. 5, declaring an aggravated assault to be one committed by an "adult" male on the person of a female or a child, or by an "adult" female on a child, signifies a person who has attained the full age of 21 years, according to its well-defined meaning, both in law and its common acceptation, which makes an adult one of full age, or one who has reached the years of manhood, the term "adult" and the phrase "having arrived at the age of 21 years" being used interchangeably. *Schenault v. State*, 10 Tex. App. 410, 411; *George v. State*, 11 Tex. App. 95, 96; *Hall v. State*, 16 Tex. App. 6, 10, 49 Am. Rep. 824; *Henkel v. State* (Tex.) 11 S. W. 671, 672; *Galbraith v. State* (Tex.) 13 S. W. 607.

"Adult," within the provisions of a statute providing for the prohibition of sale of intoxicating liquors on petition by the majority of the adult inhabitants of the district, means all males of the age of 21 years, and females of the age of 18. *Wilson v. Lawrence* (Ark.) 69 S. W. 570, 571.

Where an indictment alleges an assault by an "adult male," and the evidence showed that the defendant was "a railroad hand," and he was spoken of as "a man," and there was no question raised below as to his being an adult, the Supreme Court will not reverse a conviction for lack of specific proof of such fact. *Henkel v. State*, 11 S. W. 671, 672, 27 Tex. App. 510.

#### ADULTERATED—ADULTERATION.

Base as synonymous, see "Base."

Adulteration is the act of corrupting or debasing; the act of mixing something im-

pure or spurious with something pure or genuine, or an inferior article with a superior one of the same kind. *Grosvenor v. Duffy*, 80 N. W. 19, 20, 121 Mich. 220; *Commonwealth v. Hufnal*, 39 Atl. 1052, 185 Pa. 376.

#### Beer or wine.

The placing of salicylic acid in any quantity in beer to be sold as food, such beer being placed on sale without a label on the package notifying the purchaser that it contains such an ingredient, is, when found to be poisonous or deleterious to health by its continuous or indiscriminate use, an "adulteration" within the meaning of Ohio Pure Food Law (as amended April 22, 1890) § 3, par. "b," cl. 7. *State v. Hutchinson*, 45 N. E. 1043, 1044, 55 Ohio St. 573.

All liquors denominated as wine containing alcohol, "except such as shall be produced from the natural fermentation of pure, undried grape juice," or compounded with distilled spirits, or by both methods, whether denominated as wine or by any other name whatsoever, in the nature of articles for use as beverages, except compound wine, or for compounding with other liquors for such use, and all compounds of the same with pure wine, and all preserved fruit juices compounded with substances not produced from undried fruit, in character of or intended for use as beverages, and all wines (including all grades and kinds) which contain, or in the production or manufacture of which, any glucose, or uncrystallized grape or starch sugar, or cider, or pomace of grapes out of which the juice has been pressed or extracted, known as "grape cheese," has been used, and all wines, imitations of wines, or other beverages produced from fruit into which carbonic acid gas has been artificially injected, or which shall contain any alum, baryta, salts, caustic lime, carbonate of soda, carbonate of potash, carbonic acid, salts of lead, salicylic acid, or any other antiseptic coloring matter (other than produced from undried fruit or pure sugar), essence of either, or any foreign substance whatever, which is injurious to health, shall be denominated as "adulterated wine." *Bates' Ann. St. Ohio 1904*, § 4200—56.

#### Butter or oleomargarine.

The term "adulterated butter," as used in an act relating to oleomargarine, is defined to mean a grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in any way producing a uniform, purified, or improved product from different lots or parcels of melted or unmelted butter or butter fat in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity, or any butter or butter fat with which there is mixed any substance foreign to butter, with intent or effect of cheap-

ening in cost the product, or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream. *Supp. U. S. Comp. St. 1903*, p. 267.

The act of coloring oleomargarine so as to make it look like butter is not "adulteration." *Grosvenor v. Duffy*, 80 N. W. 19, 20, 121 Mich. 220.

#### Drug.

A drug shall be deemed to be adulterated: (1) If, when sold under or by a name recognized in the United States Pharmacopœia, it differs from the standard of strength, quality, or purity laid down therein. (2) If, when sold under or by a name not recognized in the United States Pharmacopœia, but which is found in some other pharmacopœia, or other standard work on materia medica, it differs materially from the standard of strength, quality, or purity laid down in such work. (3) If its strength and purity fall below the professed standard under which it is sold. *Gen. St. N. J. 1895*, p. 1175, § 75; *Code Miss. 1892*, §§ 2096, 2097; *Rev. Laws Mass. 1902*, p. 60, c. 75, § 18.

#### Food.

An article of food shall be deemed to be adulterated: (1) If any substance or substances have been mixed with it so as to lower or depreciate or injuriously affect its quality, strength, or purity. (2) If any inferior or cheaper substance or substances have been substituted wholly or in part for it. (3) If any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it. (4) If it is an imitation of, or is sold under the name of, another article. (5) If it consists wholly or in part of a diseased, decomposed, putrid, infected, tainted, or rotten animal or vegetable substance or article, whether manufactured or not; or, in case of milk, if it is the produce of a diseased animal. (6) If it is colored, coated, polished, or powdered, whereby damage or inferiority is concealed; or if by any means it is made to appear better or of greater value than it really is. (7) If it contains any added substance or ingredient which is poisonous or injurious to health. *P. & L. Dig. Laws Pa. 1897*, vol. 3, col. 318, § 16; *Comp. Laws Mich. 1897*, § 5012; *Code Miss. 1892*, § 2096; *Gen. St. N. J. 1895*, p. 1175, § 75. If it contains any added antiseptic or preservative substance, except common table salt, saltpeter, cane sugar, alcohol, vinegar, spices, or, in smoked food, the natural products of the smoking process. *Rev. Laws Mass. 1902*, p. 660, c. 75, § 18.

#### Milk.

The dilution of milk with water is adulteration. One of the definitions of the term "adulteration" given by Worcester is to cor-



rupt by some foreign mixture, or by intermixing what is less valuable. *People v. West* (N. Y.) 44 Hun, 162, 164, 6 N. Y. Cr. R. 382, 384.

Whether mixing water with milk was intended by the terms of the statute to "adulterate" milk is a matter of doubt. The evident intent of the statute was to prevent the traffic in impure and unwholesome milk. Whether the addition of water to milk, without any other ingredient, renders it impure or unwholesome, is certainly not so clearly settled as to enable the court so to find without some evidence to establish the fact. *People v. Fauerback* (N. Y.) 5 Parker, Cr. R. 311, 312.

The sale as skim milk of milk from which the cream had been removed by the "centrifugal" method, instead of by the old-fashioned skimming process, is not a sale of an adulteration. *Commonwealth v. Hufnall*, 89 Atl. 1052, 185 Pa. 376.

"Adulterate" means to corrupt, to make impure by a mixture of baser materials; that is to say, to inject something into the thing. This definition agrees with the spirit of the law prohibiting the sale of adulterated milk, and, where the statute authorizes the sale of skim milk with more than 6 per cent. of the cream, such skim milk with 6 per cent. is not adulterated. "Adulterated milk" means milk to which any foreign substance has been added. *Commonwealth v. Hough*, 1 Pa. Dist. R. 51, 53.

As used in the act relating to the sale of impure milk, "adulteration" means the addition of water or ice to the milk. *P. & L. Dig. Laws Pa. 1894*, vol. 1, col. 1271, § 449.

If the milk is shown, upon analysis, to contain more than 88 per cent. of watery fluid, or to contain less than 12 per cent. solids, not less than one-fourth of which must be fat, it shall be deemed, for the purpose of the chapter relating to adulteration, to be adulterated, and not of good standard quality, except during the months of May and June, when milk containing less than 11½ per cent. of milk solids shall be deemed to be not of good quality. *Bates' Ann. St. Ohio 1904*, § 4200-12.

## ADULTERY.

See "Double Adultery"; "Single Adultery."

"Adultery" is illicit sexual intercourse between two persons one of whom is married. *Banks v. State*, 11 South. 404, 405, 96 Ala. 78; *Hull v. Hull*, 2 Strob. Eq. 174, 175; *Territory v. Whitcomb*, 1 Mont. 359, 362, 25 Am. Rep. 740; *Dinkey v. Commonwealth*, 17 Pa. (5 Harris) 126, 129, 55 Am. Dec. 542. Or both of them may be married. *State v. Fellows*, 6 N. W. 239, 50 Wis. 65; *State v. Mahan*, 46 N. W. 855, 81 Iowa, 121.

"Adultery" is the voluntary sexual intercourse of a married person with one not the husband or wife. *Aitchison v. Aitchison*, 68 N. W. 573, 574, 99 Iowa, 98; *Lyman v. People*, 64 N. E. 974, 198 Ill. 544; *Heifrich v. Commonwealth*, 83 Pa. (9 Casey) 68, 70, 75 Am. Dec. 579.

"Adultery" is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex, whether married or single. *Cook v. State*, 11 Ga. 53, 56, 56 Am. Dec. 410. It is sexual intercourse between a married person and one of the opposite sex, whether married or single. *Miner v. People*, 58 Ill. 59, 60; *Republica v. Roberts* (Pa.) 1 Yeates, 6, 7; *In re Smith*, 37 Pac. 1099, 1100, 2 Okl. 153. The offense cannot be committed by an unmarried person. *Republica v. Roberts* (Pa.) 1 Yeates, 6, 7. When the crime is committed between parties only one of whom is married, both are guilty of adultery. *St. Okl.* p. 468, § 2173; *In re Smith*, 37 Pac. 1099, 1100, 2 Okl. 153; *State v. Whealey*, 59 N. W. 211, 5 S. D. 427.

"Adultery" by the Roman law was limited to illicit sexual intercourse with a married woman. *State v. Fellows*, 6 N. W. 239, 240, 50 Wis. 65.

Criminal intercourse between a married man and an unmarried woman is not adultery. *State v. Searle*, 56 Vt. 516, 518; *State v. Lash*, 16 N. J. Law (1 Har.) 380, 384, 32 Am. Dec. 397.

"Adultery" is illicit connection by a married man with an unmarried woman as well as with a married woman. *Pickett v. Pickett*, 7 N. W. 144, 27 Minn. 299; *Heifrich v. Commonwealth*, 83 Pa. (9 Casey) 68, 70, 75 Am. Dec. 579; *State v. Fellows*, 6 N. W. 239, 240, 50 Wis. 65.

"Adultery" is sexual intercourse between a married woman and a single man or a married one not her husband. *Hood v. State*, 56 Ind. 263, 267, 26 Am. Rep. 21.

"Adultery" is when a married woman has sexual intercourse with any other person than her husband, and such intercourse is adultery in both parties, and is so called from its tendency to produce an adulterated, spurious, or counterfeit issue, and no other connection between the sexes is adultery, for from no other connection can such consequences follow. *Ohio v. Connaway* (Ohio) Tapp. 90, 91; *State v. Weatherby*, 43 Me. 258, 261, 263, 69 Am. Dec. 59.

"Adultery" is not a crime which, like conspiracy, is one which consists in the concurring act of two or more, necessitating that such joint action be alleged and proved. One person may be alone guilty of it. The act of sexual intercourse by a married man with an unmarried woman, or by an unmarried man with a married woman, is adultery in the man, without regard to the guilt of the woman. It is an act committed by him,

between him and the woman, although she is not a criminal or conscious participant. That a man cannot commit rape upon a married woman without also committing adultery, only shows that he commits both crimes by one act, which includes all the elements of both. Upon an indictment against a man and a married woman for adultery, the man may be alone convicted, although at the time the act was committed the woman was in such a state of stupefaction as to be incapable of consent. *Commonwealth v. Bakeman*, 131 Mass. 577, 578, 41 Am. Rep. 248.

"Adultery" at the common law was not denounced as a crime. As the basis of a civil right of action it consisted only of a man having sexual intercourse with a married woman other than his wife, thereby introducing the danger of spurious issue of the marriage. *State v. Hasty* (Iowa) 96 N. W. 1115.

Where one of two statutes makes "adultery" a ground for divorce, and the other a criminal offense, "adultery" as a ground for divorce is not used in the restricted sense in which it is used in the statute, making it a criminal offense which requires it to be committed with a married woman, but in the more enlarged sense in which it is commonly used. "In a civil light, as a violation of the marriage contract, no distinction is made between illicit connection by a married man with a married or unmarried woman. In either case, for the purpose of a divorce, he is guilty of 'adultery.'" *Pickett v. Pickett*, 7 N. W. 144, 27 Minn. 299.

Adultery is sexual intercourse between a married woman and any man other than her husband. *Names v. State*, 50 N. E. 401, 20 Ind. App. 168 (citing *State v. Smith*, 47 N. E. 685, 18 Ind. App. 179).

Every act of adultery implies three things: First, the opportunity; secondly, the disposition in the mind of the adulterer; thirdly, the same in the mind of the particeps criminis. And the proposition is substantially true that whenever these three are found to concur the criminal act is committed. *Jayne v. Jayne*, 25 N. Y. Supp. 810, 811, 5 Misc. Rep. 307.

The term "adultery," as used in the chapter relating to offenses against chastity, morality, and decency, has the same meaning as when used in reference to the causes of a divorce, and the same which it bears according to the common usage of the language. *Comp. Laws Mich. 1897*, § 11,689.

#### **Marriage of one party necessary.**

To constitute adultery under the statute, it is necessary that at least one of the parties to the act of sexual intercourse be married, and both may be.—*State v. Mahan*, 46 N. W. 855, 856, 81 Iowa, 121.

To constitute adultery, one of the parties must be married, as it imports a violation of the marriage bed. Under an indictment for adultery, one cannot be convicted of fornication. *Smitherman v. State*, 27 Ala. 23, 24.

#### **Marriage of one party sufficient.**

Adultery may be committed in three ways: By a married man having sexual intercourse with an unmarried woman, by a married woman having the same with an unmarried man, and by either having the like intercourse with a married person of the opposite sex other than such person's husband or wife. When the crime is committed between parties only one of whom is married, both are guilty of adultery under the statutes. *State v. Roth*, 17 Iowa, 336, 340; *State v. Wilson*, 22 Iowa, 364, 366.

"Adultery" is the illicit intercourse between two persons of different sexes, where either is married. *White v. State*, 74 Ala. 31, 34.

The term "adultery" has a more comprehensive signification than in the civil law, and renders both parties implicated equally liable for punishment if either the man or woman be married; but adultery can only be committed by parties one of whom at least is married, and by parties who are not married to each other. *State v. Weatherby*, 43 Me. 258, 261, 263, 69 Am. Dec. 59.

Where two persons live together in a state of cohabitation, one of them being married, they are both guilty of adultery. *Parks v. State*, 8 Tex. App. 337, 338.

Illicit intercourse between an unmarried man and a married woman is fornication in the man, and not adultery. *Commonwealth v. Lafferty* (Va.) 6 Grat. 672, 673.

Adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex, and when the crime is committed between parties only one of whom is married both are guilty of adultery. *Civ. Code S. D. 1903*, § 68.

#### **Other sexual offenses distinguished.**

Adultery and bastardy are two separate and distinct offenses, and therefore the fact that the governor pardoned a man convicted of the crime of adultery did not toll his punishment for bastardy, or the judgment rendered against him for the maintenance of the bastard child, since such maintenance is designed to relieve the public from the cost of maintaining paupers, and has nothing whatever to do with the punishment of the other crime. *Duncan v. Commonwealth* (Pa.) 4 Serg. & R. 449, 451.

"Adultery" is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife, whether the latter is married or single. The

offense of the married person is adultery, and of the unmarried person fornication. *Lyman v. People*, 64 N. E. 974, 198 Ill. 544.

"Adultery," as used in 2 Rev. St. 1876, p. 466, providing that every person who shall live in open and notorious adultery or fornication shall be punished, etc., should be construed to mean sexual connection between a married woman and an unmarried man or a married man other than her own husband. Strictly, adultery consists in carnal connection with another man's wife. Such an act is adultery, and not fornication, and the sexual intercourse of any man with a married woman is adultery in both. The woman must not be single. As distinguished by Bacon in his *Abridgment, Marriage and Divorce*, 509, "Fornication is unlawful because children are begotten without any care for their education, but adultery goes further, as it entails a spurious race on a party for whom he is under no obligation to provide." *Hood v. State*, 56 Ind. 263, 267, 26 Am. Rep. 21.

Fornication is not a common-law offense, and therefore both the information and proof under it must conform to the statute which prescribes the penalty. The commonly accepted legal meaning of "fornication" is illicit sexual connection between a man and woman as husband and wife, not being such. By Rev. St. § 4580, when a man commits fornication with a single woman both of them shall be punished. The offense is limited to a man and a single woman, thus creating a clear distinction between fornication and adultery, which latter crime can be committed only by a married man or with a married woman. The crime of rape may be committed upon an unmarried woman not the wife of the defendant. The crime of incest can be committed only with a woman of certain consanguinity or relationship with the man. The crimes of incest, adultery, and fornication differ, therefore, only as to the persons, while the crime of rape differs from the other crimes against chastity both as to the person and the manner of sexual connection, as by force and against the will of the woman. *State v. Shear*, 8 N. W. 287, 51 Wis. 460.

By "fornication" is meant illicit carnal connection; unlawful sexual intercourse. This unlawful intercourse, unaccompanied by any circumstances which tend to aggravate it, is simply fornication; and when, as the result of such fornication, a child is born, it is called "bastardy." If a man who is married is guilty of unlawful sexual intercourse, we call it "adultery" in him. When the act is between the parties sustaining relations to each other within certain degrees of consanguinity or affinity, we call it "incest." Where the female consents to unlawful intercourse through fraudulent acts, including a promise of marriage, we call it "seduction." In each case the essential fact which constitutes the crime is fornication. *People v. Rouse*, 2 Mich. (N. P.) 209, 210.

Adultery and fornication, while of the same grade, are essentially different offenses. To commit the former, one of the parties at least must be at the time a married person. Whether, if one of the offenders be married and the other single, the latter commits the offense of adultery or fornication the authorities are not in harmony. The better opinion seems to be that in such case the married offender is guilty of adultery, and the unmarried one of fornication. The offense of fornication proper is committed when neither of the offending parties is married. *Buchanan v. State*, 55 Ala. 154, 157.

"Adultery" is an unlawful carnal connection by a married person with another than his or her husband or wife, and the fact that the act was forcibly committed, and without the woman's consent, did not prevent the crime from constituting "adultery" on the part of the man, though it also amounted to rape. *State v. Chambers*, 53 N. W. 1090, 1092, 87 Iowa, 1, 43 Am. St. Rep. 349.

#### Single act.

Pen. Code, art. 567, providing that homicide is justifiable when committed by the husband on the person of any one taken in the act of "adultery" with the wife, did not mean the adultery which is defined as a specific offense, which is the living together, but ecclesiastical adultery—adultery as it is known in common parlance; violation of the marriage bed, whether the adultery consisted of but one act, or whether the parties lived in habitual carnal intercourse. *Price v. State*, 18 Tex. Civ. App. 474, 484, 51 Am. Rep. 322.

At common law adultery was not a crime, but adultery was made punishable by the ecclesiastical courts, and according to the ecclesiastical law unlawful sexual intercourse by a married man with another woman than his wife, whether she be married or single, constitutes adultery. Under section 208 of the Criminal Code, a single act of sexual intercourse by a married man with an unmarried woman constitutes the crime of adultery. *State v. Byrum*, 83 N. W. 207, 208, 60 Neb. 384.

A single act of unlawful sexual intercourse falls within the definition of "adultery" or "fornication," according as the party is married or not. *State v. Brown*, 23 N. E. 747, 748, 47 Ohio St. 102, 21 Am. St. Rep. 790.

#### ADVANCE—ADVANCES.

See "Agricultural Advances"; "To be Advanced."

See, also, "Moneys Advanced."  
All advances, see "All."

To "advance" money is to pay it before it is due, or it is to furnish money for a spec-

ified purpose, understood between the parties, the money or some equivalent to be returned; and this is its meaning as used in Rev. St. § 1001, providing that all contracts whereby any money is advanced to any person gaming or betting shall be void. *Klinney v. Hynds*, 49 Pac. 403, 404, 7 Wyo. 22. A like construction is given to the term as used in a contract for the production of an opera by defendants, which provided that the defendant would "advance" a certain sum for the drawings, which sum was to be deducted from the first fees due to the plaintiffs under the contract. *Thorne v. French*, 24 N. Y. Supp. 694, 696, 4 Misc. Rep. 436.

An "advance" is money paid before due on goods sold on credit, by way of accommodation, in expectation of reimbursement; and one who has paid more money or furnished more goods to another person than the latter is entitled to is said to be in advance to him. *Lee v. Byrne*, 75 Ala. 132, 133. Such is its meaning as used in St. 1869, p. 104, § 1, providing that any officer or person who has presented a claim against the state for services or "advances" authorized by law, which claim the board of examiners or state auditor has refused to allow, may commence an action for the recovery thereof. *Ormsby County v. State*, 6 Nev. 283, 287.

"Advance," as used in a contract between an inventor and a manufacturer, providing that the former should manufacture the article which he had invented, and that the corporation should "advance" to him from time to time certain materials entering into the composition of the article, meant "supply beforehand." *Laflin & Rand Powder Co. v. Burkhardt*, 97 U. S. 110, 117, 24 L. Ed. 973.

The term "advances" does not, in ordinary cases, include money expended for the children's support. Its etymological and its ordinary use indicates money paid before or in advance of the proper time of payment. Thus, it is used as to moneys paid before the completion of work under a contract, and as to property given to a child at his full age or majority, and which is received in anticipation of the share which he will have in his parent's estate at their decease. *Vail v. Vail* (N. Y.) 10 Barb. 69, 73.

The word "advances," in St. 1869, p. 104, relating to claims for services or advances to the state, is used in its popular sense, and includes rents of buildings used by the state. *Ormsby County v. State*, 6 Nev. 283, 287.

Under articles of copartnership between an inventor and another, by which such other agreed to pay all expenses of obtaining future patents in this and foreign countries, and to have a half interest therein, and to also have a half interest in other patents upon paying such sum as he and his partner should agree therefor, and that he should advance all necessary moneys, funds, etc., for obtaining, pro-

tecting, and insuring the promotion and development of the inventions, improvements, and patents of which he is the joint owner with such inventor, and in consideration thereof should be repaid and reimbursed in full for all such expense so incurred from amounts derived and deducted from moneys or equivalent consideration received by the copartnership, on the dissolution of such firm such partner is entitled to reimbursement for the moneys advanced under the last-mentioned article, but not for moneys paid in procuring patents or for a half interest therein. The word "payment" indicates a finality; the word "advancement" indicates the return of the money advanced in some way; and the articles provided for the return only of those sums termed "advancements" therein, and not to the sums referred to as payments. *Henderson v. Ries* (U. S.) 108 Fed. 709, 711, 712, 47 C. C. A. 625.

#### Advancement distinguished.

Where a testator has money in the hands of his sons, and refers in his will to such moneys as "loaned or advanced," the word "advanced" means the payment or delivery of money for the purpose of a loan, and not an advancement from a parent to a child for a settlement in life. In *re Luqueer's Estate* (N. Y.) 1 Tuck. 236, 240.

Advancement is used to distinguish money or property given by a father to his child as a portion of his estate, and to be taken into account in the final partition or distribution thereof; and the word "advance" is not an appropriate term for money or property thus furnished, but in legal parlance has a different and far broader signification, and may be used to characterize a loan or a gift of money advanced, to be repaid conditionally. *Chase v. Ewing* (N. Y.) 5 Barb. 597, 612.

"Advances," as used in a will reciting, "I have made 'advances' to my children which are charged to them, and I may make further 'advances' to them, which may be charged on the books to their respective accounts," is used in the sense of furnishing; supplying in advance of the final distribution of the will. It is absurd to suppose that the word was used as equivalent to the technical word "advancements." In the nature of things, it is not possible for the testator to have intended by "advances" the same thing as "advancements," for that involves an intention, at the time of supplying the money, that it shall be such. *Cowen v. Adams* (U. S.) 78 Fed. 536, 546, 24 C. C. A. 198.

"Advances," as used in a will devising certain property to testator's son, and stating that with "advances" made by the testator to such son it would make the share of the latter equal to the share of testator's other children, construed to include not only "advancements," but also any benefits confer-

red on the son by the testator in his lifetime, and which he might reasonably consider to have been such an appropriation of his estate as, added to what he bequeathed him, would make him equal with his other sons. *Baker v. Comins*, 110 Mass. 477, 488.

#### Change of title involved.

An "advance" to a child by a parent is a transfer of the property advanced to the child, divesting the parent and investing the child with the title. *Knight v. Oliver* (Va.) 12 Grat. 33-37.

Where a contract provided that a company should make "advances" of money and materials to a manufacturer in consideration that he turn his product over to them for sale, the term "advance" meant to "supply beforehand," to "loan before work is done" or goods are made, and the advances became the property of the manufacturer, and were not a bailment so as to entitle the corporation to replevy them when levied on under a judgment against the manufacturer. *Lafin & Rand Powder Co. v. Burkhardt*, 97 U. S. 110, 117, 24 L. Ed. 973.

#### Loan equivalent.

"Advance," as used in a contract by which a party agreed to purchase the master's certificate of sale of property under foreclosure, the owner's right to redeem from which had expired, and hold the same for his own benefit unless such owner should pay the amount "advanced" within a certain time, does not mean that the money advanced should be regarded as a loan to be repaid. *Carpenter v. Plagge*, 61 N. E. 530, 533, 192 Ill. 82.

"Advance," as used in Code Pub. Gen. Laws, art. 23, § 113, giving power to an insurance company to "advance" money on any property, real or personal, is not equivalent to "loan," as used in section 69, providing that no loan of money shall be made by any corporation to any stockholder, but that the section shall not apply to any building or homestead association, or any association for the loaning of money on real or personal property. *Fisher v. Parr*, 48 Atl. 621, 628, 92 Md. 245.

"Advances," as used in a clause in a will reciting that testator has loaned money to his children in certain sums which he wishes to be considered as "advances," and to be deducted from their share in his estate, construed to include the bond of one of the children to the father, as the words "loan" and "advance" were apparently used interchangeably. *Appeal of Wright*, 93 Pa. 82, 97; *Id.*, 89 Pa. 67, 70.

A will provided that it was testator's desire that on the division of his property among his children each one should be charged with all money or property he had re-

ceived from him, so as to make him share equally in the property to be divided and in advances. It is held that the word "advances" should be construed to mean loans as well as gifts or advancements. *Nolan's Ex'rs v. Boltan*, 25 Ga. 352, 355.

"Advances" are not always loans, but may mean, in an offer to make advances on a legacy, that the legacies are to be purchased. The word is capable of the former construction when so used, and will be so construed in reference to a defense made pursuant to such advancement, when the intent of the parties appears from the evidence to have been the making of a loan on the legacy. *Trust & Deposit Co. v. Verity*, 67 N. Y. Supp. 918, 920, 33 Misc. Rep. 4.

"Advanced," as contained in an instrument reciting that in consideration of certain money "advanced" certain property was bargained and sold to M., does not of itself convert the absolute transfer of property into a mere security, as the word may well be construed to mean an acknowledgment of the payment in cash of the price of the property sold in conformity with other terms of the paper. *State v. Rice*, 20 S. E. 986, 987, 43 S. C. 200.

#### As pecuniary advances.

"Advances," as used in a decree reciting that certain advances had been made by a husband to his wife's estate, and that the estate was chargeable with the sums so advanced, construed as referring only to pecuniary advances, and not to advances in the shape of personal services rendered by the husband in the improvement and management of the estate. *Hodges v. Hodges*, 9 R. I. 32, 34.

An advance note given by the master of a vessel to one of the seamen stipulated that 10 days after the ship sailed the undersigned agreed to pay, to any person who should "advance to the seamen on this agreement, the sum of six pounds." It was held to include any advance to that amount, whether in money or in money's worth. *McKune v. Joynson*, 5 C. B. (N. S.) 218, 230.

"Advances," as used in a contract by which a married woman agreed to become responsible for "advances" to her husband, referred to advances in money only, and did not make her liable for liquidated damages arising from his failure to fulfill the terms of the contract for the delivery of personal property. *Greig v. Smith*, 7 S. E. 610, 613, 29 S. C. 426.

#### By factor.

"Advances" in the commercial world are made where a commission merchant accepts the drafts of a planter, although they are not yet paid. *Turpin v. Reynolds*, 14 La. 473, 477.

An "advance" is something which precedes. As applied to the payment of money, it implies that the parties look forward to the time when the money will be due the recipient. An advancement by a factor is a prepayment, a mere anticipation of the avails of the goods consigned, and no more creates a debt in the first instance than an advancement by a father to a son in anticipation of his expected inheritance creates a debt. In *re Atwood*, 38 N. Y. Supp. 338, 340; *Gihon v. Stanton*, 9 N. Y. (5 Seld.) 476, 477; *Balderston v. National Rubber Co.*, 27 Atl. 507, 510, 18 R. I. 338, 49 Am. St. Rep. 772.

"Advances" are moneys paid by a factor to his principal on the credit of the goods consigned and in anticipation of the debt which will become due to the principal upon the sale of such goods. The ordinary use of the term indicates moneys paid before or in advance of the proper time of payment. To advance is to supply beforehand; to loan before the work is done or the goods are made. *Lafin & Rand Powder Co. v. Burkhardt*, 97 U. S. 110, 117, 24 L. Ed. 973; *Balderston v. National Rubber Co.*, 27 Atl. 507, 510, 18 R. I. 338, 49 Am. St. Rep. 772.

#### By owner.

Under the supplemental mechanic's lien law (Pub. Laws 1895, p. 313, § 35), providing that payments made by an owner on a building contract in advance of the terms of the contract shall be no defense to the claim of a subcontractor who serves a stop notice under the statute, payments made by the owner of the building to one to whom the contractor has assigned a part or the whole of any of his payments cannot be considered in any sense as a voluntary "advance payment," no matter when made, but wholly involuntary. In such case he pays because he cannot ultimately escape payment. The fact that he pays sooner than he would be obliged to pay is immaterial, because it does not affect the result; for if he should defer payment until, by the strict terms of the contract, the money was actually due to the contractor, he would still be obliged to pay the holders of the orders, and nobody can be injured by the payment in advance. In short, such payments lack the essential elements of advance payments from the owner to the contractor. *Binns v. Slingerland*, 36 Atl. 277, 279, 55 N. J. Eq. 55.

#### In marine insurance.

"Advances," as used in a policy of marine insurance, refers to money paid to the crew in advance, and to money advanced to the captain to buy bait on a fishing voyage, but does not cover the outfit of the vessel. *Burnham v. Boston Marine Ins. Co.*, 1 N. E. 837, 839, 139 Mass. 399.

In a count on a policy of marine insurance in the ordinary form, the interest was

declared to be on "money advanced on account of freight," and it was averred that the interest was in the shipowner in money advanced to him by the owners of the cargo. It was held that the interest was sufficiently described. The court would not infer that the expression "money advanced on account of freight" necessarily indicated that the insurance was effected by the charterers or shippers, and that the freight paid in advance was at his risk, not at the risk of the shipowner. *Hall v. Janson*, 4 El. & B. 500, 509.

The owners of a brig wrote to plaintiffs to procure a freight for the vessel, stating that if the plaintiffs accepted a charter they preferred the captain drawing against freight. In this letter was inclosed a letter to the captain in which they referred him to plaintiffs to procure a charter. The captain showed his letter to the plaintiffs, and asked them if they would draw on account of freight, and they said they would. The vessel was loaded as a general ship for Liverpool, and was intended to be consigned to M. & Co. Plaintiffs wrote the owners that the vessel was being loaded as a general ship, and stating that they would draw on the freight for the amount of disbursements. The captain accordingly drew on the consignees, requesting them to charge the same to account of freight. The consignees refused to accept the draft, and it was indorsed to plaintiffs' agents, who effected an insurance on the freight. In an action by the plaintiffs on the policy, it was held that the plaintiffs' insurable interest was correctly described in the policy as "advances on account of freight." *Willson v. Martin*, 11 Exch. 684, 694.

The law of New York state gives a lien "for advances made for the purpose of procuring necessities for a ship or for the insurance thereof." Held that, to create a lien, the advances must be made for the purpose of obtaining the insurance, or paying off those who have a lien therefor; and where they are made merely for the purpose of repaying an old debt, not accompanied by any lien, no lien is created in favor of the person making such advances. *The Allianca* (U. S.) 61 Fed. 507, 509.

#### On crops.

"Advances," as used in a lease of farm land, providing that "advances" should be a lien on the crops, meant not only necessary supplies to carry on the business of farming, but also goods furnished by a plantation store open only to the laborers and employes on the place. *Cain v. Pullen*, 34 La. Ann. 511, 519.

Rev. St. § 2514, providing that "any person who shall make any advance or advances, either in money or supplies," to any person employed in the cultivation of the soil, shall be entitled to a lien on the crop, includes a note on which money is obtained from a

corporation, which money was expended in the cultivation of the soil. *Lockhart v. Smith*, 27 S. E. 567, 570, 50 S. C. 112. A like statute is construed not to include a mule furnished to be used in cultivating the soil, since the mule, "instead of being worn out and rendered useless in producing a crop, may be in much better condition and more valuable after the crop is made than before." *McCullough v. Kibler*, 5 S. C. (5 Rich.) 468, 469. Such a statute includes only such things as the landlord furnishes or causes to be furnished to the tenant which did not previously belong to him, which definition does not include the landlord's forbearance to demand something due him from the tenant. *Lumley v. Gilruth*, 3 South. 77, 65 Miss. 23.

An "advancement," in the sense of a statute relating to advancements to croppers, is anything of value pertinent for the purposes, to be used, directly or indirectly, in the making and saving of crops supplied in good faith to the lessee by the landlord. Thus, where the lessor furnishes table board to the lessee and his family in order that the latter may make and save his crops, such board at once becomes an advancement. *Brown v. Brown*, 13 S. E. 797, 109 N. C. 124.

The hire of a mule to work an agricultural crop is within the statute allowing a lien on the crop for "advances." *McCaslan v. Nance*, 46 S. C. 568, 24 S. E. 812.

#### On stocks, bonds, etc.

"In common understanding, an advance or loan of money on stocks, bonds, bullion, bills of exchange, or promissory notes is an advance or loan where these species of property are pledged as collaterals or are hypotheated to secure the return of the advance or the payment of the sum lent." It is used in this sense in Rev. St. § 3407 [U. S. Comp. St. 1901, p. 2246], providing that every person, firm, or company having a place of business where money is advanced or loaned on stocks, bonds, bullion, etc., shall be regarded as a bank or as a banker; and such statute does not include a corporation whose business is confined to the investment of its capital in bonds secured by mortgages, and to negotiation, sale, and guaranty of them. *Selden v. Equitable Trust Co.*, 94 U. S. 419, 421, 24 L. Ed. 249.

### ADVANCEMENT.

In a will devising property to a trustee for 21 years, but giving him a discretion to convey or pay over to either of the beneficiaries before that time, for his or her "advancement in life," the whole or any portion of his or her share of the trust estate, "advancement in life" cannot be construed as equivalent to "for his or her use and benefit," but the words "advancement in life" restrict

his discretion. What is meant by "advancement in life" depends to a greater or less degree on circumstances, but it points to some occasion, out of the everyday course, when the beneficiary has in mind some new act or undertaking which calls for pecuniary outlay, and which, if properly conducted, holds out a prospect of something beyond a mere transient benefit or employment. Thus, if the beneficiary were going to enter upon a business or profession, or to get married or to build a dwelling house, or to make some unusual repairs or renovation, it would be a proper occasion for the trustee to use his discretion; but the trustee cannot transfer the trust estate to the cestui before the expiration of the 21 years merely because he thinks it would be for their general benefit for him to do so, without any particular call for the transfer. *Bailey v. Bailey*, 14 Atl. 917, 918, 16 R. I. 251.

The word "advancement" indicates the return of the money advanced in some way. —*Henderson v. Ries* (U. S.) 108 Fed. 709, 712, 47 C. C. A. 625.

In an allegation that a son received as an "advancement" on the share of the estate of his father a certain sum, and has acknowledged the receipt of that sum in writing, the word "advancement" was employed merely to signify the receipt of the moneys in advance of the time for payment, and not in its technical meaning. *Haberstich v. Elliott*, 59 N. E. 557, 559, 189 Ill. 70.

"Advancements," as used in a will, need not necessarily be construed in its technical sense of money or property paid to children of the testator and to be deducted from their distributive share of the estate, but may refer to money loaned to them and secured by notes or mortgages, so as to not to have passed beyond the testator's control. *Hammett v. Hammett*, 16 S. E. 293, 299, 839, 38 S. C. 50.

An "advancement," in the sense of a statute relating to advancements to croppers, is anything of value, pertinent for the purposes, to be used directly or indirectly in the making and saving of crops, supplied in good faith to the lessee by the landlord. Thus, where the lessor furnishes table board to the lessee and his family in order that the latter may make and save his crops, such board at once becomes an advancement. *Brown v. Brown*, 13 S. E. 797, 109 N. C. 124.

#### ADVANCEMENT (To child).

See "Real Advancement."

An advancement is the giving by the intestate in his lifetime by anticipation the whole or a part of what it is supposed the donee will be entitled to on the death of

the party making it. *Grattan v. Grattan*, 18 Ill. (8 Peck) 167, 170; *Gary v. Newton*, 66 N. E. 267, 271, 201 Ill. 170; *Wallace v. Reddick*, 119 Ill. 151, 156, 8 N. E. 801; *Weatherhead v. Field*, 26 Vt. 665, 668; *In re King's Estate* (Pa.) 6 Whart. 370, 373; *Berlinger v. Lutz*, 41 Atl. 643, 645, 188 Pa. 364; *Dillman v. Cox*, 23 Ind. 440, 442; *Ruch v. Biery*, 11 N. E. 312, 315, 110 Ind. 444; *Daugherty v. Rogers*, 20 N. E. 779, 783, 119 Ind. 254, 3 L. R. A. 847; *Slaughter v. Slaughter*, 52 N. E. 994, 21 Ind. App. 641; *Dillman v. Cox*, 23 Ind. 440, 442; *In re Pickenbrock's Estate*, 70 N. W. 1094, 1095, 102 Iowa, 81; *McMahill v. McMahon*, 28 N. W. 470, 471, 69 Iowa, 115; *Hattersley v. Bissett*, 29 Atl. 187, 188, 51 N. J. Eq. (6 Dick.) 597, 40 Am. St. Rep. 532; *Nolan's Ex'rs v. Bolton*, 25 Ga. 352, 355; *Cawthon v. Coppedge*, 31 Tenn. (1 Swan) 487, 488; *Kintz v. Friday* (N. Y.) 4 Dem. Sur. 540, 542; *Chase v. Ewing* (N. Y.) 51 Barb. 597, 610; *Messmann v. Egenberger*, 61 N. Y. Supp. 556, 560, 46 App. Div. 46 (quoting *Bouv. Law Dict.*); *Osgood v. Breed's Heirs*, 17 Mass. 356, 358; *Franke v. Auerbach*, 20 Atl. 129, 72 Md. 580; *Nicholas v. Nicholas*, 42 S. E. 609, 670, 100 Va. 600 (citing *Chinn v. Murray* [Va.] 4 Grat. 348); *Richardson v. Seevers' Adm'r*, 4 S. E. 712, 716, 84 Va. 259.

An advancement is an irrevocable gift by a parent to a child in anticipation of such child's future share of the parent's estate. *Brook v. Latimer*, 24 Pac. 946, 947, 44 Kan. 431, 11 L. R. A. 805, 21 Am. St. Rep. 292; *Moore v. Freeman*, 35 N. E. 502, 50 Ohio St. 592; *Appeal of Christy* (Pa.) 1 Grant, Cas. 369, 370; *Appeal of Porter*, 94 Pa. 332, 336; *In re Hengst's Estate* (Pa.) 6 Watts, 86, 87; *Appeal of Yundt*, 13 Pa. (1 Har.) 574, 580, 53 Am. Dec. 496; *Appeal of Miller*, 81 Pa. (7 Casey) 337; *Mason v. Mason*, 34 N. W. 208, 210, 72 Iowa, 457; *In re Miller's Will*, 34 N. W. 769, 772, 73 Iowa, 118; *Slaughter v. Slaughter*, 52 N. E. 994, 21 Ind. App. 641; *In re Lyon's Estate*, 30 N. W. 642, 644, 70 Iowa, 375; *Bissell v. Bissell*, 94 N. W. 465, 466, 120 Iowa, 127.

"Advancement" has been defined to be that which is given by a father to a child or presumptive heir by anticipation of what he might inherit. *Hattersley v. Bissett* (N. J.) 25 Atl. 332, 335.

An "advancement" is a gift by a parent in present of a portion of the share of his child in his estate which would fall to each child at the parent's death by the statute of distribution or descent. *Johnson v. Patterson*, 81 Tenn. (13 Lea) 626, 633.

An advancement is a transfer of property from a person standing in loco parentis towards another to that other in anticipation of the share of the donor's estate which the donee would receive in the event of the donor dying intestate. *Waldon v. Taylor*, 45 S. E. 336, 339, 52 W. Va. 284.

All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such by the child or other successor or heir. *Rev. St. Utah* 1898, § 2843; *Rev. St. Okl.* 1903, § 6907; *Rev. Codes N. D.* 1899, § 3754; *Civ. Code S. D.* 1903, § 1106; *Civ. Code Idaho* 1901, § 2545; *Civ. Code Mont.* 1895, § 1863; *Comp. Laws Mich.* 1897, § 9072.

An "advancement" is any provision by a parent made in, and accepted by a child out of, his estate, either in money or property during his lifetime, over and above the obligation of a parent for maintenance and education. Donations from affection, and not made with a view of settlement, nor intended as advancements, shall not be counted as such; nor shall the support of a child under the parental roof, although past majority, nor the expenses of education, be held as advancements, unless charged as such by the parent. *Civ. Code Ga.* 1895, § 3474.

An "advancement" is a gift, and after it is made the donor has no interest whatever therein, although he might doubtless have converted it into a simple gift. *Ellis v. Newell*, 94 N. W. 463, 464, 120 Iowa, 71.

"An advancement is a present gift, and it does not make it any less a gift that it is part or the whole of what it may be supposed the donee may inherit on the death of the donor." *Appeal of Potts* (Pa.) 10 Atl. 887, 888; *Gary v. Newton*, 66 N. E. 267, 271, 201 Ill. 170.

"Advancement" imports a substantial benefit, in money or property, conferred by a parent on his child, without any equivalent from the latter by an act of the former in his lifetime, other than the making of a last will and testament. Where the gift or grant conveys a title to the thing, or the use of it, so as to bestow the immediate enjoyment, it is a present advancement; but where, from the want of a present title or effectual possession, the enjoyment has been postponed until the subsequent event or period, it is a future advancement. *Chinn v. Murray*, 4 Grat. (Va.) 348, 378.

Where a child, in consideration of the sum paid him by his father, releases his claim to his share of the inheritance, the sum advanced constituted an advancement, though the sum so paid was much less than the child's share of his father's estate at the time of the father's death. *Kenney v. Tucker*, 8 Mass. 143, 145.

An advancement is presumptively a satisfaction pro tanto or in the whole of anticipated ulterior benefits. *Hattersley v. Bissett*, 29 Atl. 187, 188, 51 N. J. Eq. (6 Dick.) 597, 40 Am. St. Rep. 532.



Advancements do not form a part of the personal estate of the testator. *Ruch v. Biery*, 11 N. E. 312, 315, 110 Ind. 444.

According to the decisions under the English and similar American statutes, the ancestor must have died intestate in order to make a gift an advancement. *Grattan v. Grattan*, 18 Ill. (8 Peck) 167, 170.

**Advance distinguished.**

See "Advance—Advances."

**As a chattel.**

See "Chattel."

**Debt distinguished.**

"Advancement," in its legal acceptation, does not involve the idea of obligation or future liability to answer. It is a pure and irrevocable gift made by a parent to a child in anticipation of such child's future share of the parent's estate, and hence a debt due to the parent cannot be treated as an advancement. *Appeal of Yundt*, 13 Pa. (1 Harris) 575, 53 Am. Dec. 496.

An advancement differs from a debt in that there is no enforceable liability on the part of the child to repay during the lifetime of the donor or after his death, except in the way of suffering a deduction from his portion of the estate. *Waldron v. Taylor*, 45 S. E. 336, 339, 52 W. Va. 284.

An advancement is distinguished from a debt, for in the case of an advancement the common relation of debtor and creditor does not exist, the property not being delivered or received as borrowed capital. In the case of charges on books or memoranda made by the intestate, the inference must be fairly drawn from the book itself that an absolute gift or debt was not intended. If that appears, the legal intentment will be that the property was delivered as an advancement. *Weatherhead v. Field*, 26 Vt. 665, 668.

"Taking a note or a chattel mortgage indicates a debt, and not an advancement." *Kintz v. Friday*, 4 Dem. Sur. 540, 542.

Where a testator signed notes as surety of his son, with the understanding that if compelled to pay the same the amount should be deducted from the son's share of the estate, and some of the notes were paid by the testator, the sums so paid were advancements, and not debts. *In re Pickenbrock's Estate*, 70 N. W. 1094, 1095, 102 Iowa, 81.

"It would be entirely contrary to the character of an advancement that it should be viewed in the light of a debt upon interest." *Osgood v. Breed's Heirs*, 17 Mass. 356, 358.

A writing acknowledged the receipt of \$500 by a son from his father to be in full of all claims as heir against the latter's es-

tate, such sum to bear interest from date. The court held that this was not an advancement as to the interest, and the father's estate could recover it. *Slaughter v. Slaughter*, 52 N. E. 994, 996, 21 Ind. App. 641.

Testator advanced to his daughter, for the purchase of premises and erection of a house thereon, certain money, and an agreement was entered into reciting that the amount so advanced exceeded the amount he had advanced to his other children in a certain sum, and that he held the premises under a deed of trust to secure such sum, she agreeing to pay interest at the rate of 6 per cent. per annum annually on such sum during his life, and that on his death the sum of \$5,000 a year should be withheld from the income to be bequeathed to her until such sum and all accrued interest thereon had been paid. Thereafter in his will he directed that the debts from his children to him should be discharged. She owed no debt to her father other than this advancement. Even if originally an advancement, this sum had assumed the character of a debt; she had in terms agreed to pay the interest upon it annually, and, ordinarily, no advancement bears interest. There had been provided also a distinct method by which the principal sum and the accumulation of interest, if any, should be paid to the estate of testator. Therefore, being a debt, it was discharged by the will. *Bradlee v. Andrews*, 187 Mass. 50, 58, 59.

**Gift distinguished.**

An advancement differs from a gift, inasmuch as it is charged against the child. *Waldron v. Taylor*, 45 S. E. 336, 339, 52 W. Va. 284.

"Advancement" is not synonymous with "gift," though they are often used interchangeably, since, though "an advancement is always a gift," a gift is very frequently not an advancement. *In re Dewees' Estate* (Pa.) 3 Brewst. 814, 316.

An advancement is distinguished from a gift which the parents may make to their children, whether to a greater or less amount, for in such case there is no intention to have it chargeable to the child's share of the estate. *Weatherhead v. Field*, 26 Vt. 665, 668.

**Intent essential.**

In order that a gift may be construed as an advancement, proof of the testator's intention that it should be so must be clear and explicit, since its effect is to charge the child with the amount thereof in settlement of his share of the testator's estate. *Osgood v. Breed's Heirs*, 17 Mass. 356, 358.

"Whether the conveyance of property by a father to a son is to be considered as an advanced portion, or a gift, or partly one and partly the other, depends on the intention of the grantor at the time the convey-

ance is made." Appeal of Christy, 1 Grant, Cas. 369, 370.

An advancement is purely an expression of intention, and, in order to constitute it, the proof must be certain that the testator made the gift intending that the same should be an advancement to the child and should be deducted from his share in the estate. Dillman v. Cox, 23 Ind. 440, 442.

No particular form of words is required by the statute to constitute an "advancement," but it must appear that the money paid or property delivered was not paid or delivered as a loan or gift. It must appear that the money or property was intended as an advancement towards the child's future share of his father's estate. Cass v. Brown, 44 Atl. 86, 68 N. H. 85.

Every gift by a father to his children cannot be deemed an advancement in case of his dying intestate, and there is no reason for holding that it shall never be within the power of a parent to make a present to his child during his lifetime which shall not be considered in the law as an advancement. A parent has a right to give his property to his child as well as to third persons, and all such questions must depend on the intention of the parent in making the gift, and hence the fact that a father gave his daughter some furniture at the time of her marriage cannot be considered as an advancement, in the absence of evidence of an intention that it should be so considered. In re King's Estate, 6 Wm. 1. 370, 373.

An advancement is to be distinguished from a debt due, or from an absolute or independent gift or conveyance having no view whatever to the portion or settlement. Where a real gift from a parent to a child is unexplained, or the conveyance is silent as to its design, it is the province of the law to declare its effect, and in some states it must be proved to have been intended as an advancement, or it will be deemed an absolute gift, but in other states and in England the presumption of law is that it is an advancement, but the presumption may be repelled or rebutted by proper evidence, and in such cases the law leans in favor of the equitable rule of equality. It is not necessary to constitute an advancement that the provision should take place in the parent's lifetime, and the portion may be secured to the child in futuro, or may commence after the parent's death, or upon a contingency that has happened, or to arise within a reasonable time. Clark v. Willson, 27 Md. 693, 700.

The definition of an "advancement" is a payment or appropriation of money or a settlement of real estate made by a parent to or for a child in advance or in extinction of the share to which he would be entitled after the death of the parent. Therefore,

when money is given, resort must be had to the facts and circumstances tending to make the transaction, in order to determine its character. The rule that the intent of the parent, if demonstrable, must prevail, seems to be established where there is nothing expressed upon the subject. Bruce v. Griscom, 9 Hun (N. Y. Sup. Ct.) 280, 282.

#### Subsequent legacy.

In a will, after providing for certain legatees, the testator added: "Any advancement that I may hereafter personally make to the legatees named in the item shall be deemed a partial satisfaction of such legacy equal in amount to the sum so advanced." Thereafter in a codicil the testator declared that the "testamentary disposition made in such will shall remain unchanged, and I again ratify the same." He then proceeded to make certain bequests of money which he had in Germany, where he then was, which he stated, "I shall dispose of in favor of other relatives," and directed specific sums to be paid to several relatives, some of whom were legatees in the prior will, and some of whom were not. These bequests in the codicil could not be deducted from the sums given to the same parties in the prior will as "advancements," but must be considered as cumulative. The term "advancement" does not of itself, either in its technical or in any popular sense, cover a subsequent legacy. Webster defines advancement as "the payment of money paid in advance," and payment in advance implies a payment beforehand, before an equivalent is received, or before the happening of an event in the contemplation of the parties in the contract. When used in a will, unless another event is mentioned prior to which the advance is to be made, or the context indicates a different meaning, the words "payment in advance" to be applied in satisfaction of a legacy" import payment prior to the happening of the event on which the will is to take effect, to wit, the death of the testator. In re Zelle, 15 Pac. 455, 458, 462, 74 Cal. 125.

#### Support.

A provision in a will, in view of the nature of the estate, which was slow to realize on, giving testator's wife, who was executrix, five years in which to wind it up, and providing that in the meantime she should give to each of the two children \$250 per month to live on, is not an "advancement" in the sense of being a gift during the life of the parent. In anticipation of what the children would receive on the death of their father, for it was not to be paid to them until after his death, and then only for their maintenance and support. It is a general rule, recognized in many cases, that money provided for education is not to be treated as an advancement, and, a fortiori, money provided for support and maintenance is not to

be so treated. *Ensley v. Ensley*, 58 S. W. 288, 292, 105 Tenn. 107.

The term "advances" does not in ordinary cases include money expended for the children's support. *Vall v. Vall*, 10 Barb. 69, 78.

#### Transfer of real estate.

Where the purchaser of two lots had them conveyed to his two sons, such conveyance constituted an "advancement." *Rhea v. Bagley*, 38 S. W. 1039, 63 Ark. 374, 86 L. R. A. 86.

A conveyance of land by a parent to one of his children for a consideration of natural love and affection, or for a nominal consideration, is presumably an advancement within the meaning of the statute, providing that advancements shall be deducted from the share of an heir. *Hattersley v. Bissett*, 29 Atl. 187, 188, 51 N. J. Eq. (6 Dick.) 597, 40 Am. St. Rep. 532.

### ADVANTAGE.

Any advantage, see "Any."

In Collection Law March 2, 1799, providing that, where sureties or executors shall pay to the United States moneys due on any bond given to the United States for their principal, they shall have the like "advantage" for the recovery of the money as is reserved to the United States, the word "advantage" is used as synonymous with "preference" and "priority." A preference of payment is nothing more nor less than a right to be first paid, and a right of priority is a preference of payment before the other creditors of an insolvent, and such a preference or priority is an advantage enjoyed by the United States which by this section is conferred on the sureties. *United States v. Preston* (U. S.) 27 Fed. Cas. 617, 619.

### ADVANTAGEOUSLY.

"Advantageously," as used in a lease of mining property providing that lessee should not be liable on the lease unless the ore could be advantageously mined, meant beneficially, conveniently, profitably, and gainfully, and were not intended merely to relieve lessee from hidden defects in the mine, such as a fault or some physical difficulty in getting out the ore, not contemplated by the parties. *Garman v. Potts*, 19 Atl. 1071, 1072, 135 Pa. 506.

### ADVANTAGES.

The "advantages" which may be taken into consideration in determining the just compensation to which the landowner is entitled on condemnation of land are the direct and peculiar benefits or advantages accruing to him, in particular, in respect of the

residue of his land unappropriated, and not any general benefit or increase of value received by such land in common with other lands in the neighborhood. *Louisiana & F. Plank Road Co. v. Pickett*, 25 Mo. 535, 539.

In an act prohibiting the conversion, loaning, or deposit for the benefit of officers, agents, and servants of public funds, and giving a right of action to municipalities against any such officer, agent, or servant who has contracted for or received any "benefits or advantages" because of the deposit of the public funds, the term "benefits or advantages" was clearly intended to include the interest on such deposits. *State v. McFetridge*, 54 N. W. 1, 12, 998, 84 Wis. 473, 20 L. R. A. 223.

### ADVENTITIOUS VALUE.

The location of a railroad, the places or territories it connects, its capabilities for future expansion, are all elements going to make up its productiveness as a vendible thing in the market. It would be unreasonable to affirm that a road connecting two hamlets would under usual conditions bring as much if sold as a road connecting two large cities, the cost or district value of the same being equal. This additional value of the road imparted to it by reason of its location, etc., is its "adventitious value." *Central R. Co. v. State Board of Assessors*, 7 Atl. 306, 309, 49 N. J. Law (20 Vroom) 1.

### ADVENTURE.

"Adventures," as used in a marine insurance policy, is a time-worn word, and is synonymous with "perils," and the fact that a policy stated that the "adventures" which the company was to bear were those of the lakes, seas, rivers, canals, railroads, fires, and jettisons, does not warrant considering adventures as more than perils of the river on which the boat was operated, since the association of the word "adventures" with the other words was merely a convenient form of general policy to receive any risk within the scope of the company's business, and it must be construed in relation to the particular risk, and if the risk be on the lake it is limited to lake navigation, and if on the seas to ocean navigation, and if on the river to river navigation, and if on the railroad to railroad transportation, and the contract is to be read as if these words were not so associated, and constitutes a kind of general distributing policy according to the subject-matter. *Moores v. Louisville Underwriters* (U. S.) 14 Fed. 226, 233.

The term "adventures and perils of the rivers," in a marine policy on a barge and cargo against all loss in voyage by reason of the "adventures and perils of said rivers" and all other perils, was construed not to

include a loss occasioned by the vessel springing a leak and sinking at port. *Gartside v. Orphans' Ben. Ins. Co.*, 62 Mo. 322.

The word "adventure," as used in a clause in a policy of insurance to the effect, "beginning the adventure upon said goods and merchandise from and immediately following the loading thereof on board said ship," fixed the time of the commencement of the risk; the words "beginning the adventure" being equivalent to the expression "risk commencing." *Cottam v. Mechanics' & Traders' Ins. Co.*, 40 La. Ann. 259, 260, 4 South. 510.

## ADVERSE.

The word "adverse," as used in relation to the "adverse" possession of real estate, means "hostile" and "distinct." *Miller v. Beck*, 35 N. W. 899, 900, 68 Mich. 76.

Under an instruction relating to adverse possession of real property, stating that, where the parties have held adverse, actual, open, continuous, and exclusive possession of the premises in controversy for a period of 10 years, a complete title was acquired, it was contended that the jury should have been further instructed that such possession to be effective must have been hostile, notorious, and under a claim or color of title. It was held that the word "adverse" used in the instruction is a general term, and in legal significance involves the elements of hostility under a claim or color of title; that this would be a reasonable and natural interpretation given to the instruction to the jury. *Eastern Oregon Land Co. v. Cole* (U. S.) 92 Fed. 949, 952, 35 C. C. A. 100.

## ADVERSE CLAIM.

It is not essential to the jurisdiction of equity, in a suit brought under Code, § 550, to determine an adverse claim to real property, that such claim should constitute a technical cloud on title, as the term is understood in general equity jurisprudence, it being enough if the claim is such as is calculated to create doubt and uncertainty in respect to the title of the true owner, or if operating injuriously in any way to his enjoyment of, or beneficial domain over, the property. Any attempt persisted in to have such property sold on execution against a third person amounts to an adverse claim or cloud on the title, within the meaning of such section. *Murphy v. Sears*, 4 Pac. 471, 472, 11 Or. 127. In construing a like statute, it was held that the phrase "some claim adverse to the estate of the petitioner" is not restricted to claims appropriately enforceable by ejectment, but includes all claims which may be asserted in courts of equity as well, and includes the claim made by defendants that plaintiffs, as trustees of certain realty, are holding it in violation of their trust, and

are offering it for sale to defray the expense of erecting another building for particular members of the cestui que trust. *Bredell v. Alexander*, 8 Mo. App. 110, 113.

An "adverse claim" in or to the land of another, considered apart from the evidence by which its existence is usually manifested to others, may be regarded essentially as nothing more than a certain complex mental state or condition. In this sense a claim differs from any and all assertions of it, and these last are but evidence of its existence. *Miles v. Strong*, 36 Atl. 55, 59, 68 Conn. 273.

## ADVERSE ENJOYMENT.

"Adverse enjoyment," as used with reference to an adverse, exclusive, and uninterrupted enjoyment of a right of way, means a user without license or permission, for an adverse right of an easement cannot grow out of a mere permissive enjoyment, the real point of distinction being between a permissive or tolerative user and one which is claimed as a matter of right. *Cox v. Forrest*, 60 Md. 74, 79.

## ADVERSE HOLDING.

The "adverse holding" of property, to constitute a bar of the statute of limitations, does not vest the title of the first holder in the adverse claimant, but extinguishes it; and the adverse title does not rest on the title it has defeated, but upon its own assurance and holding thereunder. *Coal Creek Consol. Coal Co. v. East Tennessee Iron & Coal Co.*, 59 S. W. 634, 635, 105 Tenn. 563.

## ADVERSE INTEREST.

"Adverse interest," as used in Rev. St. U. S. § 5057, providing that no suit shall be maintainable, between an assignee in bankruptcy and a person claiming an "adverse interest touching any property or rights of property to or vested in such assignee," unless brought within two years from the time when the cause of action accrued for or against such assignee, includes debts owed to or by the bankrupt. See *Jenkins v. International Bank*, 2 Sup. Ct. 1, 106 U. S. 571, 27 L. Ed. 304; *Doty v. Johnson* (U. S.) 6 Fed. 481. There can be no doubt that the limitation applies to all adverse claims to property of a bankrupt existing in favor of or against the bankrupt at the time of the adjudication of the bankruptcy and appointment of the assignee. *Bowen v. Delaware, L. & W. R. Co.*, 47 N. E. 907, 909, 153 N. Y. 476, 60 Am. St. Rep. 667. Such section applies to any claims to the property in specie, or to any interests which are claimed by one of the parties to the suit and denied by the other, the determination of which claim will affect the quantum of the bankrupt's estate and the distributive share of the creditors. *Gildersleeve v. Gaynor* (U. S.) 15 Fed. 101, 103.

**ADVERSE PARTY.**

An "adverse party" entitled to notice of appeal is every party whose interest in relation to the judgment and decree appealed from is in conflict with the modification or reversal sought by the appeal; every party interested in sustaining the judgment or decree. *Moody v. Miller*, 33 Pac. 402, 24 Or. 179; *The Victorian*, 32 Pac. 1040, 1041, 24 Or. 121, 41 Am. St. Rep. 838; *Cooper Mfg. Co. v. Delahunt*, 51 Pac. 649, 36 Or. 402; *Lillenthal v. Caravita*, 15 Pac. 280, 15 Or. 339; *Stutter v. Baker County*, 47 Pac. 705, 706, 30 Or. 294; *Osborn v. Logus*, 38 Pac. 190, 191, 28 Or. 302; *Randall v. Hunter*, 10 Pac. 130, 131, 69 Cal. 80; *Pacific Mut. Life Ins. Co. v. Fisher*, 39 Pac. 758, 759, 106 Cal. 224; *Mohr v. Byrne*, 64 Pac. 257, 132 Cal. 250; *United States v. Crooks*, 47 Pac. 870, 871, 116 Cal. 43; *O'Kane v. Daly*, 63 Cal. 317, 319; *Lancaster v. Maxwell*, 36 Pac. 951, 952, 103 Cal. 67; *Milliken v. Houghton*, 17 Pac. 641, 642, 75 Cal. 539; *In re Clarke*, 76 N. W. 790, 791, 74 Minn. 8; *Thompson v. Ellsworth* (N. Y.) 1 Barb. Ch. 624, 627 (quoted in *Williams v. Santa Clara Min. Ass'n*, 5 Pac. 85, 87, 66 Cal. 193); *Cotes v. Carroll* (N. Y.) 28 How. Prac. 436, 446; *Crowns v. Forest Land Co.*, 74 N. W. 546, 547, 99 Wis. 103; *T. C. Power & Bro. v. Murphy*, 68 Pac. 411, 412, 26 Mont. 387.

Every party whose interest in the subject matter of an appeal is adverse to and will be affected by the reversal or modification of the judgment or order from which the appeal has been taken is an "adverse party" and entitled to notice of appeal, irrespective of the question whether such party appears on the face of the record in the attitude of plaintiff, defendant, or intervener. *Senter v. De Bernal*, 38 Cal. 637, 640; *Williams v. Santa Clara Min. Ass'n*, 5 Pac. 85, 87, 66 Cal. 193; *Lancaster v. Maxwell*, 36 Pac. 951, 952, 103 Cal. 67; *Green v. Berge*, 38 Pac. 539, 540, 105 Cal. 52, 45 Am. St. Rep. 25; *Herriman v. Menzies*, 44 Pac. 660, 661, 115 Cal. 16, 35 L. R. A. 318, 56 Am. St. Rep. 81; *Vincent v. Collins*, 55 Pac. 129, 130, 122 Cal. 387; *Harper v. Hildreth*, 33 Pac. 1103, 99 Cal. 265; *Jones v. Quantrell*, 9 Pac. 418, 419, 2 Idaho (Hash.) 153; *Coffin v. Edgington*, 23 Pac. 80, 81, 2 Idaho (Hash.) 627; *Aulbach v. Dahler*, 43 Pac. 192, 4 Idaho, 522; *Seattle Trust Co. v. Pitner*, 49 Pac. 505, 17 Wash. 365; *Sutton v. Consolidated Apex Min. Co.*, 82 N. W. 188, 190, 12 S. D. 576.

A party whose interests will not be affected by the reversal or modification of the judgment is not an "adverse party" on whom notice of appeal must be served. *Sutton v. Consolidated Apex Min. Co.*, 82 N. W. 188, 190, 12 S. D. 576; *Lillenthal v. Caravita*, 15 Pac. 280, 15 Or. 339; *Fitzgerald v. Cross*, 30 Ohio St. 444, 449.

If the position of a party on the record makes him "adverse," he must be so considered for the purposes on appeal from the

judgment thereon. So that a person who is joined as a defendant and answers without objection from other parties, and whose rights therein to subject-matter are favorably adjudicated by the decree, is an adverse party to any party attacking such a decree, without regard to whether originally a proper party or not. *Herriman v. Menzies*, 44 Pac. 660, 661, 115 Cal. 16, 35 L. R. A. 318, 56 Am. St. Rep. 81.

"Adverse party," as used in Code, § 348, requiring notice of the entry of judgment affirming a judgment appealed from to be served on the "adverse party" at least 10 days before commencing an action on the undertaking on appeal, means the parties to the original judgment by whom the appeal was taken. *Yates v. Burch*, 18 Hun (N. Y.) 622, 625.

The "adverse party" upon whom a notice of appeal is to be served is the party who appears by the record to be adverse. On an appeal from an order denying a new trial, the parties to the motion in the court below are the only proper parties to the appeal. In *re Ryer's Estate*, 42 Pac. 1082, 1083, 110 Cal. 556.

Code, § 75, provides that, before default judgment on constructive service shall be opened up, the applicant shall give notice to the "adverse party" of his intention, etc. Held, that by "adverse party" is meant the person having a real and substantial interest in the controversy, or, at least, one who is a necessary or proper party to such judgment. Accordingly, where action was brought by F. for the use of K., and the judgment was had in like form, and the record showed that F. had no interest therein, but was a nominal partner merely, and that the judgment was rendered for the sole use of K., it was sufficient, in proceedings to open up such judgment, to serve notice on K. *Fitzgerald v. Cross*, 30 Ohio St. 444, 449.

The words "adverse party," as used in 2 Ballinger's Ann. Codes & St. § 4984, subd. 2, providing for challenge for bias of a person standing in the relation of guardian and ward, attorney and client, master and servant, to the adverse party, clearly refer to the parties to the action, the plaintiff and defendant, and are used to include both. The attorney of a party to the action is not an adverse party within the meaning of the section, any more than any other employé could be said to be an adverse party. He merely represents one of them. *McCorkle v. Mallory*, 71 Pac. 186, 188, 30 Wash. 632.

**Administrator.**

An administrator of an estate is an "adverse party" in adjudications of claims against an estate, within the provisions requiring notice of appeal to be served upon the adverse party. *Kasson v. Bocker's Estate*, 47 Wis. 79, 1 N. W. 418, 421.

It seems that a special administrator of an estate, appointed before probate of a will, is the "adverse party" to whom the bond on appeal from an order admitting the will to probate should run, under a statute requiring the giving of such a bond to the adverse party, and that this is certainly so where the special administrator is also the proponent of the will and the executor named in it. *Appeal of Mullins*, 40 Wis. 154, 156.

#### **Aggrieved party synonymous.**

Adverse party as used in Prac. Act, § 201, providing that certain rules will be deemed excepted to by the "adverse party," construed to have the same meaning as the term "aggrieved party" used in section 436 of the same act which authorizes appeal by the aggrieved party. *Fox v. West*, 1 Idaho, 782, 783.

#### **Codefendants.**

Notice of appeal by one of several codefendants should be served not only on the plaintiff but also on the nonappealing codefendants, they having an interest in the judgment to be affected by the reversal. *Milliken v. Houghton*, 17 Pac. 641, 642, 75 Cal. 539.

In a suit against a county and its treasurer and sheriff to restrain the levy of a tax, the county is an adverse party, so as to entitle it to a notice of an appeal by the other defendants from a decree granting the injunction. *Stuller v. Baker County*, 47 Pac. 705, 706, 30 Or. 294.

Where a defendant, whose land, together with that of his codefendants, is condemned, appeals, the latter are adverse parties. *United States v. Crooks*, 47 Pac. 870, 871, 116 Cal. 43.

Where in an action the judgment is several and for different amounts against each defendant, and an appeal is taken from judgment against one defendant, the other defendants are not adverse parties. *Aulbach v. Dahler*, 43 Pac. 192, 4 Idaho, 522.

Where the judgment rendered against defendants was joint and several in character, and no decision of the Supreme Court can be rendered affecting one of the defendants without affecting all, such facts make them adverse parties. *Coffin v. Edgington*, 23 Pac. 80, 81, 2 Idaho (Hash.) 627.

Where plaintiff had judgment against one of two defendants, and appealed from a judgment for costs in favor of the other, the respondent codefendant was not an adverse party on whom notice of appeal must be served. *Green v. Berge*, 38 Pac. 539, 540, 105 Cal. 52, 45 Am. St. Rep. 25.

In an action against R. and K., R. put in an answer and K. made default. Judgment was rendered making R. first liable, and K. after him. R. appealed, not serving any no-

tice of appeal on K., and the judgment as to R. was reversed and he released from liability. After the judgment of reversal, plaintiff issued execution against K. On a motion by K. to set aside the execution on the ground that he was by the original judgment not liable until after R., and was not bound by the appeal, not being made a party thereto, it was held that K., not having put in an answer, was not a party to the question of R.'s prior liability, and could not litigate it, and was not a "party aggrieved" under Code, § 325, or an "adverse party" within section 327, and hence could not appeal, and was not a necessary party to an appeal, on the issue between R. and the plaintiff. *Garnsey v. Knights*, 1 Thomp. & C. 259, 263.

Where, in an action on a note, there was judgment against defendants, and against an intervener who claimed an interest in one of the notes, the defendants are not adverse parties to an appeal by the intervener from the judgment against him. *Mohr v. Byrne*, 64 Pac. 257, 132 Cal. 250.

In an action against partners on a partnership demand on default by one of the defendants and judgment after trial against the others, the defendant making the default is not an adverse party, since if reversed as to him, and if affirmed the judgment appealed from would remain unchanged. *Randall v. Hunter*, 10 Pac. 130, 181, 69 Cal. 180.

#### **Contractor or materialman.**

Where a decree in an action to foreclose a mechanic's lien directed that if the property was not sufficient to pay the liens the deficiency shall be docketed as a personal judgment against the contractor, the contractor is an adverse party in an appeal by the owner. *Lancaster v. Maxwell*, 38 Pac. 951, 952, 103 Cal. 67.

Contractors to whom plaintiff furnished material, who, although named as defendant, were not served and did not appear in the lower court, are not adverse parties. *Osborn v. Logus*, 38 Pac. 190, 191, 23 Or. 302.

Where a materialman sued to foreclose a lien, making the contractor and owner both parties, and the contractor defaulted, and the court dismissed the suit, and plaintiff appealed, but did not serve the contractor with notice, it was held that, the owner not having alleged facts which would entitle him to relief against the contractor, the contractor was not an "adverse party." *Cooper Mfg. Co. v. Delahunt*, 51 Pac. 649, 36 Or. 402.

#### **Creditors.**

Under a statute providing that, where an administrator appealed from an order of the county court disallowing his personal claim against the estate, his appeal bond should be executed to the "adverse party," the appeal

bond might properly run to such of the creditors as resisted the claim. Appeal of Spiegelburg, 5 N. W. 813, 49 Wis. 349.

Where one is admitted as party defendant to a pending foreclosure suit under a stipulation that the trial shall proceed without reference to his claim, and if, after the mortgaged premises are sold and plaintiff's claim is satisfied, there should be a surplus, these defendants' right should then be determined, and accordingly, after trial, a decree was entered to which such defendant was not a party, the latter is not, on appeal from such decree, an "adverse party." Shirley v. Burch, 18 Pac. 344, 349, 16 Or. 1.

#### **Garnishee.**

A garnishee is an adverse party on an appeal by a plaintiff from a judgment declaring defendant in the principal action not indebted. Seattle Trust Co. v. Pitner, 49 Pac. 505, 17 Wash. 365.

#### **Heir.**

On appeal from an order denying probate of a nuncupative will, the heir at law of the decedent is the "adverse party" within the meaning of a statute relative to appeal bonds. Nelson v. Clongland, 15 Wis. 392, 393.

#### **Mortgagor.**

Where a decree was entered for the foreclosure of a mortgage against the mortgagor and his assignee in insolvency, and the mortgagor, being the only defendant to appear, moved to set aside the sale for irregularities, which motion was denied, and he appealed from the judgment and order, the assignee was an adverse party. Vincent v. Collins, 55 Pac. 129, 130, 122 Cal. 387.

In a suit to foreclose a mortgage given by a married woman on two tracts of land, where the husband, who owned one of the tracts, was made defendant, together with several subsequent incumbrancers, and the wife defaulted, and the court decreed the foreclosure of both tracts, and entered a personal judgment against the husband and wife for any deficiency, from which decree the husband and some of the incumbrancers appealed, the wife was an "adverse party," inasmuch as she would be injuriously affected by a reversal and modification of the decree. Moody v. Miller, 33 Pac. 402, 24 Or. 179.

A mortgagor is an adverse party on appeal by the mortgagee in an action to foreclose the mortgage from an adjudication that certain mechanics' liens are entitled to priority over the mortgage, where such modification might shift the personal responsibility as between the mortgagor and his grantee for the liens. Pacific Mut. Life Ins. Co. v. Fisher, 89 Pac. 758, 759, 106 Cal. 224.

#### **Purchaser at judicial sale.**

The purchaser at a foreclosure sale of a vendor's lien on land owned by a testator also took an assignment of the debt secured by the lien, as well as of an unsecured debt against testator's estate. Afterwards testator's adult devisees instituted a proceeding against the minor devisees for the sale of testator's other land not subject to the vendor's lien, praying that the proceeds of the sale be distributed after payment of testator's debts. The land was ordered sold, and this proceeding was then consolidated with the vendor's lien suit. Held, that the purchaser at the foreclosure of the vendor's lien was entitled to notice of the confirmation of the sale ordered in the proceedings between the devisees, as he was an "adverse party" to the purchaser at such sale. Patterson v. Eakin, 12 S. E. 144, 145, 87 Va. 49.

A purchaser at a foreclosure sale whose title has become absolute by confirmation, if a stranger to the record, is not an adverse party on whom notice of appeal must be served. Crowns v. Forest Land Co., 74 N. W. 540, 547, 99 Wis. 103.

A purchaser at a foreclosure sale is an "adverse party" within Rev. St. § 3049, who should be served with a copy of notice of appeal from the order confirmed in the sale. Rogers v. Shove, 73 N. W. 989, 990, 98 Wis. 271.

A purchaser at a sale made by an assignee in insolvency subject to the approval of the court is a party to the proceedings resulting in an order confirming the sale, and hence an adverse party on an appeal from such order. Kells v. Nelson-Tenney Lumber Co., 76 N. W. 790, 791, 74 Minn. 8.

#### **Party brought in by order of court.**

The term "adverse party" means every person whose interests require that the order, judgment, or decree appealed from be sustained. And, if such party must be served with notice of appeal, this is so regardless of whether he appeared as one of the original parties to the action, or was brought in by order of court. A person who has once appeared in the action is a necessary party to the appeal, unless after his appearance he has ceased to have an interest in such action. Commercial Nat. Bank v. United States Savings, Loan & Building Co., 44 Pac. 1043, 1045, 13 Utah, 189.

#### **Party not served or appearing below.**

A person named as a party, but not served with notice, and not appearing in the suit, and against whom no judgment is entered, is not an "adverse party" on whom notice of appeal must be served. Merced Bank v. Rosenthal, 31 Pac. 849, 850, 99 Cal. 89.

**Surety.**

In an action to enforce a lien against a vessel, where claimant, to obtain its release, files an undertaking with sureties, and judgment is rendered against the claimant, notice of claimant's appeal need not be served on the sureties, as their interests are identical with claimant's. *The Victorian*, 32 Pac. 1040, 1041, 24 Or. 121, 41 Am. St. Rep. 838.

**As witnesses.**

Rev. Code 1855, § 8, declares that any party to a civil action or proceeding may compel any "adverse party" or person for whose benefit such action or proceeding is instituted to testify at the trial, or by deposition as a witness, etc. Held, that the term "adverse party" must be a party adversely interested, and not simply an opposing party on the records. *Harris v. Harris*, 25 Mo. 567, 568.

"Adverse party," as used in Pub. St. c. 167, § 49, authorizing the filing of interrogatories to be answered by the adverse party for the discovery of facts in proceedings in probate court, does not include a person appearing as next friend of a minor and instituting proceedings for the removal of the guardian of the latter. *Gray v. Parke*, 29 N. H. 641, 642, 155 Mass. 433.

The words "adverse party" as used in Gen. St. 1897, c. 95, § 833, relating to competency of witnesses, are not limited to the adversary positions of plaintiff and defendant, but affect any party, whether plaintiff or defendant, whose interests are actually adverse to those of another party to the action who appears in the capacity of executor, administrator, heir at law, next of kin, surviving partner, or assignee, where the latter has acquired title to the cause of action immediately from the deceased person. *American Inv. Co. v. Coulter*, 61 Pac. 820, 8 Kan. App. 841.

Under Laws 1847, p. 630, providing "that any party in any civil suit, etc., may require any adverse party \* \* \* to give testimony under oath in such suit or proceeding in the same manner as persons not parties to such suit or proceeding, and who are competent witnesses therein," the fact that one of two copartners sued for an alleged partnership debt, who has given his individual note for the debt, suffered a default, did not render him a competent witness for the plaintiff, as he did not thereby cease to be an adverse party within the meaning of the statute. *Rich v. Husson*, 6 N. Y. Super. Ct. (4 Sandf.) 115, 119.

**ADVERSE POSSESSION.**

See "Title by Adverse Possession."

An "adverse possession" which will bar a legal title must be hostile, and under a claim of title, actual, open, and notorious, exclusive

and continuous. *Sailor v. Hertzogg*, 2 Pa. (2 Barr) 182, 185; *Thomas v. England*, 12 Pac. 491, 492, 71 Cal. 456; *Unger v. Mooney*, 63 Cal. 588, 595, 49 Am. Rep. 100; *Alta Land & Water Co. v. Hancock*, 24 Pac. 645, 646, 85 Cal. 219, 20 Am. St. Rep. 217; *Springer v. Young*, 12 Pac. 400, 403, 14 Or. 280; *Bryan v. Atwater*, 5 Day, 181, 186, 5 Am. Dec. 136; *Murray v. Hudson*, 32 N. W. 889, 891, 65 Mich. 670; *Cook v. Clinton*, 31 N. W. 317, 319, 64 Mich. 809, 8 Am. St. Rep. 816; *Sherin v. Brackett*, 30 N. W. 551, 552, 38 Minn. 152; *Washburn v. Cutter*, 17 Minn. 361, 368 (Gil. 335, 344); *Robinson v. Lake*, 14 Iowa, 421, 424; *Hempsted v. Huffman*, 51 N. W. 17, 84 Iowa, 398; *Ward v. Cochran*, 14 Sup. Ct. 230, 233, 150 U. S. 597, 37 L. Ed. 1195; *Ballard v. Hanson*, 51 N. W. 295, 297, 33 Neb. 861; *Goodson v. Brothers*, 20 South. 443, 444, 111 Ala. 589; *Taylor v. Town of Philippi*, 14 S. E. 130, 132, 85 W. Va. 554; *Sadtler v. Peabody Heights Co.*, 10 Atl. 599, 601, 66 Md. 1; *Yeager v. Woodruff*, 53 Pac. 1045, 1046, 17 Utah, 361.

Possession is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible. *Williams v. Buchanan*, 23 N. C. 535, 540, 85 Am. Dec. 760.

Adverse possession is a possession open, notorious, and characterized by visible occupation. *Watts v. Griswold*, 20 Ga. 732, 783, 65 Am. Dec. 647.

To acquire title by "adverse possession," the possession must not only be continuous for the time prescribed, but, under well-settled law, must be actual, open, and notorious, with an intention on the part of the claimant to claim the title as owner, and against the rights of the true owner; and, in addition to this, the adverse claimant must pay all the taxes which are lawful charges on the land. *Dignan v. Nelson* (Utah) 72 Pac. 936, 937.

The possession of land is rendered adverse by unequivocal assertion of the party in possession of a title in himself, exclusive of every other right. *Sherry v. Frecking*, 11 N. Y. Super. Ct. (4 Duer) 452, 454.

To constitute "adverse possession" the possession must be actual, for otherwise there is no disseisin, and the real owner remains in possession, actually or constructively. It must be continuous, for upon its cessation or interruption the possession, in contemplation of law, is again in the holder of the legal title. It must be hostile to the real owner, and with the intention to claim the land adversely to him. This claim must be manifest from the nature or circumstances of the possession, so that the owner may be informed of it, and that he shall not be misled into acquiescence in what he might reasonably suppose to be a mere trespass when he would not have acquiesced in the assertion of a right adverse to his own title. The



possession of land may consist in and may be shown by a great variety of acts, but the law prescribes no particular manner in which possession shall be maintained or made manifest. *Costello v. Edison*, 46 N. W. 299, 301, 44 Minn. 135.

"Adverse possession" of another's land is such a possession as, when accompanied by certain acts and circumstances, will vest title in the possessor. In all jurisdictions where the determination of what constituted "adverse possession" has arisen, the decisions and the text-books are unanimous in declaring that the possession must be actual, visible, exclusive, hostile, and continued during the time necessary to create a bar under a statute of limitations. *Johnston v. City of Albuquerque* (N. M.) 72 Pac. 9, 11.

Adverse possession is possession by one person which is inconsistent with possession or right of possession by another. *Sheaffer v. Eakman*, 56 Pa. (6 P. F. Smith) 144. In theory it is a possession founded in trespass or disseisin, an ouster of the true owner, and the continued exclusion of such owner for the period of the statute of limitations. *Olewine v. Messmore*, 128 Pa. 470, 484, 18 Atl. 495. Adverse possession cannot arise until there is some one to dispute the right claimed. *Lucas v. White*, 95 N. W. 209, 210, 120 Iowa, 735.

Adverse possession, such as to ripen into title by limitation, must be actual as contrasted with constructive, and must be an absolute dominion, evidenced by visible use in whole or in part; the evidence of ownership which the land itself exhibits to any one who sees fit to look and inquire for himself. It must be adverse in the sense that the occupant must hold for himself against all of the world, and exclusive in that he must either turn out or shut out other claimants. It must be uninterrupted and continuous, neither broken by another nor abandoned by himself; and honest or bona fide, in that his holding for himself shall involve no breach of faith or any duty he may owe to another, though he may not be ignorant of a better title; and such possession must exist for the statutory period under some colorable claim of title, which must be derived from another if his possession is to extend beyond his inclosure, but need not be so derived when the land is all visibly inclosed. *Taylor v. Town of Phillippi*, 14 S. E. 130, 132, 35 W. Va. 554.

A possession which has been continuous, open, notorious, by one claiming to hold and own the property adversely to all persons whomsoever, is an adverse possession. *Bowers v. Ledgerwood*, 64 Pac. 936, 937, 25 Wash. 14.

"Adverse possession," as defined in *Black's Dictionary*, "means the possession or enjoyment of real property or estate lying in grant continuously for a certain length of

time, held adversely and in denial and opposition to title of another claimant, or under circumstances which indicate an assertion or color of right or title on part of the person maintaining it as against another out of possession." A man may come in by rightful possession and yet hold adversely without title. *Van Wickle v. Alrough*, 2 N. J. Law J. 446, 449.

Possession, to be "adverse," must be accompanied by a payment of taxes by the possessor. *Unger v. Mooney*, 63 Cal. 586, 595, 49 Am. Rep. 100; *Thomas v. England*, 12 Pac. 491, 492, 71 Cal. 456.

"Adverse possession" is an actual and peaceable appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another. *Rev. St. Tex. 1895, art. 3349*.

For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or judgment or decree, land shall be deemed to have been possessed and occupied in the following cases: First, where it has been usually cultivated and improved; second, where it has been protected by a substantial inclosure; third, where, though not inclosed, it has been used for the supply of fuel or of fencing timber for the purpose of husbandry, or for the use of pasturage, or for the ordinary uses of the occupants; fourth, where a known lot or single farm, not exceeding 320 acres in extent, has been partially improved, the portion of such farm or lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated. *Comp. Laws Nev. 1900, § 3711; Rev. St. Wis. 1898, § 4212*.

#### Actual occupation.

Under Code Civ. Proc. N. Y. §§ 370, 371, land, to be held by "adverse possession," must have been usually cultivated or improved or protected by a substantial inclosure, or used for the supply of fuel or fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant. *Wright v. Phipps* (U. S.) 90 Fed. 556, 575.

To constitute an adverse possession under color of title so as to bar a strictly legal paper title, there must be other evidence than that of the mere residence on or inclosure of a small part of the tract included within the metes and bounds of the defective paper title. There should be proof of acts of ownership over the uninclosed part, such as it is usual and customary to exercise over land of that particular description, or as will amount to actual possession, and such as may fairly be considered evidence of an intention to assert an ownership and posses-

sion of the whole. *Saxton v. Hunt*, 20 N. J. Law (Spencer) 487, 491.

"Neither actual occupation, cultivation, or residence are necessary to constitute actual possession when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party, as may be evidenced by the public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim." *Ewing v. Burnet*, 86 U. S. (11 Pet.) 41, 49, 53, 9 L. Ed. 624.

"Adverse possession" means possession made under claim of title, and accompanied by such visible acts as from their nature indicate a notorious claim of property in the land. The character of the acts necessary, of course, varies with the situation of the land, condition of the country, etc. *Hollingsworth v. Sherman*, 81 Va. 668, 671.

Possession, to be adverse, must be actual, by inclosures upon some part of the land, if the nature of the land admits of it; otherwise, by such acts of dominion as the nature of the land will allow. A possession may exist without an actual residence on the land. It is enough that the inclosures are kept up and the doors of the house closed, so as to indicate that the premises are not abandoned. These acts indicate a concurrence of act and intention, and fill the idea of actual occupation or possession. As a general rule, it may be said that an entry upon or possession of the lands claimed by another, which, in the first instance, would suffice to effect a disseisin or ouster of the real owner, will break the continuity of the holder claiming by adverse possession. It is not every entry, however, by the owner that will destroy the adverse possession, but to effect this he must assert his claim to the land by the acts of ownership. An entry by stealth, or for other purposes than those connected with the right to enter, will not break the continuity of adverse possession in another. The mere intrusion of a trespasser, not brought to the knowledge of the party in possession, or continued long enough to raise a presumption that it was known to him, is not an interruption. *Cowan v. Hatcher* (Tenn.) 59 S. W. 689, 691.

To constitute an "adverse possession" there need not be a fence, building, or other improvement, and it suffices for the purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by statute. It may safely be said that where acts of ownership have been done upon the land which from their nature indicate a notorious claim of property in it, and are continued sufficiently long with the knowledge of an adverse claimant without interruption or an adverse entry by him, such acts are evidence of an ouster of a former owner and an actual ad-

verse possession against him, provided the jury should think that the property was not susceptible of a more strict or definite possession than had been so taken and held. *Batz v. Woerpel*, 89 N. W. 516, 519, 113 Wis. 442 (quoting *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 440, 447, 84 N. W. 855, 85 N. W. 402, 406, 83 Am. St. Rep. 905).

"There must be a real and substantial inclosure, an actual occupancy, a *possessio pedis*, which is definite, positive, and notorious, to constitute an adverse possession." *Jackson v. Schoonmaker*, 2 Johns. 230, 234.

There must be an actual occupancy, as distinguished from a constructive possession; that is, some one must be in actual possession of the property, not necessarily living upon the property. If the property is inclosed and cultivated, this would be a sufficient actual occupancy; and, if crops were continuously growing upon the premises, this would be a visible occupancy; and, even though in the interim between the harvesting of the crop and the recropping of the land the succeeding spring, no person was actually on the premises, and nothing was done with them, yet if, year after year, the land was thus cropped and cultivated, this would be a sufficiently continuous possession. A possession is sufficient and notorious if it is open and visible, and the premises are actually so that, if people pass to and fro, they may see the visible evidences of occupation. *Cook v. Clinton*, 81 N. W. 317, 319, 64 Mich. 309, 8 Am. St. Rep. 816.

"Adverse possession" may be said to be a collective fact made up of other facts which are essential, constituent elements to the creation of the collective fact. Among these constituent elements are an actual possession of the res; and an open and notorious assertion of claim of ownership hostile to the true owner. After its creation it is a continuance of this collective fact, without interruption for the period fixed by the statute of limitations as a bar to the commencement of a suit, that renders it effective as a defense. *Washington v. Norwood*, 30 South. 406, 406, 128 Ala. 383.

Possession, to be adverse, must be as definite as the character of the land will permit; but occupancy of a part, with color of title defining the extent of the claim, is deemed to extend to the boundaries expressed. *Baucum v. George*, 65 Ala. 259, 268.

To constitute adverse possession such as will work a disseisin of the lawful owner, there must be actual and visible occupancy of the premises, but what will constitute such occupancy will depend somewhat upon the nature and situation of the property and the use to which it can be applied. *Murphy v. Doyle*, 33 N. W. 220, 221, 37 Minn. 113.

"While the possession, to be adverse, must be actual, yet it may be by agent or

tenant." Omaha & F. Land & Trust Co. v. Parker, 51 N. W. 139, 140, 33 Neb. 775, 29 Am. St. Rep. 506.

Neither actual cultivation nor residence is necessary to constitute actual possession, where the property is so situated as not to admit of any permanent useful improvements, and the continued claim of the party has been evidenced by public acts of ownership. Copeland v. Murphey, 42 Tenn. (2 Cold.) 64, 70.

#### Color of title.

Adverse possession is a hostile possession of real estate which will ripen into a title thereto. "In order to be adverse it need not be under any muniment of title. Adverse possession is a possession inconsistent with the right of the true owner, and depends upon the intention with which it is taken and held; and an actual occupation of the land by one, accompanied by acts of ownership inconsistent with the act of ownership in another, is presumptively adverse possession." Faloon v. Simshauser, 22 N. E. 835, 836, 130 Ill. 649.

It is not necessary that a title set up as adverse should be a rightful title; it is sufficient if it be a possession under claim or color of title. When an adverse possession is set up, all idea of right is excluded, and the only question is *quo animo* the possession was taken. The sum of all the authorities is that, to negative the adverse possession, it must be shown that such possession is held in subjection to and is consistent with the true title. Innerarity v. Mims' Heirs, 1 Ala. 660, 668, 669.

All that is necessary to render possession of lands adverse, so as to set the statute of limitations in motion, is that the dispossessor enter and take possession with the intention of holding land for himself to the exclusion of all others. It is not necessary that he should enter under color of title, or under a claim that he has a legal right to enter. Carpenter v. Coles, 77 N. W. 424, 75 Minn. 9.

The only distinction which can be recognized between title acquired under the statute of limitations by adverse occupancy under claim and color of title, and without such claim or color, is that in the latter case title will only be coextensive with actual, visible, continued occupancy, while in the former color of title may by construction embrace lands only a part of which were thus actually occupied. Roots v. Beck, 9 N. E. 698, 700, 109 Ind. 472 (cited in Gildehaus v. Whiting, 18 Pac. 916, 919, 39 Kan. 706).

Fifteen years' uninterrupted, wrongful possession, with actual notorious occupation, claiming land as the occupier's own, whether at first the occupier's entry was with or without color of title, tolls the entry of the rightful owner, and impairs any possessory action which he may bring, giving title to the occu-

pler by adverse possession. Hapgood v. Burt, 4 Vt. 155, 160.

In Commonwealth v. Gibson, 85 Ky. 666, 4 S. W. 453, 454, it was said: "If one in fact enters under a purchase, although it may be verbal, and holds the land by actual, open possession, claiming it as his own, such possession is adverse, and right of action at once accrues to the vendor." The law is well settled in Kentucky that an entry under a parol purchase of land the extent of which is definitely fixed is adverse to the vendor, and ripens into a title after the lapse of the requisite statutory period. Gilbert v. Kelly (Ky.) 57 S. W. 228, 229.

Entry under claim of title is generally sufficient to constitute an adverse possession, and it is not material whether the title is valid or not. Hoye v. Swan's Lessee, 5 Md. 237, 250.

Possession of land by an adverse occupant for more than 15 years, which possession is actual, notorious, continuous, and exclusive, will give title thereto, though such possession is entirely destitute of color of title. Anderson v. Burnham, 34 Pac. 1056, 1057, 52 Kan. 454.

An uninterrupted possession, accompanied by occupancy and ownership, constitutes adverse possession, whether the alleged ownership depends on a written instrument, inheritance, a deed, or even an instrument which may not convey all the land in controversy. Probst v. Trustees of Board of Domestic Missions, 9 Sup. Ct. 263, 265, 129 U. S. 182, 32 L. Ed. 642.

Possession under color and claim of title amounts to adverse possession, and it has never been considered as necessary, to constitute adverse possession, that there should be a rightful title, and it is wholly immaterial whether the claim of title be under a good or a bad, a legal or an equitable, title. Nowlin v. Reynolds, 25 Grat. 187, 141.

One who enters on land without title is deemed to have possession of so much only as he actually occupies, but when he enters under color of title he is presumed to occupy according to the boundaries named in his deed. Sumner v. Blakslee, 59 N. H. 242, 247, 249, 47 Am. Rep. 196.

Color of title is not essential to adverse possession. Murray v. Romine, 82 N. W. 318, 319, 60 Neb. 94.

#### Continuance.

Claim of adverse possession may be made up by tacking together the adverse possessions of several successive holders, but such adverse possessions must be connected by privity, since, unless they are so connected, the dispossessor of the real owner resulting from the adverse possession would be interrupted, and during such interruption, though

but for a moment, the title of the real owner draws to it the seisin or possession. *Sherin v. Brackett*, 80 N. W. 551, 552, 36 Minn. 152 (citing *Melvin v. Proprietors of Locks and Canals on Merrimack River*, 46 Mass. [5 Metc.] 15, 38 Am. Dec. 384; *Haynes v. Boardman*, 119 Mass. 414, 415; *McEntire v. Brown*, 28 Ind. 347; *Jackson v. Leonard* [N. Y.] 9 Cow. 653; *Wood, Lim.* § 271; *City and County of San Francisco v. Fulde*, 37 Cal. 349, 99 Am. Dec. 278; *Crispèn v. Hannavan*, 50 Mo. 536; *Shuffleton v. Nelson* [U. S.] 22 Fed. Cas. 45; *Ang. Lim.* §§ 413, 414; *Sedg. & W. Tr. Title Land*, §§ 740, 745-747; *Riggs v. Fuller*, 54 Ala. 141).

"Adverse possession is that kind of continued occupation and enjoyment of real estate which indicates assertion of right on the part of the person maintaining it." *Rivers v. Thompson*, 43 Ala. 633, 641 (quoting *Webster's Dict.*).

#### Disseisin.

Adverse possession cannot begin until there has been a disseisin, and to constitute a disseisin there must be an actual expulsion of the true owner of the land for the full period prescribed by the statute, and hence the possession must be one not under the legal proprietor, but one entered into without the proprietor's consent, either directly or indirectly. *Bryan v. Atwater* (Conn.) 5 Day, 181, 186, 5 Am. Dec. 136; *Springer v. Young*, 12 Pac. 400, 403, 14 Or. 280; *French v. Pearce*, 8 Conn. 439, 440, 443, 21 Am. Dec. 680; *Larwell v. Stevens* (U. S.) 12 Fed. 559, 560; *Morse v. Seibold*, 35 N. E. 369, 370, 147 Ill. 318; *Yeager v. Woodruff*, 53 Pac. 1045, 1046, 17 Utah, 361.

"Adverse possession" is now understood to denote a disseisin on which an adverse title is founded, the term "disseisin" being expressive of any act the necessary effect of which is to divest the estate of the former owner. "Adverse possession" is generally considered as synonymous with "disseisin," and disseisin anciently was nothing less than some act or mode by which the disseisor acquired the tenure and usurped the place and feudal relation of the tenant. And adverse possession is therefore something more than the mere possession accompanied with hostile claim of ownership; and though, ordinarily, the actual occupancy of lands, accompanied with an open, notorious, and uninterrupted claim of ownership, with intention to claim hostile to the title of the real owner, constitutes adverse possession, yet this is so only where the possession of the occupying claimant is hostile to the claim and right of possession of some one else; and if there be no other person entitled to present possession there can be no repugnancy, actual or constructive, between the possession of the occupant and the rights of any one else. A possession, to be adverse, must operate to dis-

seise or oust some other claimant of his possession or right. An adverse possession has been defined to be an occupancy which disclaims the title of the negligent owner, and it is impossible to conceive of an adverse possession which is not exclusive of the rightful owner, or does not operate to encroach on his right of possession so as to oust or disseise him. *Pickett v. Pope*, 74 Ala. 122, 131.

To constitute that "adverse possession" which gives title to real estate under the statute of limitations, two things must concur: (1) An ouster of the real owner, followed by an actual possession by an adverse claimant; and (2) an intention on the part of the latter to so oust the owner and possess for himself the property. *Pioneer Wood Pulp Co. v. Chandos*, 47 N. W. 661, 662, 78 Wis. 526; *Ivy v. Yancey*, 31 S. W. 937, 938, 129 Mo. 501.

"There must be an actual entry and ouster under claim of title in hostility to that of the true owner, accompanied or manifested by acts of ownership, and followed by actual and continuous possession. That is to say, the claim of the disseisor must be asserted as a matter of right, so as to be notice to the owner and expose him to an action by the latter, for it is the fact of his being thus exposed to an action, and the neglect of the opposite party to bring suit within the statutory period, which forms the basis of the title by prescription or adverse possession." *Village of Glencoe v. Wadsworth*, 51 N. W. 377, 378, 48 Minn. 402.

#### Exclusiveness.

Adverse possession is an actual, visible appropriation of land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another. *Rev. St. 1895*, art. 3349. Occupancy of a part of the survey by the true owner interrupts adverse possession as to all of the survey not actually occupied by the adverse claim. *Freedman v. Bonner* (Tex.) 40 S. W. 47, 49.

"Adverse possession is an occupancy of land indicative of an exercise of ownership such as is usual by the owner of property. It must appear as a fact that the possession is adverse, and not under a tenancy or otherwise in subordination to the title of the true owner. There is no necessary implication of any wrongful act or intention in effecting the entry, or actual hostility in maintaining possession. It is immaterial whether the occupant obtains his seisin as a purchaser or a trespasser, or whether the claim of title was originally based on a written or parol contract, or no contract at all. An exclusive possession for the statutory period under a claim of ownership will create a good title." *Martin v. Maine Cent. R. Co.*, 21 Atl. 740, 741, 83 Me. 100.

A husband who during the lifetime of his wife received the rents and profits of her

farm, and on her death, she never having had any children, took possession of the farm, and claimed thereafter to have a life estate therein, held such farm in adverse possession to the title of her heirs. To constitute adverse possession it is not necessary that the possessor claimed the entire estate, or that he claimed to the exclusion of all other rights; it is sufficient that the possession be in opposition to the rights of the lawful owner. *Hanson v. Johnson*, 62 Md. 25, 29, 50 Am. Rep. 199.

#### Good faith.

"Adverse possession," in order to be effective, must consist of an occupancy of lands in good faith and under the belief that the claimant has a good title, and an adverse possession which is not characterized with good faith and honesty is a mere sham, and cannot avail as against the true owner or his grantee. *Woodward v. McReynolds (Wis.)* 2 Pin. 268, 275, 1 Chand. 244.

#### Hostile character.

Adverse possession is the occupancy of real estate by a person holding in opposition to the rights of all others. To constitute valid adverse possession, the possession must be hostile to the rights of others in its inception. *Heermans v. Schmaltz (U. S.)* 7 Fed. 568, 576 (quoting *Tyler, Ej.* 874); *Pickett v. Pope*, 74 Ala. 122, 131; *Washington County v. Norwood*, 30 South. 405, 406, 128 Ala. 383; *Innerarity v. Mims' Heirs*, 1 Ala. 660, 668; *Alexander v. Polk*, 39 Miss. 737, 755.

Adverse possession is an actual appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another. *Stanley v. Schwably*, 13 Sup. Ct. 418, 420, 147 U. S. 508, 37 L. Ed. 259; *Walsh v. McIntire*, 13 Atl. 348, 350, 68 Md. 402; *Kearney v. Borough of West Chester*, 49 Atl. 227, 228, 199 Pa. 392; *Morse v. Seibold*, 35 N. E. 369, 370, 147 Ill. 318.

Adverse possession is an actual possession and exclusive appropriation of land, commenced and continued under a claim of right, either under an openly avowed claim, or under a constructive claim arising from the fact and circumstances pending the appropriation to hold the land against him who is seised. *Magee v. Magee*, 37 Miss. 138, 152; *Davis v. Bowmar*, 55 Miss. 671, 751.

The mere possession of land is not *prima facie* adverse to the title of the true owner, and all presumptions and intendments are favorable to the title, and possession is not presumed to be hostile, but rather in subordination to it. The whole doctrine of adverse possession rests on the presumed acquiescence of the party immediately affected by such possession; therefore, when possession of property was originally acquired in subordination to the title of the true owner,

there must be a disclaimer of the owner's title in order to make the continued possession adverse. *Dothard v. Denson*, 72 Ala. 541, 545.

Adverse possession is occupancy of land without the permission, and not in subservience to the rights, of the true owner, and, as a general rule, is founded on reasons of public policy that a tenant shall never be permitted to controvert his landlord's title, or to set up against him a title which is hostile in its character to that which the tenant acknowledged when he accepted the demise; and therefore, if an adverse claimant comes into possession of land by tampering with the tenant, he cannot resist the landlord's claim, since the tenant himself could not. *Forbes v. Caldwell*, 17 Pac. 478, 480, 39 Kan. 14.

Possession that in its commencement is not adverse becomes so only when the holder changes his mind or intends it to become adverse, and there is united with such change or intent a knowledge thereof on the part of the true owner. *Gay v. Mitchell*, 35 Ga. 139, 141, 89 Am. Dec. 278.

No possession consistent with the right of the true owner can be adverse to him. Thus, where inclosed land was dedicated to the public, the city had the right to postpone the removal of the obstructions and the opening of the streets until such time as its resources permitted and the public necessity demanded. As the city only acquired the right to use the land as streets, and the dedicatory reserved all other rights, he had authority to use the land for pasturage or crops, or any purpose consistent with the rights of the city, until the authorities of the city, in the lawful exercise of its power, determined to open the streets; and such use would not constitute "adverse possession." *City of Little Rock v. Wright*, 23 S. W. 876, 878, 58 Ark. 142.

The possession of land which will ripen into a title valid against the real owner must be such a one as would subject the claimant to an action of ejectment, and the mere fact that one offers the land for sale or pays taxes thereon is insufficient. *Fuller v. Elizabeth City*, 23 S. E. 922, 118 N. C. 25.

In order to acquire title by adverse possession, the occupation or possession must be of that nature that the real owner is presumed to have known that there was a possession adverse to his title, under which it was intended to make title against him. *Foulke v. Bond*, 41 N. J. Law (12 Vroom) 527, 545.

#### Intent.

"Adverse possession" is the act of holding possession and claiming the right to do so against one having a superior right or title. Two things, it is said, must occur: First, an

ouster of the real owner, followed by an actual possession by the adverse claimant; and, second, an intention on the part of the latter to oust the owner and possess for himself. *Ivy v. Yancey*, 31 S. W. 937, 938, 129 Mo. 501; *Pioneer Wood Pulp Co. v. Chandos*, 47 N. W. 661, 662, 78 Wis. 526. Under such definition, the possession of the grantor in a deed of trust is not adverse to the trustee, unless the grantor specifically repudiate the deed; and after the land is sold under the trust deed, if the grantor remains in possession, his possession is not adverse to the purchaser's title, unless he specifically repudiate the trust deed. *Ivy v. Yancey*, 31 S. W. 937, 938, 129 Mo. 501.

Adverse possession is an entry by one person on the land of another under a claim and color of right, and, in legal language, it is the intention of the party taking the possession which fixes the character of the entry, and any one in possession with no claim to the land whatever must, in the presumption of law, be in possession in amity with and in subservience to the title of the rightful owner, and the fact that possession is taken under a claim of title is sufficient to show the intention of the party to hold adversely, and it is not necessary that the adverse title must be found in some written instrument. *Ewing v. Burnet*, 86 U. S. (11 Pet.) 41, 53, 9 L. Ed. 624; *Harvey v. Tyler*, 69 U. S. (2 Wall.) 328, 349, 17 L. Ed. 871; *Probst v. Trustees of Board of Domestic Missions*, 9 Sup. Ct. 263, 265, 129 U. S. 182, 32 L. Ed. 642.

The adverse possession of real estate sufficient to ripen into a title thereto, "must not only have been actual, open, and continuous, but it must be accompanied by an intention to hold the land as owner of it. It must have been under a claim of ownership. No matter how exclusive and hostile to the real owner in appearance, it cannot be effectually adverse unless accompanied by the intent on the part of the plaintiff to make it so. A naked possession unaccompanied with any claim of right will never constitute a bar, but will inure to the advantage of the real owner. *Colvin v. Republican Valley Land Ass'n*, 36 N. W. 861, 863, 23 Neb. 75, 8 Am. St. Rep. 114.

#### Mistake.

Where one, at the time of buying a claim to land, erroneously thought it was government land, and intended to make a homestead of it, his possession prior to learning his mistake was not an "adverse possession." *Hunnell v. Burchett*, 54 S. W. 487, 152 Mo. 611.

Where adjoining landowners occupy land under mistake, and believe that the land located was correct, and that neither intended to claim more than the true amount, the plaintiff did not hold the excess by adverse

possession. *Kahl v. Schmidt*, 78 N. W. 204, 205, 107 Iowa, 550.

#### Occupancy distinguished.

The terms "adverse possession" and "occupancy," though nearly synonymous, are yet to be distinguished. The former term cannot, with strict propriety, be applied to the possession of the owners of land, for his possession cannot be adverse to any one other than himself; which is to say, that it cannot be adverse in the ordinary sense of the term. But to such possession—that is, the possession of the owner—the term "occupancy" is entirely appropriate, and indeed, as compared with possession without title, applies for much stronger reasons. *Crocker v. Dougherty*, 73 Pac. 429, 431, 139 Cal. 521.

#### Openness and notoriety.

"Whatever construction may have prevailed in England, it is clear that when a man hath obtained a grant of land he thereby gains a constructive possession, which continues until an actual 'adverse possession' commences, and that adverse possession must be continued seven years before the right of possession of the first grantee is lost. A single act of entry cannot take away the grantee's right of possession, because such entry may be made without any notoriety, whereas seven years' actual possession affords notoriety, and, as it were, calls on the owner to assert his right." *Slade v. Smith*, 2 N. C. 248, 249.

"To constitute adverse possession two facts must concur: First, there must be an entry under color of right, claiming title hostile to the true owner and the world; second, that the entry must be followed by possession appropriate to the terms to be used publicly and notoriously, so that the other claimants may take notice and others may be cognizant of the fact." *Dixon v. Cook*, 47 Miss. 220, 226.

Adverse possession must be a possession that is notorious, in the sense of being generally known by those residing in the neighborhood, and must be open, visible, and exclusive, and accompanied by such acts of ownership as would enable any one upon a visit to and inspection of the land to see that some person or persons held it in actual possession. *Leeper v. Baker*, 68 Mo. 400, 404.

Adverse possession is the occupancy of another's land under claim of right, which must consist of such acts as will establish an ouster of the owner, and must be open and notorious, as well as continuous, in order to set the statutes of limitation in motion, and of such a character as to operate as notice to the holder of the true title that possession is held under a claim of right; and the acts of possessor should clearly indicate that he holds for himself and in opposition to the

owner. *Mauldin v. Cox*, 7 Pac. 804, 808, 67 Cal. 387.

Adverse possession is occupancy of another's land, which must be under a claim of ownership, though it need not be under color of title; and it is sufficient if a party goes on the land and declares to the world by his acts and conduct that he is the owner of it, and maintains that attitude for the statutory period. *Swift v. Mulkey*, 21 Pac. 871, 872, 17 Or. 532.

"Where the acts done upon a tract of land are such as give unequivocal notice to all persons of a claim to it adverse to the claim of all others, and this is accompanied by an actual possession, exclusive in its character, then limitations will run in favor of the persons so asserting adverse claim and enjoying an exclusive possession from the time such exclusive occupancy began, whether the land be inclosed or not." *Richards v. Smith*, 4 S. W. 571, 573, 67 Tex. 610.

"A subjection of land by a claimant for such use as is ordinarily susceptible to the exclusion of others is an adverse possession, and that subjection may appear by its cultivation or occupation for ordinary husbandry or pasturage. The extent of land to which an adverse possession is claimed must, of course, be properly indicated, so that others may see and respect it, but it need not be shown by an artificial inclosure." *Zellin v. Rogers* (U. S.) 21 Fed. 103, 108.

"To constitute adverse possession of real estate, entry must be made with definite claim of title and of possession continued while the statute runs. It must be visible and notorious, and such as may fairly imply, on notice to the owner, an acquiescence on his part. Proof of occupation and use by the adverse claimant for more than 20 years, when such occupation and use are consistent with the claim of ownership, may raise the presumption that the entry was under a claim of title, exclusive of any other right." *Graeven v. Dieves*, 31 N. W. 914, 915, 68 Wis. 317.

It is not necessary that the land should be inclosed by a fence, or that the same should be resided upon, or that buildings should be erected thereon. It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate and assume control or use, or such as are consistent with the character of the premises in question. It is not necessary that the occupation should be such that a mere stranger passing by the land would know that some one was asserting title to and dominion over it. It is not necessary that the land be cleared or fenced, or any buildings be placed upon it. *Murray v. Hudson*, 32 N. W. 889, 891, 65 Mich. 670.

"Adverse possession" is when there is such an appropriation of land as will inform

the vicinage that it is for the exclusive use and enjoyment of such known person. *Morrison v. Kelly*, 22 Ill. (12 Peck) 609, 624, 74 Am. Dec. 169.

To constitute "adverse possession" so as to bar or limit the right of the true owner thereof to recover them, such lands need not be surrounded by fences or rendered inaccessible by water, but it is sufficient if the possession, occupation, and improvements are open, notorious, and comport with the ordinary management of a farm, though part of the same which composed the woodland belonging to such farm, and used therewith as a wood lot, is not so inclosed. *Rev. St. c. 105, § 10. Adams v. Clapp*, 87 Me. 316, 32 Atl. 911.

To make out an adverse possession in ejectment, the tenant must show a substantial inclosure, an actual occupancy definite, positive, and notorious. It is not enough to make what is called a "possession fence" or "lot fence" merely by felling trees and lapping them one upon another around the land. *Coburn v. Hollis*, 44 Mass. (3 Metc.) 125, 129.

It is manifest that there can be no absolutely unvarying rule with reference to every class of real estate, and that the required occupancy of or dominion over a section of desert lands or of a mining camp, a nonnavigable lake, a prairie, a forest, a fertile farm in a high state of cultivation, or a town lot, would not answer as to a lot in the business center of a populous and thrifty city. Adverse possession of unproductive lands, consisting of barren sand hills cut up by sloughs, is shown by recording the deed under which the occupant claims, cutting all the timber of any value thereon, having the land surveyed and boundary lines grubbed out and staked, going upon the land at intervals, claiming absolute ownership, clearing a small portion, building a brush fence around the portion cleared, employing agents in the neighborhood of the land to look after it, and paying taxes, without proof of actual occupation. *Worthley v. Burbanks*, 45 N. E. 779, 781, 146 Ind. 534.

It is impossible to specify the particular acts which under every condition would constitute "open and visible possession of land." In the nature of things, the right of way of a railway company, within the limits of an incorporated city or village, cannot be inclosed as a lot or farm might be, nor occupied by permanent structures or improvements, but must be left free for approach to the tracks, and for such other purposes as the exigencies and necessities of the railroad company, in the operation and maintenance of the railway, may require; and therefore, if there have been such unequivocal acts of dominion and control over the land as are sufficient to give notice of the claim of ownership, it will amount to open, notorious, and visible possession. *Penn v. Preston* (Pa.) 2

**Rawle, 14.** Where part of a city lot was fenced in by one claiming title to the whole, and the rest of it was covered by a railroad embankment, though the tracks only occupied a small part of the land, the railroad company had actual possession of all of the lot outside the fence. *St. Louis, A. & T. H. R. Co. v. Nugent*, 39 N. E. 263, 265, 152 Ill. 119.

Building on or inclosing the land of another without right is constructive notice to the owner of an adverse claim thereto. *Allden v. Gilmore*, 13 Me. (1 Shep.) 178, 180.

The erection of a small cow pen on a boundary line separating two lots of land and immediately contiguous to the defendant's improvements, an occasional felling of trees, and permitting the cattle to range over the uncultivated land, are not altogether such an assertion to the world of claim of right as against the true owner as to constitute adverse possession. *Royall v. Lisle's Lessee*, 15 Ga. 545, 549, 60 Am. Dec. 712.

Getting rails, boards, shingles, wood, and timber for building houses from a woodland or uninclosed lot are not such acts of ownership as will constitute adverse possession. *Carrol v. Gillion*, 33 Ga. 539, 547.

"Adverse possession" includes a case where the land purchased was measured and monuments of stone erected, and hay cut and stacked on the premises, and furrows for fire guards were ploughed around the stacks, and taxes paid, and an open claim of ownership made. *Dickinson v. Bales*, 61 Pac. 403, 62 Kan. 865.

It is essential to the validity of an "adverse possession" that there shall be an actual entry upon the land of the rightful owner, and an actual, visible possession taken of some part of it. Residence and possession, with cultivation, on adjoining land, with boundaries including the valid title of another, will not give actual possession of the latter, although accompanied by the ordinary use of it as woodlands in connection with that part resided on or cultivated. *Olewine v. Messmore*, 128 Pa. 470, 482, 18 Atl. 495, 496.

A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible, or it must be an actual and continuous occupation of the house, or the cultivation of the inclosed field according to the usages of husbandry. *Shaffer v. Gaynor*, 23 S. E. 154, 155, 117 N. C. 15.

That one planted tobacco on different portions of land for more than the statutory period, the land not being inclosed except for the period of cultivation, did not fall within the possession necessary as a predicate for title. *Hamilton v. Icard*, 23 S. E. 354, 117 N. C. 476.

Acts of notoriety, such as building a fence around the land, entering on it and making improvements, and payment of taxes on the land, are sufficient to constitute adverse possession. *Tourteltotte v. Pearce*, 42 N. W. 915, 917, 27 Neb. 57.

#### Trespass.

A mere trespass by occasional entry on land for the purpose of cutting timber or grass thereon for the full period of limitation is not such "adverse possession" as to confer title thereby. *Barr v. Potter (Ky.)* 57 S. W. 478, 479.

Adverse possession is a hostile holding of real estate which is sufficient to give title thereto. An "adverse possession," such as to prevent the true owner from maintaining trover for trees, timber, or other things severed and taken from it, "should be of such a kind and so long continued as to be clearly distinguished from that which the claimant has while engaged in the mere act of committing the waste or severing and removing the property from the freehold. It should be something different from that which every trespasser has and must have in order to commit the trespass. If it be only the possession enjoyed by the trespasser, and taken and held by him for the very purpose, and that alone, of committing the trespass, it is not an adverse possession within the meaning of the rule that trover will not lie for timber and logs taken from it. *Wadleigh v. Marathon County Bank*, 17 N. W. 814, 817, 58 Wis. 546.

One who merely cut logs upon unoccupied and wild land, it not appearing whether the land was capable of cultivation, or whether the cutting of the trees was for the purpose of occupancy and improvement of the land, or merely for the purpose of stripping it of the timber, was not an "adverse possession" of such land. *Washburn v. Cutter*, 17 Minn. 361, 368 (Gil. 335, 344).

Adverse possession is the enjoyment of land or such estate as lies in grant under such circumstances as indicates that such enjoyment has been commenced and continued under assertion or color of title or right on the part of the possessor, and hence the entry of a stranger and the taking of rents and profits by him is not an adverse possession. *Omaha & Grant Smelting & Refining Co. v. Tabor*, 21 Pac. 925-929, 13 Colo. 41 (citing *Wallace v. Duffield*, 2 Serg. & R. 527, 7 Am. Dec. 660; *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680; *Smith v. Burtis*, 9 Johns. 174).

"It is not necessary that there should be an express claim of title, or that there should be color of title; but when a person disclaims title in himself, or does not claim title, but asserts the right to be in another, it is not such an adverse possession as will



give title under the act of limitations." *Rung v. Shoneberger* (Pa.) 2 Watts, 23, 27, 26 Am. Dec. 95.

### ADVERSE USER.

"Adverse user is nothing more than such a use of the property as the owner himself would exercise; and that when a party in this manner and for the purposes of a way have received no permission from the owner of the soil, and uses the way as the owner would use it, disregarding claims entirely, using it as though he owned the property himself, that is an adverse user." *Blanchard v. Moulton*, 63 Me. 434, 437.

The terms "limitation," "prescription," or "adverse user" may be used interchangeably in setting up an easement of water in the land of another, as they mean substantially the same thing. "Prescription properly applies only to incorporeal hereditaments, and is of the same length of time as limitation by statute; and an adverse user is the same." *Murray v. Scribner*, 43 N. W. 549, 74 Wis. 602.

"Adverse user" is construed by the court in *Ward v. Warren*, 82 N. Y. 265, in speaking of the phrase that the user "must have been with a knowledge and acquiescence of the owner," as opposed to a use which is clandestine and by stealth. And where the evidence showed that a use was the open and constant exercise of the very right which the plaintiffs claimed, and in the absence of opposition and objection, it was sufficient to show that the claim was adverse. *Hey v. Collman*, 79 N. Y. Supp. 778, 779, 78 App. Div. 584.

Where defendant, in building a wall on his lot line, inclosed part of the adjoining lot, and the wall so stood for over 20 years, he acquired title to the strip on which the wall actually stood by "adverse user." *Pearshall v. Westcott*, 60 N. Y. Supp. 816, 818, 45 App. Div. 34.

### ADVERSE VERDICT.

Rev. St. c. 24, § 38, relating to condemnation proceedings for the establishment of highways, provides that a party appealing from the award of the commissioners shall give bond for the payment of costs if the verdict shall be "adverse" to the petitioner. Held, that the word "adverse" in this connection meant that the amount of damages allowed to the petitioner by the selectmen of the town was as great or greater than the amount subsequently allowed by the jury on the appeal. *Hamblin v. Barnstable County Com'rs*, 82 Mass. (16 Gray) 256, 259.

### ADVERSE WITNESS.

"Adverse," as used in 17 & 18 Vict. c. 125, authorizing a party producing a witness

whose testimony is adverse to contradict him by evidence of former contradictory statements made by him, construed as meaning hostile, and not merely unfavorable, and hence a witness cannot be contradicted by showing his former statements, unless he shows hostile mind to the party calling him. *Greenough v. Eccles*, 5 C. B. (N. S.) 786, 801.

### ADVERTISE.

"Advertise" means to give public notice; to announce publicly, especially by a printed notice. One insertion of the advertisement of a tax sale in each calendar week during the period of 30 days immediately preceding the day of sale is sufficient under a city charter declaring that tax sales shall be advertised for 30 days. *Montford v. Allen*, 36 S. E. 305, 306, 111 Ga. 18.

Where a contract by which lands were placed with an agent for sale recited that, if the lands were sold without the instrumentality of the agent, the owner would pay them \$50 in full for all trouble in showing and "advertising" the land, the word "advertising" meant the publication of a notice in a newspaper in the usual way that such matters are advertised, and not the showing of the land to prospective buyers, the word being taken in connection with the subject-matter and conditions. The word "advertise," as defined by Webster, meant "to publish notice of; to publish a written or printed account of"; and Bouvier defines "advertisement" to mean "a notice published in handbills or a newspaper." *Darst v. Doom*, 38 Ill. App. 897, 400.

### ADVERTISEMENT.

"Advertisement," as used in the astray law, requiring the "advertisement" of "astray notices," is to be construed as including not only newspaper publications, but publication by the posting of notices. *Haffner v. Barnard*, 24 N. E. 152, 154, 123 Ind. 429.

"Advertisement," as used in Code 1873, § 880, providing that no irregularity or informality in the "advertisement" of sales for taxes shall affect the legality of the sale, is synonymous with "notice," and hence includes both the publication and the posting. *Davis v. Magoun*, 80 N. W. 423, 430, 109 Iowa, 308.

"Advertisement," as used in an act prohibiting the tearing down of show bills, poster or other "advertisement," is insufficient to cover a constable's notice of sale. The word is not used to apply to anything and everything set up along the highway which may be designated as an "advertisement," but rather the bills and posters giving notice of or advertising public entertainments. *Commonwealth v. Johnson*, 3 Pa. Dist. R. 222, 13 Pa. Co. Ct. R. 543, 544.

A signboard erected at a person's place of business, giving notice that lottery tickets are there for sale, is an advertisement within the meaning of St. 1825, c. 184, prohibiting the advertisement of lottery tickets for sale. *Commonwealth v. Hooper*, 22 Mass. (5 Pick.) 42, 43.

## ADVICE.

"Advice" is optional with the giver; that is, he can advise or remain silent. It is optional with him to whom it is directed; that is, he can accept or decline it. *Commonwealth v. Mercer*, 42 Atl. 525, 526, 190 Pa. 134.

Act April 18, 1878, providing that the recorders of the cities of the first class shall be appointed by the governor by and with the "advice of the senate," construed not to confer the appointing power on the senate, but only gives the senate a supervisory power over the governor's appointments. *Commonwealth v. Lane*, 13 Wkly. Notes Cas. 29, 32.

## ADVISE.

To "advise" is to give advice; to offer an opinion as worthy or expedient to be followed; to counsel. *Webst. Dict.*; *Long v. State*, 36 N. W. 310, 315, 23 Neb. 33, 45.

"Advise," as used in Pen. Code, § 294, providing that any person who advises or causes a woman to take medicine with intent to produce a miscarriage shall be guilty of abortion, construed to mean advice which is acted on by the woman, and not that on which she does not act. *People v. Phelps*, 15 N. Y. Supp. 440, 441, 61 Hun. 115.

The words "counsel, advise, or assist" may be, and frequently are, used to describe the offense of a person who, not actually doing the felonious act, by his will contributes to or procures it to be done, and thereby becomes a principal or accessory. *True v. Commonwealth*, 14 S. W. 684, 685, 90 Ky. 651; *Omer v. Commonwealth*, 25 S. W. 594, 596, 95 Ky. 353.

There are no words in the law that have acquired a more definite and specific meaning than "procure, advise, and assist," as contradistinguished from the actual commission of the crime. The latter is the principal offense; the former only accessory. If a person does no more than procure, advise, or assist he is only an accessory; but if he is present, consenting, aiding, procuring, advising, and assisting, he is a principal, and must be indicted as such. *United States v. Wilson* (U. S.) 28 Fed. Cas. 699, 710.

### As instruct.

Pen. Code, § 1118, providing that, if at any time after the evidence on either side is closed the court deems it insufficient to warrant a conviction, it may "advise" the jury to

acquit the defendant, does not authorize the court to instruct the jury to acquit, since the court cannot direct, but only "advise." *People v. Daniels*, 38 Pac. 720, 721, 105 Cal. 262; *People v. Horn*, 70 Cal. 18, 11 Pac. 470.

### As procure.

"To advise is to give advice to; to offer an opinion, as worthy or expedient to be followed; to counsel"; while "procure" means to bring about, to cause, contrive; and hence an instruction that if defendant requested, "advised," and incited, etc., is unobjectionable under a statute using the term "aid, abet, and procure." *Long v. State*, 36 N. W. 310, 315, 23 Neb. 33.

## ADVISABLE.

That is "advisable" which is expedient, prudent, and proper to be done, and therefore proper to be advised to be done. Its synonyms, according to Webster, Worcester, and the Century Dictionary, are expedient, proper, desirable, prudent, wise, best; and, as used in the act authorizing the dissolution of a savings institution by its manager if deemed advisable, the word "advisable" includes those qualities as applied to the continuance of the corporation, in view of the best interests of the property generally. *Barratt v. Bloomfield Sav. Inst.*, 54 Atl. 543, 549, 64 N. J. Eq. 425.

The act of February 16, 1863, declaring that the board of supervisors may, if deemed "advisable," levy a special tax to pay a judgment against the county, held to be mandatory, and not giving the board discretion in the matter, the decision being based on the construction of "may" as "shall." *Rock Island County v. United States*, 71 U. S. (4 Wall.) 435, 445, 18 L. Ed. 419.

## ADVISEMENT.

"Advisement" is the act of a judge or justice in taking time to consider all his judgment before rendering the same. A judge may take such time as is necessary to arrive at a decision, but must give the parties notice when he will give judgment. If delay in rendering judgment arises from improper motives or is unnecessarily protracted, a party may compel the entry of judgment. *Clark v. Read*, 5 N. J. Law (2 South.) 486, 487.

## ADVOUTRY.

A term used in old statutes and authors to mean the crime of adultery between parties both of whom were married. *Hunter v. United States* (Wis.) 1 Pin. 91, 92, 39 Am. Dec. 277.

## ADVOUTRER.

A word now obsolete, but signifying the same as our word "adulterer." *Beatty v.*

Richardson, 34 S. E. 73, 75, 56 S. C. 173, 46 L. R. A. 517.

## ADVOWSON.

In modern times and in ordinary language the term "advowson" has been used to mean the perpetual right of presentation to a church or ecclesiastical benefice. Lord Coke, however, in 1 Inst. p. 17 B., defines it thus: "Advowson, advocatio, signifying an advowing or taking into protection, is as much as jus patronatus. The patronage or jus patronatus in this case was not certainly to present to a church or an ecclesiastical benefice, but in every respect, other than that of having the cure of souls attached to the office, it exactly resembles, if it be not identical with, an ecclesiastical benefice; and accordingly in 8 Edw. III, 3 Ass. Pl. 29, 31, the right of nomination to the guardianship of a hospital is called an advowson." Attorney General v. Chaplains of Ewelme Almshouse, 21 Eng. Law & Eq. 409, 418.

In what is known at the common law as the right of advowson or presentation to an ecclesiastical benefice, and of institution, and induction, the first belongs to the founder or patron of the church; the second to the bishop, which, according to Blackstone, "is a kind of investiture of the spiritual part of the benefice"; and the last to the churchwardens and vestrymen, which is a giving of the possession or an investiture of the temporal part, as "institution" is of the spiritual. Humbert v. St. Stephens' Church, 1 Edw. Ch. 308, 315.

## ÆQUUS.

"Æquus" means even, equal; and such is its meaning in a will which, after disposing of half of testator's estate, provided the other half should be distributed "ex æquus" among the other bequests and legacies. Archer v. Morris, 47 Atl. 275, 276, 61 N. J. Eq. 152.

## AEROLITE.

An aerolite is a substance in the nature of a stone falling from the heavens, which attaches to and becomes a part of the real estate on which it falls. Goddard v. Winchell, 52 N. W. 1124, 86 Iowa, 71, 17 L. R. A. 788, 41 Am. St. Rep. 481.

## AFFAIRS.

See "Fiscal Affairs"; "Municipal Affairs"; "Prudential Affairs."

"Affairs" is well defined to be business; something to be transacted; matter; con-

cern. Public affairs are matters relating to government; and an act requiring school directors to assess a tax to repay certain money due by the district deals with the affairs of the district, as it imposes a specific business on the district which it was not chargeable with before. It is a matter which concerns every person in the district who was thereby made subject to additional taxation. Montgomery v. Commonwealth, 91 Pa. 125, 133.

### Of city.

A law fixing the excise tax on the liquor traffic is not a law relating to the property, affairs, or government of cities, within the meaning of the words as used in the Constitution. People v. Murray, 44 N. E. 146, 150, 149 N. Y. 367, 32 L. R. A. 344.

### Of county.

See "County Affairs."

### Of railroad.

"Affairs," as used in Act 1869, § 5, providing that when a railroad company which the state has aided has paid the debt the state treasurer shall withdraw the receiver appointed by him from the management of its "affairs," is a word of large import. A receiver having the management of the affairs of a railroad company must necessarily have the control and management of its road. Tompkins v. Little Rock & Ft. & S. R. Co. (U. S.) 15 Fed. 6, 13.

### Of testator.

"Affairs," as used in the introductory clause of a will which stated that testator desired to have his "affairs" properly arranged, refers to the condition and management of property, and does not signify property itself, so as to show an intention to dispose by will of all of testator's property, including land. Bragaw v. Bolles, 25 Atl. 947, 950, 51 N. J. Eq. (6 Dick.) 84.

## AFFECT.

In Act Mont. March 4, 1897, § 25, relating to building and loan associations, and providing that, except as to taxation, this act shall not "affect" any association heretofore organized under the laws of Montana, "affect" is used in the sense of operate, act upon, or concern. Home Building & Loan Ass'n v. Nolan, 53 Pac. 738, 740, 21 Mont. 205.

Within the provisions of an act providing that agreements for the sale of land, duly acknowledged by the wife, shall be good and effectual to convey or "affect" the lands or her interest therein thereby intended to be conveyed or "affected," it was held a familiar way to affect the interest of a person in land to contract to convey it. Goldstein v. Curtis, 52 Atl. 218, 221, 63 N. J. Eq. 454.

**As act on injuriously.**

In Act June 13, 1812, § 1, relating to rights of property in the territory acquired from France by treaty of April 30, 1803, and providing that the rights, title, and claims to certain lots and commons in, adjoining, and belonging to towns and villages in the territory of Missouri are confirmed to the inhabitants according to their several rights or rights of common thereto, provided that nothing herein contained shall be construed to "affect" the rights of any persons claiming the same lands or any part thereof, whose claims have been confirmed by the board of commons for adjusting and settling claims to lands in the said territory, "affect" should be construed as having been used in the sense of acting injuriously upon persons and things. Such interpretation accords with the reason and manifest intent of the proviso, unsettles no confirmed title, and secures to the inhabitant of the village, according to their respective rights, the protection which Congress thought proper to afford them. *Ryan v. Carter*, 93 U. S. 78, 84, 23 L. Ed. 807.

"Affect" is often used in the sense of acting injuriously upon persons; and hence where an act provides that nothing contained therein should be construed to "affect" the rights of any person, etc., it means that the section must not be so construed as to prejudice or injuriously affect such rights. *Baird v. St. Louis Hospital Ass'n (Mo.)* 21 S. W. 11, 13; *Id.*, 116 Mo. 419, 427, 22 S. W. 726.

"Affect," as used in an act providing that it should not "affect or impair the rights," etc., means injuriously affect. Undoubtedly a party may be beneficially affected as well as injuriously affected, and the word "affect," standing alone, might be said to be ambiguous, but its meaning is clearly the same as impair or affect injuriously. *Tyler v. Wells*, 2 Mo. App. 526, 538.

Const. art. 19, § 27, providing that nothing in the constitution shall be construed to prevent the General Assembly from authorizing the assessment of lands for local improvements in towns and cities where such improvements are based on the consent of the majority of the adjoining property holders whose property is "affected" thereby, means any property adjoining or near the improvement which is physically affected, or the value of which is materially affected directly by the improvement to a degree in excess of the effect on the property in the city generally. *City of Little Rock v. Katzenstein*, 12 S. W. 198, 52 Ark. 107.

"Affected," as applied to abutting property on the improvement of a street, relates to property which is burdened with the expense of the grading. *Stowell v. City of Milwaukee*, 31 Wis. 523, 526.

**As change.**

The word "affect" means to act upon; to produce an effect or change upon. It is so used in a statute providing that nothing therein contained shall be so construed as to affect any appointments theretofore made under certain other acts. *Canniff v. City of New York*, 4 E. D. Smith, 430, 439.

"Affect" means to act upon; to change; and hence Acts 25th Gen. Assem. c. 62, known as the "Mulct Law," is not applicable to cities acting under special charters, as it changes the method of control of sale of intoxicating liquors, and is within the provision of Acts 16th Gen. Assem. c. 116, § 23, providing that no general law shall be construed to "affect" the charters or laws of cities organized under special charters. *Clark v. Riddle*, 70 N. W. 207, 211, 101 Iowa, 270.

"To affect does not mean to impair, but to work a change upon. A right is affected if it is either enlarged or abridged. This is the meaning of the word in Code 1873, § 50, providing that this repeal of existing statutes shall not 'affect' any act done, or any right accruing, or which may have accrued or been established, nor any suit or proceedings had or commenced in a civil case before the time when such repeal takes effect, and therefore the statute does not change pre-existing rights." *Holland v. Dickerson*, 41 Iowa, 367, 373.

In Bankr. Act July 1, 1898, § 6, providing that such act "shall not affect" the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition, etc., "shall not affect" means shall not enlarge or diminish. *Richardson v. Woodward (U. S.)* 104 Fed. 873, 874, 44 C. O. A. 235.

**As promote.**

"Affect," as used in Code, § 400, providing that no person who, previous to his examination, had an interest in the subject-matter in litigation, however it may have been transferred to a party to the action, shall be examined as to communication between the witness and a person deceased against a person defending as assignee, when such interest may be "affected" by the judgment, means to promote. *Westbury v. Simmons*, 35 S. E. 764, 765, 57 S. E. 467.

**AFFECTING.****Affecting ambassadors, etc.**

Const. art. 3, § 2, providing that in all cases "affecting ambassadors, other public ministers and consuls," the Supreme Court shall have original jurisdiction, cannot be construed to apply to a case of an indictment under Crimes Act 1790, c. 36, § 39, for an infraction of the law of nations by offering violence to the person of a foreign

minister, since the case is one in which the minister has no concern in the event of the prosecution or in the costs attendant thereon. *United States v. Ortega*, 24 U. S. (11 Wheat.) 467, 468, 6 L. Ed. 521.

#### **Affecting character.**

An action for breach of contract of marriage is an action "affecting the character of the plaintiff," within the meaning of Mill. & V. Code, § 3560, providing that actions for wrongs "affecting the character of plaintiff" shall abate by the death of either party. *Weeks v. Mays*, 10 S. W. 771, 772, 87 Tenn. (3 Pickle) 442, 3 L. R. A. 212.

#### **Affecting public rights.**

See "Public Right."

#### **Affecting a substantial right.**

See "Substantial Right."

#### **Affecting title.**

An action brought to set aside a deed and to compel a conveyance is an "action affecting the title of real property or an interest therein." *Warren v. Wilder*, 23 N. Y. St. Rep. 108, 111.

Not every action which relates to real property or in some way affects it is an "action affecting the title to real property or an interest therein"; as, for instance, actions for an injury to the property, or to foreclose a lien thereon, though affecting the property, do not affect the title thereto. *Nichols v. Voorhis*, 74 N. Y. 28, 29.

#### **AFFECTION OF THE LIVER.**

An application for a life policy required the insured to answer whether he had ever had certain diseases, among which was included "affection of liver." Held, that it was difficult to define precisely what was meant by "affection of liver"; that ordinarily there would be understood from such term, some chronic disease of the organ; but that it should be construed to mean some affection of the liver amounting to a disease—that is, of a character so well defined and marked as to materially derange, for a time, the functions of the organ. *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 5 Sup. Ct. 119, 123, 112 U. S. 250, 28 L. Ed. 708; *Metropolitan Life Ins. Co. v. Rutherford*, 30 S. E. 383, 385, 95 Va. 773.

It does not include every accidental disorder or ailment which lasted only for a brief period, and was unattended by substantial injury or inconvenience or prolonged suffering. *Metropolitan Life Ins. Co. v. Rutherford*, 30 S. E. 383, 385, 95 Va. 773.

#### **AFFIANT.**

As witness, see "Witness."

#### **AFFIDAVIT.**

See "False Affidavit"; "Supplemental Affidavit"; "Verified by Affidavit."

An affidavit is "a statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath." "An affidavit is a voluntary *ex parte* statement, formally reduced to writing, and sworn to or affirmed before some officer authorized by law to take it." "An affidavit is simply a declaration on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths." *Cox v. Stern*, 48 N. E. 906, 170 Ill. 442, 62 Am. St. Rep. 385 (citing *Harris v. Lester*, 80 Ill. 307); *Morris v. State*, 2 Tex. App. 502, 503; *Shelton v. Berry*, 19 Tex. 154, 155, 70 Am. Dec. 326; *Gill v. Ward*, 23 Ark. 16, 17; *Metcalf v. Prescott*, 25 Pac. 1037, 1039, 10 Mont. 283; *Davidson v. Bordeaux*, 38 Pac. 1075, 1076, 15 Mont. 245; *Williams v. Stevenson*, 2 N. E. 728, 731, 103 Ind. 243; *Blyth & Fargo Co. v. Swensen*, 51 Pac. 873, 874, 7 Wyo. 303; *Norton v. Hauge*, 47 Minn. 405, 406, 50 N. W. 368; *Barhydt v. Alexander*, 59 Mo. App. 188-192.

An "affidavit" is defined by Blackstone to be a voluntary oath before some judge or officer of the court to evince the truth of certain facts. *Shelton v. Berry*, 19 Tex. 154, 155, 70 Am. Dec. 326.

An "affidavit" is a written declaration, under oath, made without notice to the adverse party. Rev. St. Okl. 1903, § 4528; Rev. Codes N. D. 1899, § 5666; Code Civ. Proc. S. D. 1903, § 504; *Cobbey's Ann. St. Neb.* 1903, § 1352; Rev. St. Wyo. 1899, § 3704; Gen. St. Kan. 1901, § 4789; Ann. St. Ind. T. 1899, § 2026; Code Civ. Proc. Cal. 1903, § 2003; *Bates' Ann. St. Ohio* 1904, § 5262; B. & C. Comp. Or. 1901, § 815.

The terms "oath" and "affidavit" include every mode authorized by law of attesting the truth of that which is stated. *Laws N. Y. 1892*, c. 677, § 14.

To make an "affidavit" to a thing is to testify to it upon oath, in writing. *William v. Stevenson*, 2 N. E. 728, 731, 103 Ind. 243.

An "affidavit" is a voluntary *ex parte* statement, formally reduced to writing, and sworn to or affirmed before some officer authorized to take it. The essential requisites are, apart from the title, that there shall be an oath administered by an officer authorized by law to administer it, and that what the affiant states under such oath shall be reduced to writing before such officer. *Lutz v. Kinney*, 46 Pac. 257, 258, 28 Nev. 279.

An affidavit is an oath in writing signed by the party deposing, sworn before and attested by one who had authority to administer the same, and the component parts of an affidavit are (1) the written oath; (2) the sig-

nature of the deponent; (3) the attestation or administering of the oath by the officer who had administered it; and, if any of these elements are lacking, the affidavit is defective. *Hargadine v. Van Horn*, 72 Mo. 370.

An affidavit is a written declaration under oath, made without notice to the adverse party. To make such a document legal and authoritative in a court of justice, it takes both the affiant and an officer authorized to administer the oath acting together. And the oath must be either administered by the officer to the affiant, or asseveration to the truth of the matter contained in the affidavit by the party making it to the officer, with his signature. Without a direct administration of the oath there can be no affidavit under the statute. *State v. Finn*, 52 Pac. 756, 757, 32 Or. 519.

An affidavit reduced to writing, and sworn and subscribed to before an officer, is not invalid because the affiant's name does not appear in the body thereof. *Davidson v. Bordeaux*, 38 Pac. 1075, 1076, 15 Mont. 245.

An "affidavit" is a declaration under oath, and where the verification by the affiant is only "according to the best of his knowledge, information, and belief, true in substance and in fact," it is not sufficient. *City of Atchison v. Bartholow*, 4 Kan. 124, 139.

"Affidavits" are usually made to facts, not to opinions; to actual expenditures, not to estimates of them. So that, under an insurance policy requiring the insured to attach to the preliminary proofs of loss a duly verified certificate of a builder as to the actual cash value of the building immediately before the fire, such certificate need not be sworn to, such value being the expression of an opinion. *Summerfield v. Phoenix Assur. Co. (U. S.)* 65 Fed. 292, 296.

A professional statement of a counsel, being received by a court, is to be regarded as an affidavit. *Rice v. Griffith*, 9 Iowa, 539, 540.

"It is a settled rule of practice in the English court that on a motion for an information or any affidavit to hold to bail the affidavit must not be entitled, and if it be entitled it cannot be read. The reason assigned is that there is at the time no cause pending in the court, and an indictment for perjury in making such an affidavit must fail, as it could not be shown that such a case existed in the court in which the affidavit was made." *Haight v. Turner*, 2 Johns. 371, 372.

#### Caption or venue, necessity of.

An "affidavit" is merely a declaration on oath and in writing, sworn to by a party before some person who has authority under the laws to administer oaths. Its weight does not depend on the fact whether it is en-

titled to any cause, or in a particular manner, nor is any caption whatever necessary. *Harris v. Lester*, 80 Ill. 307, 311.

Under Comp. Laws, §§ 5278, 5279, defining an "affidavit" as being a written declaration under oath made without notice to the adverse party, a written statement under oath having a jurat and seal attached thereto is sufficient though a venue is not shown. *State v. Henning*, 54 N. W. 536, 537, 3 S. D. 492.

The omission of the venue makes an affidavit prima facie a nullity, but where the affidavit was in fact sworn to within the jurisdiction, as appears from an affidavit used to procure an amendment of the notary who administered the oath, the omission did not invalidate the oath, nor did it render the affidavit a nullity when it appeared that the oath was duly administered. *Fisher v. Bloomberg*, 77 N. Y. Supp. 541, 542, 74 App. Div. 368.

An "affidavit" is simply a declaration on oath in writing, sworn to by a party before some person who has authority to administer oaths. It does not depend on the facts whether it is entitled in any cause or in any particular way. Without any caption it is nevertheless an affidavit. A declaration, therefore, sworn to by defendant before a person who has authority to administer oaths, is an "affidavit," within the meaning of the Illinois practice act, requiring an affidavit of merits to be filed with a plea in certain cases, and it is not necessary that it should have a caption or be entitled in any cause or particular way. It is sufficient if it can be identified as having been filed in the cause *Hays v. Loomis*, 84 Ill. 18, 19.

#### Complaint or answer.

As the term "affidavit" is used in the United States statute authorizing extradition on copy of indictment or affidavit made before a magistrate charging the commission of a crime specified, which must accompany the requisition, it does not mean the same thing as "complaint," and therefore a requisition accompanied by a paper styled a "complaint" against the person sought to be extradited is not sufficient. *State v. Richardson*, 24 N. W. 354, 355, 34 Minn. 115, 117.

Code Civ. Proc. § 290, declares that an injunction may be granted at the time of the commencement of the action or at any time afterwards, on its appearing satisfactorily by the "affidavit" of the plaintiff that sufficient ground exists therefor. Held, that where plaintiff states all the facts necessary to lay the foundation for an injunction, and swears to the complaint positively, the complaint is an affidavit, within section 290. *Blatchford v. New York & N. H. R. Co.*, 7 Abb. Prac. 322, 323.

The word "affidavit," as used in Code, providing for the granting of an injunction where the right to do so depends upon facts established by affidavits, includes a verified pleading in an action or a verified petition or answer in a special proceeding. *Clark v. Herbert Booth King & Bro. Pub. Co.*, 57 N. Y. Supp. 975, 976, 40 App. Div. 405.

The term "affidavit," within the meaning of Comp. Laws, § 5278, providing that an affidavit is a written declaration under oath, made without notice to the adverse party, includes a verified complaint showing a cause of action against a defendant; and therefore it is sufficient, under section 4900, authorizing publication where it appears by affidavit that defendant cannot be found, and that a cause of action exists against him. *Woods v. Poland*, 84 N. W. 214, 217, 14 S. D. 44.

The term "affidavit," as used in Laws 1833, c. 271, § 8, providing that in all actions at law a certificate of the notary, under his hand and seal, on the presentment by him of any promissory note for payment, and of the protest thereof for nonpayment, shall be presumptive evidence of the facts contained in the certificate, unless the defendant shall annex to his plea an affidavit denying the fact of having received notice of nonpayment of said note, means an affidavit separate and distinct from the answer, and attached thereto, and the sworn answer cannot be treated as being such an affidavit. *Gawtry v. Doane*, 51 N. Y. 84, 89.

#### **Date, necessity of.**

A date is not essential to the affidavit, and if a mistake has been made in the date it is competent to show it by parol. *Bell v. City of Spokane*, 71 Pac. 31, 32, 30 Wash. 508.

#### **Deposition distinguished.**

The word "deposition" is sometimes used both in common parlance and legislative enactment as synonymous with "affidavit" or "oath," and is thus defined by Webster. *State v. Dayton*, 23 N. J. Law (3 Zab.) 49, 54, 53 Am. Dec. 270.

An "affidavit" is a written declaration under oath, made without notice to the adverse party. Civ. Code Proc. § 3321. A "deposition" is a written declaration on oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine. Both affidavit and deposition are declarations under oath. And a distinction recognized by the court between the two is simply for the purpose of preserving the right of cross-examination. So that in a probate proceeding, where there is no adverse party, an affidavit will be treated as a deposition. In *re Liter's Estate*, 48 Pac. 753, 755, 19 Mont. 474.

"An 'affidavit' is the mere voluntary act of the party making the oath, and may be,

and generally is, taken without the cognizance of the one against whom it is to be used." It is distinguished from a deposition in that the latter "is given by a witness under interrogatives, oral or written, and usually written down by an official person." *Stimpson v. Brooks* (U. S.) 23 Fed. Cas. 100.

An "affidavit" is a voluntary ex parte statement formally reduced to writing, and sworn to or affirmed before some officer authorized by law to take it. The distinction between an affidavit and a deposition is that the former is ex parte and voluntary, and the latter is made after notice, and is compulsory. If the witness is subpoenaed, sworn, and required to answer, his evidence, reduced to writing, is his deposition. *Crenshaw v. Miller* (U. S.) 111 Fed. 450, 451.

An "affidavit" is a written declaration under oath, without notice to the adverse party; and hence includes a deposition taken under oath, and without notice to the adverse party. *Hanna v. Barrett*, 18 Pac. 497, 39 Kan. 446.

#### **As evidence or testimony.**

An "affidavit" is a written declaration under oath, made without notice to the adverse party. It is one of the forms of taking or presenting testimony. *First Nat. Bank v. Swan*, 23 Pac. 743-746, 3 Wyo. 356.

An "affidavit" is a voluntary ex parte declaration, sworn to before some officer, and can only be used to verify pleadings, prove service of notices or other process in support of motions, or to obtain provisional or other remedies, and in chancery proceedings, unless specially authorized by law, and does not constitute evidence. *Watkins v. Grieser*, 66 Pac. 332, 334, 11 Okl. 302.

"Affidavit" is defined to be a statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath or affirmation. It differs from a deposition, in this: that in the latter the opposed party has an opportunity to cross-examine the witness, whereas an affidavit is always taken ex parte. An affidavit includes the oath, and may show what facts affiant swore to, and thus be available as an oath, although unavailable as an affidavit. By general practice affidavits are allowable to present evidence upon the hearing of a motion, although the motion may involve the very merits of the action, but they are not liable to present evidence on the trial of an issue raised by a witness. Here the witness must be produced before the adverse party. According to this definition of the word "affidavit" it may contain evidence, and, if evidence, then it is in a sense testimony, because it is a statement of facts witnessed by the affiant, and testimony is defined as a solemn declaration or affirmation for the purpose of establishing or proving some fact.

Hence a juror who has formed an opinion of the guilt or innocence of the defendant, based on reading an affidavit of the witness to the transaction, is within the criminal code, which renders incompetent jurors who have formed or expressed opinions based on conversations with witnesses to the transaction or reading their testimony or hearing them testify. *Woods v. State*, 33 N. E. 901, 903, 134 Ind. 35.

#### **Jurat as part of.**

A jurat is that part of an affidavit where the officer certifies that it was sworn to before him. It is not the affidavit. *Theobald v. Chicago, M. & St. P. Ry. Co.*, 75 Ill. App. 208, 213.

An "affidavit" is simply the written declaration on oath, in writing, sworn to by the declarant before a person who has authority to administer oaths. The jurat certificate is no part of the oath or affidavit, but simply evidence that the oath was made or the affidavit was sworn to. *Bantley v. Finney*, 62 N. W. 213, 215, 43 Neb. 794; *Williams v. Stevenson*, 2 N. E. 728, 731, 103 Ind. 243; *Cox v. Stern*, 48 N. E. 906, 170 Ill. 442, 62 Am. St. Rep. 385; *Turner v. St. John*, 78 N. W. 340, 346, 8 N. D. 245. So that under a statute requiring a claim for lien to be verified by affidavit the affidavit is sufficient, though in place of the jurat there is attached a regular form of acknowledgment. *Turner v. St. John*, 78 N. W. 340, 346, 8 N. D. 245.

To entitle an affidavit to be read in court, the fact that it was sworn to by the party whose oath it purports to be must be certified by the officer before whom it was taken, which certificate is commonly called a "jurat," and must be signed by such officer. This certificate, however, is no part of the affidavit. *Garrard v. Hitsman*, 16 N. J. Law (1 Har.) 124, 125.

An "affidavit" is defined by Webster to be a sworn statement in writing. Technically considered, the word is doubtless broad enough to include the jurat or certificate of the officer before whom the oath is taken. In common acceptance, however, it has the more restricted meaning, and refers to those statements sworn to and subscribed by the affiant, but does not include the notarial certificate. And this use in such sense in Rev. St. § 4746, provides for the punishment of every person who knowingly or willfully in any wise procures or makes a presentation of any false or fraudulent affidavit concerning a claim for a pension, and the fact that the jurat of the notary attached contains a false statement does not render it a false affidavit. *United States v. Glasener* (U. S.) 81 Fed. 566, 568.

A paper stating grounds of an attachment, but which did not show on its face that plaintiff signed it before an officer authorized

to take oaths, and which was not signed by such officer, is not an "affidavit," within Rev. St. § 2517, requiring an affidavit before a warrant of attachment can issue. *Doty v. Boyd*, 24 S. E. 59, 60, 46 S. C. 39.

An "affidavit" is an oath in writing, sworn before and attested by one who has authority to administer the same; hence, if the jurat is not signed, that which purports to be an affidavit is a mere nullity. *Knapp v. Duclo*, 1 Mich. N. P. 189; *Morris v. State*, 2 Tex. App. 502, 503.

#### **As an oath.**

Rev. St. c. 127, § 47, provides that in trials before a justice of the peace, if the defendant shall appear and "make oath" that, from prejudice or other cause, he believes the justice will not decide impartially in the matter, the justice shall transfer the cause to another justice. Held, that in this connection the word "oath" had the same meaning as "affidavit," since an affidavit includes the oath, and may show what facts the affiant swore to, and is therefore available as an oath within the statute, though it might not contain all the requisites of an affidavit. *Burns v. Doyle*, 28 Wis. 460, 463.

An "affidavit" is an oath reduced to writing, and attested by him who has authority to administer the same. So that the statute giving notaries the power to take oaths in all cases is sufficiently broad to cover affidavits. *Walker v. People*, 45 Pac. 388, 389, 22 Colo. 415.

An "affidavit" is one method of taking an oath. *Metcalf v. Prescott*, 10 Mont. 283, 294, 25 Pac. 1037, 1039.

An "affidavit" includes the oath, and may show what facts affiant swore to, and thus be available as an oath, although unavailable as an affidavit. *Woods v. State*, 33 N. E. 901, 903, 134 Ind. 35.

An "affidavit" is a written declaration under "oath." *City of Atchison v. Bartholow*, 4 Kan. 124. An "oath" is a declaration or promise made by calling on God to witness what is said. Hence an order granting an execution against the person of defendant is not void because it recites that it was issued on oath, in place of affidavit, the oath being in that case a written statement. In re *Heath*, 19 Pac. 926, 927, 40 Kan. 333.

An affidavit is defined to be a formal written or printed voluntary ex parte statement, sworn or affirmed to before an officer authorized to take it, to be used in legal proceedings. Unless a statute or rule of court otherwise require, any one authorized to administer an oath may take an affidavit. An affidavit taken before a consular agent of the United States is an affidavit, under Code, § 158, providing that proof of service outside of the state shall be by affidavit. *Marine*



**Wharf & Storage Co. v. Parsons**, 26 S. E. 956, 966, 49 S. C. 136.

### **Petition distinguished.**

Under Dawson's Code, § 334, requiring a "petition and affidavit" to be filed in mandamus proceedings, a single paper styled a "petition and affidavit" is sufficient to satisfy the requirements of the statute, since the expression "petition and affidavit" does not necessarily mean two separate papers. **Golden Canal Co. v. Bright**, 6 Pac. 142, 149, 8 Colo. 144.

An affidavit is a written declaration under oath, made without notice to the opposite party. In all affidavits and depositions the witness must be made to speak in the first person. The word "petition," when used in the statute, is generally understood to mean a written application addressed to a court or judge, praying for the exercise of some judicial power, or to a public officer, requesting the performance of some duty enjoined upon him by law, or the exercise of some discretion with which he is vested. While there is a distinction between an affidavit and a petition, yet where the petition alleges sufficient facts, and is duly verified, it will be sufficient as an affidavit, under Laws 1898, p. 34, authorizing executors and administrators, with the consent of the county court, to make mortgage loans on estate real property when it is shown by affidavit that the money can be procured for the same or else a higher rate of interest than that already paid. **Lawrey v. Sterling**, 69 Pac. 460, 463, 41 Or. 518.

### **Signature, necessity of.**

An affidavit is an oath in writing sworn to and attested by the deposing party before one who has authority to administer an oath, and it is not absolutely essential, where there is no statute or rule of court requiring it, that the deposing party should sign the writing. **Crist v. Parks**, 19 Tex. 234, 235. To the same effect, **Shelton v. Berry**, 19 Tex. 154, 155, 70 Am. Dec. 326; **Alford's Adm'rs v. Cochrane**, 7 Tex. 485, 488; **Watts v. Womack**, 44 Ala. 605, 607; **Bates v. Robinson**, 8 Iowa, 318, 320; **Norton v. Hauge**, 47 Minn. 405, 406, 50 N. W. 368.

The signing or subscribing of the name of the affiant to the writing is not generally essential to its validity. It must be certified by the officer before whom the oath is taken. **Alford v. McCormac**, 90 N. C. 151. In the absence of statute requiring the affidavit to a chattel mortgage to be signed by the affiant, the mortgage is sufficient without such signature. **Lutz v. Kinney**, 46 Pac. 257, 258, 23 Nev. 279.

An affidavit is "a statement of fact under oath, reduced to writing, certified to by the officer before whom the same is made, and usually, though not necessarily, unless re-

quired by statute, signed by the affiant." The sworn testimony of witnesses reduced to writing by the official stenographer are sufficient affidavits to support a motion for change of venue. **State v. Sullivan**, 17 S. E. 865, 868, 39 S. C. 400.

The word "affidavit," as used in Rev. St. art. 2072, providing that executors and administrators shall allow no claim unless accompanied by an "affidavit" of its correctness, includes the signature of the affiant, the decisions having defined an affidavit as a voluntary oath before some judge or officer of the court to evince the truth of certain facts, including the signature. **Anderson v. Cochran**, 57 S. W. 29, 30, 93 Tex. 583.

Code, § 3598, providing that the basis of proceedings to obtain a writ of error is an affidavit, means a written declaration, under oath, signed by the affiant, and an affidavit not signed by the affiant is not sufficient. **Crenshaw v. Taylor**, 30 N. W. 647, 70 Iowa, 386.

A paper described and referred to in an attachment proceeding as an "affidavit," on which the attachment issued, but not signed by any one, is no affidavit. **Hargadine v. Van Horn**, 72 Mo. 370.

"It is necessary that affiant should sign the affidavit. He must make it; that is, he must swear to the facts stated, and they must be in writing. It is then his affidavit. And, as evidence that it was sworn by the party whose oath it purports to be, it must be certified by the officer before whom it was taken, which certificate is commonly called the 'jurat,' and must be signed by the officer." While it is true that Bacon defines an affidavit to be "an oath in writing signed by the party deposing, sworn before and attested by him who hath authority to administer the same" (1 Bac. Abr. tit. "Affidavit"), "this definition was probably founded on the practice under rules of court in England, and, though it is better practice that every officer before whom an affidavit is made should require the party sworn to subscribe his name to the body of the affidavit, the omission of the affiant's signature does not affect the validity of the affidavit." **Gill v. Ward**, 23 Ark. 16, 17; **Garrard v. Hitsman**, 16 N. J. Law (1 Har.) 124, 125.

An affidavit has been defined to be an oath in writing, signed by the party deposing, and sworn to before an officer authorized to put an oath. But the Supreme Court has held that the writing is an affidavit in law, though not signed by the deponent, if his name appears in the body of it, and it be duly sworn to. **Haff v. Spicer**, 3 Calnes, 190; **Millius v. Shafer**, 3 Denio, 60. Chancellor Walworth differed with the Supreme Court, and afterward held that an affidavit must be subscribed at the foot of it. **People v. Sutherland**, 81 N. Y. 1, 7 (citing **Hathaway v. Scott**, 11 Paige, 173).

An affidavit must be a writing, and must in some way purport to contain a statement or declaration of the person sworn or purporting to have been sworn. Thus, an instrument reciting that plaintiff, being sworn, deposes that defendants are indebted to plaintiff, and signed in the name of plaintiff, by "F.," managing agent, is not an affidavit of the plaintiff or an agent. *Blyth & Fargo Co. v. Swensen*, 51 Pac. 873, 874, 7 Wyo. 308.

#### Writing, necessity of.

The expression "writing and affidavit," while it may mean two different documents, may also properly signify but one, and thus mean a writing called an affidavit. *United States v. Corbin* (U. S.) 11 Fed. 238, 239.

The word "affidavit," *ex vi termini*, means an oath reduced to writing. Thus, under a statute requiring an application for change of venue to be based on affidavits, oral evidence cannot be introduced. *State v. Headrick*, 51 S. W. 99, 101, 149 Mo. 896.

An affidavit is a sworn statement in writing, and there is no such thing as an unwritten affidavit. *Windley v. Bradway*, 77 N. C. 333, 334.

The word "affidavit," as used in the Revised Code, relating to bail, and providing that in certain personal actions it shall be lawful for any judge of the general court upon proper affidavit to direct bail to be taken, etc., imports an oath in writing. *Hawkins v. Gibson* (Va.) 1 Leigh, 478, 480.

"Affidavit" is not an ambiguous word. It signifies a written attestation or asseveration of the truth, in contradistinction to "oath," which is a mere oral attestation. *Black v. Cochran*, 21 Pa. Co. Ct. R. 326, 327.

The term "affidavit," as used in 2 Rev. St. (3d Ed.) p. 338, § 84, providing that the proof required to obtain an attachment for a witness in any suit before a justice of the peace may be made by affidavit of the party applying therefor, is to be construed to be used in its popular sense. The words "oath," "deposition," "testimony," and "affidavit," when used in reference to legal proceedings, convey to the unprofessional ear the same meaning as do the verbs "to swear," "to make oath," "to depose," "to testify," "to make affidavit." Hence the affidavit need not be in writing, but may be oral. *Baker v. Williams*, 12 Barb. 527, 530.

#### Verified pleading included.

The word "affidavit" includes a verified pleading in an action, or a verified petition or answer in a special proceeding. Code Civ. Proc. N. Y. 1899, § 3343, subd. 11.

#### AFFIDAVIT OF DEPOSIT.

An affidavit of deposit is the promise of a bank issuing it to pay money either on de-

mand or at a fixed time. *State v. Hill*, 47 Neb. 456, 532, 66 N. W. 541.

#### AFFIDAVIT OF MERITS.

An affidavit of merits, within Code, § 2871, requiring a party in default to file an affidavit of merits in order to have the judgment set aside, is a setting out and showing of facts constituting the claim alleged to be meritorious, and an affidavit that one has a meritorious defense is not sufficient. *Palmer v. Rogers*, 80 N. W. 645, 70 Iowa, 381.

#### AFFILIATED SOCIETIES.

Affiliated societies are local societies connected with the central society or with each other. The relative bodies should continue to exist, since one body cannot be said to be connected with itself, and hence affiliation excludes any relation involving an extinguishment of any of the affiliated bodies. *Allison v. Smith*, 16 Mich. 405, 433.

#### AFFINITY.

The only kind of affinity known to the Roman law is that which exists between one of the parties joined by marriage and the relations of the other; and this alone, properly speaking, is affinity. *Poydras v. Livingston* (La.) 5 Mart. (O. S.) 292, 295.

"Affinity" is the tie which arises from marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband. *Tegarden v. Phillips* (Ind.) 39 N. E. 212, 213; *State v. Wall*, 26 South. 1020, 1021, 41 Fla. 463; *Paddock v. Wells* (N. Y.) 2 Barb. Ch. 331, 333; *Solinger v. Earle*, 45 N. Y. Super. Ct. (13 Jones & S.) 80, 84; *Ex parte Harris*, 7 South. 1, 2, 26 Fla. 77, 6 L. R. A. 713, 23 Am. St. Rep. 548; *Kirby v. State*, 8 South. 110, 111, 89 Ala. 63; *Blodget v. Brinsmaid*, 9 Vt. 27, 30; *Chinn v. State*, 26 N. E. 986, 987, 47 Ohio St. 575, 11 L. R. A. 630; *Doyle v. Commonwealth*, 40 S. E. 925, 926, 100 Va. 808; *Farmers' Loan & Trust Co. v. Iowa Water Co.* (U. S.) 80 Fed. 467, 468; *Holt v. Watson* (Ark.) 71 S. W. 262, 263 (citing *North. Arkansas & W. R. Co. v. Cole* [Ark.] 70 S. W. 812).

The word "affinity," when applied to the marriage relation, signifies the connection existing in consequence of marriage between each of the married persons and the blood relatives of the other. Code Civ. Proc. Cal. 1903, § 17, subd. 9.

#### Computation.

Affinity is the connection between the husband and his wife's parents, and the wife and the husband's parents. There are no degrees, strictly speaking, in affinity, as there are in parentage or consanguinity, but a man is considered as related to the par-

ents of his wife in the same degree as she is. *Waterhouse v. Martin*, 7 Tenn. (Peck) 374, 389.

The rule of computing the degrees of affinity is that the relations of the husband stand in the same degree of affinity to the wife in which they are related to the husband by consanguinity; which rule holds also, eo converso, in the case of the wife's relations. Thus where one is brother by blood to the wife, he is brother-in-law, or by affinity, to the husband. *Chinn v. State*, 26 N. E. 986, 987, 47 Ohio St. 575, 11 L. R. A. 630 (quoting *Erskine's Institutes*, lb., 6, t. § 8).

While the marriage tie remains unbroken, the blood relations of the wife stand in the same degree of affinity to the husband as they do in consanguinity to her. Thus, the father of the wife stands in the first degree of affinity to his son-in-law, and in the first degree of consanguinity to his daughter. Relationship by affinity may also exist between the husband and one who is connected by marriage with the blood relations of the wife. Thus, where two men marry sisters, they become related to each other in the second degree of affinity as their wives are related in the second degree of consanguinity. *Paddock v. Wells*, 2 Barb. Ch. 331, 333.

The blood relations of each party to a marriage are held as related by affinity to one spouse as by consanguinity to the other. *State v. Wall*, 26 South. 1020, 1021, 41 Fla. 463, 49 L. R. A. 548, 79 Am. St. Rep. 195; *Spear v. Robinson*, 29 Me. (16 Shep.) 531, 545; *Kelly v. Neely*, 12 Ark. (7 Eng.) 657, 659, 56 Am. Dec. 288.

The relation of affinity is contracted by the union of man and woman in the bonds destined for the propagation of the species, and its computation is in the same order as the relation of consanguinity in respect to the collateral line, and it extends only to the eighth degree of civil computation if the union be by legitimate matrimony, and to the fourth if the union be without matrimony, it being observed that the man and woman only who contracted the union are individually connected by affinity with the blood relations of the other party, and those blood relations are connected by affinity with the consort of their blood parent; and this relationship shall only be valid for the civil purposes which may be explained in the laws and acts of individuals of the human race. *Comp. Laws N. M.* § 1413.

#### Consanguinity distinguished.

"Affinity" is the connection existing in consequence of marriage between each of the married persons and the kindred of the other, being distinguished from consanguinity, which denotes relationship by blood. *Te-*

*garden v. Phillips*, 42 N. E. 549, 551, 14 Ind. App. 27; *Carman v. Newell* (N. Y.) 1 Denio, 25, 26; *Spear v. Robinson*, 29 Me. (16 Shep.) 531, 545; *Doyle v. Commonwealth*, 40 S. E. 925, 926, 100 Va. 808.

"Affinity" is a connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands towards them, and gives to the wife the same reciprocal connection with the relations of the husband. It is used in contradistinction to consanguinity. It is no real kindred. Affinity arises from marriage, by which each party becomes related to all the consanguineal of the other party to the marriage, but in such case these respective consanguineal do not become related by affinity to each other. In this respect modes of relationship are dissimilar. The relationship by consanguinity is in itself not capable of dissolution, but the relationship by affinity ceases with the dissolution of the marriage which produces it. Therefore, though a man is, by affinity, brother to his wife's sister, on the death of the wife he may lawfully marry the sister. *Kelly v. Neely*, 12 Ark. 657, 659, 56 Am. Dec. 288.

#### Dissolution of marriage.

The relation by affinity is not lost on the absolute of the marriage any more than a blood relation is lost by the death of those from whom it is derived. The dissolution of the marriage, once lawful, by death or divorce has no effect on the issue, and can have no greater effect to annul the relation by affinity. *Spear v. Robinson*, 29 Me. (16 Shep.) 531, 545.

Where a defendant during the life of her husband stood in the fourth degree of affinity to the chancellor, as her husband was related to him in the fourth degree of consanguinity, the death of the husband did not sever the tie of affinity where there was living issue of the marriage in whose veins the blood of both parties was commingled, since the relationship of affinity was continued through the medium of the issue of the marriage. *Paddock v. Wells*, 2 Barb. Ch. 331, 333.

"Relationship by consanguinity is in its nature incapable of dissolution, but relationship by affinity ceases with the dissolution of the marriage which produced it." *Blodget v. Brinsmaid*, 9 Vt. 27, 30; *Kelly v. Neely*, 12 Ark. (7 Eng.) 657, 659, 56 Am. Dec. 288. Hence though a man is by affinity brother to his wife's sister, on the death of the wife he may lawfully marry the sister. *Kelly v. Neely*, 12 Ark. (7 Eng.) 657, 659.

A justice whose brother's widow became the wife of plaintiff's brother, of which marriage there was no issue, the wife being dead at the time of trial, is not related by

affinity to plaintiff. *Carman v. Newell* (N. Y.) 1 Denio, 25, 26.

#### Kinsmen of wife and of husband.

Relationship by affinity does not extend to the nearest relations of a husband and wife so as to create a mutual relation between them. The consanguineous relations of relatives by affinity are not related at all. Thus, the sister of a man's wife is not related by affinity to that man's blood relatives. *Oneal v. State*, 47 Ga. 229, 248; *Hume v. Commercial Bank*, 78 Tenn. (10 Lea) 1, 2, 43 Am. Rep. 290; *Blodget v. Brinsmaid*, 9 Vt. 27, 30; *Ex parte Harris*, 7 South. 1, 2, 26 Fla. 77, 6 L. R. A. 713, 23 Am. St. Rep. 548; *Higbe v. Leonard*, 1 Denio, 186, 187; *Paddock v. Wells*, 2 Barb. Ch. 331, 333; *Doyle v. Commonwealth*, 40 S. E. 925, 926, 100 Va. 808; *Waterhouse v. Martin*, 7 Tenn. (Peck) 374, 389; *North Arkansas & W. R. Co. v. Cole* (Ark.) 70 S. W. 312, 313.

There is no affinity between the husband's brother and his wife's sister, which is called by the doctors *affinitas affinitatis*, because then the connection is formed, not between one of the spouses and the kinsman of the other, but between the kinsmen of both. *Chian v. State*, 26 N. E. 986, 987, 47 Ohio St. 575, 11 L. R. A. 630.

A husband holds the same relationship to his wife's relatives by affinity as she does, and she stands in the same relation to his relatives; but those sustaining a relationship to him would not hold the same to her relatives, and those related to her would not hold the same relation to his relatives. *Chase v. Jennings*, 38 Me. 44, 45.

The father of a son whose wife is the aunt of the plaintiff is not connected by affinity with the plaintiff, nor vice versa, for the son has only formed a connection with which the father is not affected. *Waterhouse v. Martin*, 7 Tenn. (Peck) 374, 389.

A juror who was a cousin of the stepfather of the deceased was related by affinity to the mother of the deceased, but bore no relation to deceased himself. *Kirby v. State*, 8 South. 110, 111, 89 Ala. 63.

"Affinity," as used in 2 Rev. St. p. 275, § 2, prohibiting a judge of any court sitting in any cause in which he would be excluded from being a juror by reason of "affinity" to either of the parties, does not bar a justice the two brothers of whom intermarried with two sisters of the plaintiff, all of whom were living, for, although he was related by "affinity" to the plaintiff's two sisters, there was no such relation between him and plaintiff. *Higbe v. Leonard* (N. Y.) 1 Denio, 186, 187.

There is no affinity between the blood relatives of the husband and the blood relatives of the wife, and hence a judge who

is a brother of the husband of the sister of a petitioner is not disqualified to take action in the cause by reason of affinity. *Ex parte Harris*, 7 South. 1, 2, 26 Fla. 77, 6 L. R. A. 713, 23 Am. St. Rep. 548.

"Affinity," as used in a statute disqualifying a person related by affinity within a certain degree to the party in an action from being a juror, construed to include a person marrying a sister of the wife of a party. *Foot v. Morgan* (N. Y.) 1 Hill, 654.

Act July 1, 1877, § 2, making fornication between persons related by affinity or consanguinity nearer than cousins criminal, construed not to include a husband and the wife of the brother of his wife. The court says that "the term affinity, as used in determining the persons between whom marriage may be lawfully solemnized, and those between whom sexual intercourse is to be regarded as incestuous, has received in law, by its application and use, a definite signification; and we must assume that the Legislature, in enacting this section defining the crime of incest, used it in the same sense. It expresses the relationship which arises by marriage between one of the parties and the blood relation of the other." *Chinn v. State*, 26 N. E. 986, 987, 47 Ohio St. 575, 11 L. R. A. 630.

#### AFFIRM.

A judgment of affirmance in the High Court of Errors and Appeals does not affect the lien of the judgment below, the meaning of the word "affirm" being to "ratify" or "confirm," and not "to destroy." *Planters' Bank v. Calvit*, 11 Miss. (3 Smedes & M.) 143, 194, 41 Am. Dec. 616.

An appeal bond conditioned that appellant shall pay, etc., if judgment "be affirmed," does not authorize a forfeiture of the bond in case of dismissal of the appeal for want of prosecution. *Drummond v. Husson*, 14 N. Y. (4 Kern.) 60, 61.

The jurat of a notary public to the certificate of the publisher of a delinquent tax list, reciting that it was "affirmed to" before him, is sufficient to authorize a judgment of sale of property for a special assessment therein shown. It need not set out the language of the affirmation, the presumption being that it was in the form prescribed by statute. *Colvin v. People*, 46 N. E. 737, 166 Ill. 82.

#### AFFIRMANCE.

The term "judgment of affirmance," in Code Civ. Proc. § 191, as amended by Laws 1896, c. 559, which provides that no appeal shall lie from the judgment of affirmance unanimously rendered by the Appellate Division, etc., includes an appeal from an or-

der overruling the exceptions to the verdict heard in the first instance by the Appellate Division of the Supreme Court, and ordering judgment on the verdict. *Huda v. American Glucose Co.*, 45 N. E. 942, 151 N. Y. 549.

The affirmance or disaffirmance by an infant of his contract is in its nature a mental assent, and necessarily implies the action of a free mind exempt from all constraint and disability. Thus, an alleged affirmance by a daughter of a contract made by her before attaining her majority to induce her mother to give her consent to the daughter's marriage was held to have been procured by an undue influence, and therefore not properly an affirmance. *Sayles v. Christie*, 58 N. E. 480, 488, 187 Ill. 420.

#### **AFFIRMATION.**

As included in oath, see "Oath."

#### **AFFIRMATIVE DAMAGES.**

Affirmative damages are damages which a respondent in a libel for injuries to a vessel may recover, which may be in excess of any amount which the libellant would be entitled to claim. *Ebert v. The Reuben Doud* (U. S.) 3 Fed. 520-524.

#### **AFFIRMATIVE DEFENSE.**

The term "affirmative defense" is frequently used to designate what the Code terms a defense in pleading, which consists only of new matter constituting a defense; that is, new matter which, assuming the complaint to be true, constitutes a defense to it. *Carter v. Eighth Ward Bank*, 67 N. Y. Supp. 300, 303, 33 Misc. Rep. 128.

#### **AFFIRMATIVE PLEA.**

An "affirmative plea" is one that sets up a single fact not appearing in the bill, or sets up a number of circumstances all tending to establish a single fact, which fact, if existing, destroys the complainant's case. *Potts v. Potts* (N. J.) 42 Atl. 1035, 1056.

#### **AFFIRMATIVE PREGNANT.**

An affirmative pregnant is an allegation implying some negative in favor of the adverse party, and makes instructions in a criminal case objectionable, as well as pleadings in civil actions. *Fields v. State*, 32 N. E. 780, 782, 134 Ind. 46.

#### **AFFIRMATIVE PROOF.**

The expression "affirmative proof," as used in an instruction that the second proposition propounded by the plaintiff cannot be found in the affirmative by inference, but must be established by "affirmative proof," is strictly meaningless, for it is equivalent to saying that the jury must find affirmatively

if there is sufficient proof in favor of the affirmative side of the proposition. If it means anything, it means that the proposition must be established by direct or positive proof. *Gates v. Hughes*, 44 Wis. 332, 336.

#### **AFFIRMATIVE RELIEF.**

The affirmative relief to which a defendant may be entitled in a judgment to be rendered under Code, § 274, means such relief as may properly be given within the issues made by the pleadings, or according to the legal or equitable rights of the parties as established by the evidence, not to that redress which is equally applicable after as before judgment, and may be obtained on motion or by action. *Garner v. Hannah*, 18 N. Y. Super. Ct. (6 Duer.) 262, 273.

#### **AFFIRMATIVE REPRESENTATIONS.**

In the law of insurance, representations are of two classes, affirmative and promissory. The former are those which affirm the existence of a particular state of things at the time the contract of insurance is made and becomes operative; the latter are those which are made by the insured concerning what is to happen during the term of the insurance, stated as matters of expectation, or, it may be, of contract. The one is an affirmation of a fact existing when the contract begins; the other is a promise to be performed after the contract has come into existence. *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 46 Atl. 777, 778, 64 N. J. Law, 580.

#### **AFFIRMATIVE WARRANTY.**

An affirmative warranty is one which affirms the existence of certain facts at the time of the insurance. *King v. Tioga County Patrons' Fire Relief Ass'n*, 54 N. Y. Supp. 1057, 1058, 35 App. Div. 58; *McKenzie v. Scottish Union & National Ins. Co.*, 44 Pac. 922, 924, 112 Cal. 548; *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 539, 35 Am. Dec. 92.

A warranty, in insurance, is affirmative where the insured undertakes for the truth of some positive allegation, as that the thing is neutral property, or that the ship sailed on such a day, etc. *Hendricks v. Commercial Ins. Co.* (N. Y.) 8 Johns. 1, 13.

Warranties are of two kinds, affirmative and promissory. Affirmative consists of representation in the policy of facts; promissory are those that require that something shall be or shall not be done after the policy takes effect. If the affirmative warranty is false, it avoids the contract; and, if a promissory warranty is not complied with, it avoids the policy. *Maupin v. Scottish Union & National Ins. Co.*, 45 S. E. 1003, 1004, 53 W. Va. 557.

There are two classes of conditions usually inserted in insurance policies, the first pointing to the time of the contract, which is called an "affirmative warranty," and the second to things which may occur or which may have to be performed at a time subsequent, or "promissory warranties." Affirmative warranties are sometimes called "warranties in present," and the breach of an affirmative warranty consists in the falsehood of the affirmation; but the breach of a promissory warranty consists in the nonperformance of the stipulation. A stipulation that a watchman shall be kept on the premises is a promissory warranty, where the statements or representations related to the descriptive character and value of the property insured, they are affirmative warranties. *Cowan v. Phenix Ins. Co.*, 20 Pac. 408, 411, 78 Cal. 181 (citing *Jefferson Ins. Co. v. Cothéal* [N. Y.] 7 Wend. 72, 22 Am. Dec. 567; *De Hahn v. Hanley*, 1 Term R. 343).

In the law of insurance, warranties which affirm the existence of certain facts pertaining to the risk are denoted "affirmative warranties." An instance of this class is found in *Virginia Fire & Marine Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973. There the insured, in answer to a question, stated that a watchman slept on the premises at night. On the night of the fire the watchman was absent, but it was held that the policy was not thereby avoided, because the answer related to the present and not to the future: in other words, that the statement was manifestly intended merely as an affirmative of the usual existing state of facts, and had nothing promissory as to the future. *Virginia Fire & Marine Ins. Co. v. Morgan*, 18 S. E. 191, 192, 90 Va. 290.

#### AFFIRMATIVELY AUTHORIZED BY LAW.

The phrase "affirmatively authorized by law," as used in the river and harbor bill of 1890, § 10, 26 Stat. 454, prohibiting the creation of any obstruction not affirmatively authorized by law and the navigable capacity of any of the waters of the United States, embraces state authorization as well as congressional authorization, and a construction of a bridge under the authority of such state was an obstruction affirmatively authorized by law. *Kansas City, M. & B. R. Co. v. J. T. Wylgul & Son* (Miss.) 33 South. 965, 966, 61 L. R. A. 578.

#### AFFIX.

A trade-mark is deemed to be affixed to an article of merchandise when it is placed in any manner in or upon either (1) the article itself, or (2) a box, bale, barrel, bottle, case, cask, or other vessel or package, or a cover, wrapper, stopper, brand, label or other thing, in, by, or with which the goods are

packed, inclosed, or otherwise prepared for sale or disposition. Pen. Code N. Y. 1903, § 367.

A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws. Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine. Civ. Code Mont. 1895, §§ 1076, 1077.

Under Civ. Code, § 660, providing that a thing is deemed to be affixed to realty when it is attached to it by roots, as in case of trees; or imbedded in it, as in the case of walls; or permanently resting on it, as in the case of buildings; or permanently attached to a building by means of cement, plaster, nails, bolts, or screws—an engine or boiler erected in a wooden building, adjoining a brick structure, for the purpose of connecting power to the machinery in the brick building by means of shafts extending into and through the walls, will be held to be affixed. *McNally v. Connolly*, 11 Pac. 320, 321, 70 Cal. 3. So, under the same section, a house of a permanent nature, but which is erected without disturbing the soil, will be deemed to be affixed to the land. *Miller v. Waddingham* (Cal.) 25 Pac. 688, 689.

#### AFFRAY.

See "Sudden Affray."

As defined by Webster, an "affray" is the act of suddenly disturbing any one; an assault or attack; the fighting of two or more persons in a public place, to the terror of others. He also says that a fighting in private is not, in a legal sense, an affray. He also gives the synonyms: Quarrel; brawl; scuffle; encounter; fight; contest; feud; tumult; disturbance. The word, as used in an instruction that the jury should find accused guilty of manslaughter if the act was done in a sudden affray, does not mean that two persons must engage in a fight on a public road, or be guilty of the common-law offense of affray. Where A. halts B. on a public highway and attempts to draw a gun on him, and B. fires four shots at him, and A. fires one at him, it certainly constitutes an "affray." *Burton v. Commonwealth* (Ky.) 60 S. W. 526, 528.

An affray is a fighting between two or more persons in a public place. *Simpson v. State*, 13 Tenn. (5 Yerg.) 356, 358; *State v. Priddy*, 23 Tenn. (4 Humph.) 429; *Wilkes v. Jackson* (Va.) 2 Hen. & M. 355, 360; *O'Neill v. State*, 16 Ala. 65, 67.

An affray is a mutual combat voluntarily engaged in by two or more persons in a public place. *Strutton v. Commonwealth* (Ky.) 62 S. W. 875, 877; *State v. Gladden*, 73 N. C. 150, 155.

"Affray" is defined by Lord Coke to be a public offense, to the terror of the King's subjects, so called because it affrighteth and maketh men afraid. *State v. Huntly*, 25 N. C. 418, 421, 40 Am. Dec. 416.

An "affray" is defined to be the fighting of two or more persons in a public place, to the terror of the people. *State v. Sumner* (S. C.) 5 Strob. 53, 56; *Thompson v. State*, 70 Ala. 26, 28; *Commonwealth v. Simmons*, 29 Ky. (6 J. J. Marsh.) 614, 615; *State v. Brewer*, 33 Ark. 176, 178; *Childs v. State*, 15 Ark. 204, 205; *Hawkins v. State*, 13 Ga. 322, 324, 58 Am. Dec. 517.

An "affray" is the fighting of two or more persons in a public place, to the terror of the citizens. *State v. Allen*, 11 N. C. 356, 357; *State v. Stanly*, 49 N. C. 290, 292; *State v. Perry*, 50 N. C. 9, 10, 69 Am. Dec. 768. This definition does not include every instance, as one person might be guilty of it by publicly riding or going armed offensively, to the terror and alarm of the peaceful citizens of the state. *State v. Woody*, 47 N. C. 335, 337. It is an essential ingredient of the offense that it be committed in a public place. *State v. Woody*, 47 N. C. 335, 337; *Childs v. State*, 15 Ark. 204, 205. Design of their meeting was innocent and lawful, and the breach of the peace happened without any previous intention. *Supreme Council Order of Chosen Friends v. Garrigus*, 3 N. E. 818, 822, 104 Ind. 133, 54 Am. Rep. 298. This circumstance alone distinguishes an affray from another distinct substantive offense at common law, to wit, an assault. An allegation, in an indictment for an affray, that it took place in the town of Clarksville, is not sufficient, as it might have been in such town and yet out of the sight and hearing of all but the parties concerned. *State v. Heflin*, 27 Tenn. (8 Humph.) 84, 85.

An affray "is a disturbance of the public peace by fighting with the mutual consent of the combatants." *Duncan v. Commonwealth*, 36 Ky. (6 Dana) 295.

"Affray," as used in Rev. St. 1881, § 1980, providing that if two or more persons by agreement fight in any public place they shall be guilty of an "affray," means a fight in which both persons must be guilty of an agreement to violate the law and engage in fighting by such agreement. *Supreme Council Order of Chosen Friends v. Garrigus*, 3 N. E. 818-822, 104 Ind. 133, 54 Am. Rep. 298.

It is not essential to an affray that the fighting should be by consent of the parties. It is because the violence is committed in a public place and to the terror of the people

that the crime is called an affray instead of an assault and battery. *Saddler v. Republic* (Tex.) Dall. Dig. 610, 611; *Pollock v. State*, 22 S. W. 19, 20, 82 Tex. Cr. R. 29. To make a man guilty of an affray, it is not necessary that the fighting take place with the consent of both parties. It is because the violence is at any public place and to the terror of the people that the crime is called an affray instead of assault and battery, and not because it took place by the mutual consent of both parties. Therefore, on the trial of an indictment for an affray, one may be acquitted while another may be found guilty. *Cash v. State*, 2 Tenn. (2 Overt.) 198, 199.

An affray is a mutual fighting, and an indictment, therefore, is charge against each person. One may be acquitted and the other convicted of assault, or one may be found guilty of an assault with a deadly weapon and the other of simple assault. *State v. Albertson*, 18 S. E. 321, 113 N. C. 633.

In constituting an affray, there must have been a fighting. An admission that the parties were engaged in a friendly scuffle is not an admission of guilt as regards the offense of an affray. *State v. Freeman*, 37 S. E. 206, 207, 127 N. C. 544.

The fighting of two persons in the presence of seven others constitutes an affray, the seven other persons making the place a "public place" within the meaning of that term as used in the definition of an "affray." *State v. Fritz*, 45 S. E. 957, 958, 133 N. C. 725.

An affray is an assault, aggravated under the circumstances under which it is committed. On an indictment against two for an affray for mutually assaulting and fighting with each other, the defendant was found not guilty of an affray, but one was found guilty of assault and battery on another, and one was acquitted. Held, that the judgment on the conviction for assault and battery was proper. *State v. Allen*, 11 N. C. 356, 357.

#### As an accident.

See "Accident—Accidental."

#### Assault and battery distinguished.

"The qualities that distinguish an affray from an assault and battery are that two or more persons must be engaged in the same combat and in a public place." *Thompson v. State*, 70 Ala. 26, 28.

An affray "is the fighting of two or more persons in some public place to the terror of others, for, if the fighting be in private, it is no affray, but an assault, because, if it be neither heard nor seen by any but the parties concerned, it cannot be said to be to the terror of the people." *Commonwealth v. Simmons*, 29 Ky. (6 J. J. Marsh.) 614, 615; *State v. Sumner* (S. C.) 5 Strob. 53, 56; *State v. Brew-*

er, 33 Ark. 176, 178; Childs v. State, 15 Ark. 204, 205.

#### **Riot distinguished.**

"Affray is when persons come together with a premeditated design to disturb the peace, and suddenly break out into a quarrel between themselves, and it is contradistinguished from a riot by being more of a private nature." *People v. Judson* (N. Y.) 11 Daly, 1, 58.

"Affray" means the fighting of two or more persons in some public place to the terror of others. It differs from a riot in not being premeditated. Thus, if a number of persons meet together at a fair or market, or on any other lawful or innocent occasion, and happen on a sudden quarrel to engage in a fight, they are not guilty of a riot, but of an "affray," only because the design of their meeting was innocent and lawful and the breach of the peace happened without any previous intention. *Supreme Council Order of Chosen Friends v. Garrigus*, 3 N. E. 818, 822, 104 Ind. 133, 54 Am. Rep. 298.

#### **Words as constituting.**

Words alone will not constitute the offense of "affray," but words accompanied by acts indicating an attempt to fight in the public streets of the city, which attempt is prevented by bystanders, are sufficient to constitute the offense, since such acts are calculated to incite the terror of peaceable citizens and disturb the public peace. *Hawkins v. State*, 13 Ga. 322, 324, 58 Am. Dec. 517.

"An affray is a fight of two or more persons in some public place, but no quarrelsome words merely will constitute the offense. It is probable, however, that if the persons arm themselves with deadly or unusual weapons for the purpose of an affray, and in such manner as to strike terror to the people, they may be guilty of this offense without coming to actual blows." *O'Neill v. State*, 16 Ala. 65, 67.

Mere words are not a fighting, and if one by insulting language provokes another to attack him in a public place, but offers no resistance to the attack when made, he does not become guilty of the offense of affray. *Pollock v. State*, 22 S. W. 19, 20, 82 Tex. Cr. R. 29.

### **AFFREIGHTMENT.**

Demise distinguished, see "Charter Party."

"Affreightment contracts are of two kinds, and they differ from each other very widely in their nature, as well as in their terms and legal effect. Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship, and have

by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command, and navigation of the ship, and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment, sounding in contract, and not a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership. *Auten v. Bennett*, 84 N. Y. Supp. 689, 692, 88 App. Div. 15; *United States v. Shea*, 14 Sup. Ct. 519, 521, 152 U. S. 178, 38 L. Ed. 403 (citing *Reed v. U. S.*, 78 U. S. [11 Wall.] 591, 600, 20 L. Ed. 220).

Where a shipowner agrees to carry goods by water, or to furnish a ship for the purpose of carrying goods in return for a sum of money to be paid, by some such contract is called a "contract of affreightment." The charterer thereby acquires right to the temporary use of the vessel for the carrying of his goods, but the control and possession of the vessel remains in the owner, through the master and crew, who continue to be his servants. *Bramble v. Culmer* (U. S.) 78 Fed. 497, 501, 24 O. C. A. 182.

### **AFORESAID.**

See "As aforesaid."

Where a prior clause in the will prescribes the manner in which property of testator is to pass, and a subsequent clause devising certain property states that it shall pass in the manner "aforesaid," the property under the last devise will pass in the same manner as that specified in the first. *Woodall v. Woodall*, 3 O. C. B. 349, 376.

In a deed by the overseers of a certain county, witnessed by the justices of the peace of "said county," describing themselves as "justices of the peace of the county aforesaid," the words "county aforesaid" have the same meaning as the words "said county" in the body of the deed. *Rex v. Inhabitants of Countesthorpe*, 2 Barn. & Adol. 487.

#### **All preceding referred to.**

U. S. St. 1864, c. 106, § 30, authorizes every national bank to charge interest at the rate allowed by the law of the state or territory where the bank is located, except that, where the law of the state limits the rate for banks of issue organized under the state laws the rate so limited shall be allowed for associations organized in any such state under this act; that, where no rate is fixed by the laws of the state or territory, the bank may charge not exceeding 7 per cent.; and that the knowingly taking, receiving, or charging a rate of interest greater than "aforesaid" shall be held and ad-



judged as a forfeiture of the entire interest. Held, that the expression "rate of interest greater than aforesaid" refers as well to the rate established by adopting the rate allowed by the laws of the states or territories, as to the rate fixed at 7 per cent. if no rate was fixed by said laws; there being no rule of grammatical construction which limits the word "aforesaid" to the paragraph immediately preceding it. *Central Nat. Bank v. Pratt*, 115 Mass. 539, 544, 15 Am. Rep. 138.

"Aforesaid," as used in a will in which testator gave a daughter certain real estate and a half part of his books, and declared that if the daughter should die unmarried her part "aforesaid" should be equally divided amongst testator's brothers and sisters, referred not merely to the gift of the books, but to all the property, both real and personal. *Gibson v. Gell*, 2 Barn. & C. 680.

#### As aforesaid equivalent.

An indictment charged the commission of larceny in the county "aforesaid," which was in the exact language of the Code (section 4297), except that the statute uses the words "as aforesaid." Held, that "aforesaid" and "as aforesaid" were equivalent terms, and hence there was no variance. *State v. Lillard*, 18 N. W. 637, 59 Iowa, 479.

#### First mentioned referred to.

"Aforesaid," as used in a deed conveying all the right in equity which A. has of redeeming certain mortgaged real estate at the time "aforesaid," refers not to the date of sale, which was the date last mentioned in the deed, but to a day previously named therein as being the time when the same was attached on mesne process. *Sanborn v. Chamberlin*, 101 Mass. 409, 418.

In an indictment averring that certain acts essential to the crime of libel charged occurred at the city of N. in the county of E., wherein the venue is laid in the margin, and then sets out the libelous publication, in the body of which the city of H. in H. county is mentioned, and then proceeds to aver that other acts essential to the crime "occurred at the city and county aforesaid," the words "city and county aforesaid" refer to the city of N. in the county of E., and not to the city and county mentioned thereafter in the setting out of the publication. *Hasse v. State*, 20 Atl. 751, 752, 53 N. J. Law (24 Vroom) 34.

#### As next before.

Although the word "aforesaid" means generally next before, yet a different signification will be given to it if required by the context and the facts of the case. *Simpson v. Robert*, 35 Ga. 180.

"Aforesaid," as used in a statute imposing a penalty on masters acting as pilots in entering certain ports, but providing that it

shall not apply to the masters and mates of vessels residing at certain places in conducting or piloting their ships or vessels into or from any of the places "aforesaid," will be construed to mean the places designated at which such masters and mates reside. *Williams v. Newton*, 14 Mees. & W. 747, 749.

In the construction of statutes the words "preceding" and "aforesaid" mean, generally, next before, unless the context requires a different construction. *Pen. Code Ga. 1895, § 2.*

#### Previous words repeated.

"Aforesaid," as used in an indictment referring to the act committed as having been done in the parish "aforesaid," has the same meaning and effect as if the description of the parish were repeated. *Reg. v. Albert*, 5 Q. B. 37, 41.

The words "articles aforesaid" in the second count in an indictment for larceny, with a reference to the goods mentioned in the prior count, do not operate to make an allegation of the value of the property in the first count and part of the second count. *State v. Wagner*, 24 S. W. 219, 220, 118 Mo. 626.

## AFORETHOUGHT.

"Aforethought" means thought of beforehand, for any length of time, however short, for a moment as well as a day. *State v. Dickson*, 78 Mo. 438, 441; *State v. Tate*, 56 S. W. 1099, 1100, 156 Mo. 119; *State v. Musick*, 14 S. W. 212, 213, 101 Mo. 260.

"Aforethought" means malice preconcerted. *State v. Peo*, 33 Atl. 257, 258, 9 *Houst.* 488.

"Aforethought" is synonymous with "premeditated," and "premeditated malice" and "malice aforethought" are the same. *Edwards v. State*, 25 Ark. 444, 446.

"Aforethought," as used in the statute defining murder as the unlawful killing of a human being with malice "aforethought," means "premeditated" or "premeditated and deliberate" malice. *People v. Ah Choy*, 1 *Idaho*, 317, 319.

"Aforethought" is defined as thought of before; premeditated; premeditated. Thus, in the phrase "malice aforethought," the adjective "aforethought" describes not the intent to take life, but the malice, and that malice must exist, must be previously and deliberately entertained when the purpose to take life is formed, and must co-operate with the blow producing death, to constitute murder. *State v. Fiske*, 28 Atl. 572, 573, 63 Conn. 388.

## AFT.

See "Fore and Aft."

## AFTER.

See "From and After."

Const. 1864, authorizing the Governor to grant pardons "after conviction," does not empower him to issue a pardon before conviction, and hence the constitutional provision authorizing him to grant pardons after conviction did not prohibit the Legislature from passing an act pardoning certain persons who were liable to be charged with crime. *State v. Nichols*, 26 Ark. 74, 78, 7 Am. Rep. 600.

The words "after the completion of the railroad," in a statute exempting a railroad from taxation for 10 years after the completion of the railroad, operates to preclude the exemption from taking effect prior to the completion of the road; the object apparently being to procure its completion as soon as possible. *Vicksburg, S. & P. R. Co. v. Dennis*, 6 Sup. Ct. 625, 627, 116 U. S. 665, 29 L. Ed. 770.

## At the end of.

A lease providing that rent is payable "after the termination of each month" means the end of the last day of the monthly term, and, though rent accrues on the last day of the term, it does not accrue until the end of that day, and hence a conveyance in the afternoon of the last day of the monthly term is a conveyance before rent accrues, within the rule that a lessor conveying the premises before rent accrues cannot recover the appropriated amount due to the time of the conveyance, though there is no eviction by him or attornment to him. *Hammond v. Thompson*, 47 N. E. 187, 168 Mass. 531.

## Charge or condition imposed.

The term "after" does not always designate the time at which one thing is to be done in reference to something else, but it expresses the relative priority and subordination of one claim to another in matter of right. And where the testator provides that the residue of his estate after the payment of his just debts, etc., shall be disposed of in a certain way, the residue is to be formed subject to the payment of debts and charges, though they may be actually paid afterwards. *Treadwell v. Cordis*, 71 Mass. (5 Gray) 341-353.

"After payment of debts," when used in a will devising real estate after the payment of debts and legacies, is sufficient to charge testator's real estate with the payment of such debts and legacies. *Reynolds v. Reynolds' Ex'rs*, 16 N. Y. 257, 259; *In re Rosenfeld* (N. Y.) 5 Dem. Sur. 251, 255; *Smith v. Coup* (N. Y.) 6 Dem. Sur. 45, 48; *Lupton v. Lupton* (N. Y.) 2 Johns. Ch. 614, 623; *In re Fox's Will*, 52 N. Y. 530, 536, 11 Am. Rep. 751; *In re Headra*, 20 N. Y. Supp. 79, 80, 2 Con. Sur. 514; *Fenwick v. Chapman*, 84

U. S. (9 Pet.) 461, 481, 9 L. Ed. 193; *Wright v. West* (U. S.) 80 Fed. Cas. 716, 717; *Kidney v. Coussmaker*, 1 Ves. Jr. 436, 440.

"After all my debts are paid," when used in a will, where the phrase is followed by a devise, indicates an intention that the lands devised shall be subject to the debts. *Smith v. Coup* (N. Y.) 6 Dem. Sur. 45, 48; *King v. King*, 14 R. I. 143, 146.

The use of the words "after payment of my debts," in a will in which the testator gives certain devises "after payment of my debts," means that he will not give anything until his debts are paid. "After payment of his debts" means that until his debts are paid he gives nothing; that everything he has shall be subject to his debts. To give these words any effect, they must charge the real estate. I am very clearly of the opinion that, whenever a testator says he wills that his debts will be paid, that will ride over every disposition, either as against his heirs at law or devisee, and the words "after my debts paid" mean the same thing. *Shallcross, v. Finden*, 3 Ves. 738, 739.

The words "after the payment of my lawful debts" in a will, in which, after directing the payment of his lawful debts, the testator proceeds to dispose of his property, is to be construed as a direction to the executors to pay the debts before distribution be made of the estate in pursuance of the will. *Appeal of Hoff*, 24 Pa. (12 Harris) 200, 203.

"After inventory and appraisement," as used in Gen. St. 1883, § 3575, providing that whenever, "after inventory and appraisement," it shall appear that the personal estate of intestate is insufficient to discharge his debts, resort may be had to the real estate, "can properly be taken only as a designation of the time at which or before which the administrator may not make his application. It is simply a statutory method of fixing the order of the proceedings, and in no sense can it be so held to be a condition precedent to the right to resort to real property as to make a failure to observe that statutory provision necessarily fatal to the proceedings." *Nichols v. Lee*, 26 Pac. 157, 160, 16 Colo. 147.

## Day excluded.

Where a time is to be computed "after" a certain date, it is meant that such date should be excluded in the computation. *Bigelow v. Willson*, 18 Mass. (1 Pick.) 485, 495.

2 Rev. St. 252, § 152, providing that a prisoner may be discharged on affidavit "after" he shall have remained in prison 30 days, means 30 full days after the commitment of the defendant, and the first day the prisoner was committed must be excluded in computing the 30 days. Where a prisoner was com-

mitted on the 26th day of August, he cannot be discharged until the 26th day of September. *Judd v. Fulton* (N. Y.) 10 Barb. 117, 118.

"After," as used in 2 Rev. St. § 24, making it the duty of an officer making a distress for rent to appraise the goods five days "after" making the distress, means five full days from the time the distress was made, and, where distress was made on the 9th day of March, the earliest date on which an appraisal could be made was on the 15th day of March. *Butts v. Edwards* (N. Y.) 2 Denio, 164, 167.

"After," as used in 2 Geo. II, c. 23, § 23, declaring that no attorney shall commence an action for his fees until the expiration of one month "after" he shall have delivered his bill, means 30 days, exclusive of the day on which the bill was delivered. *Blunt v. Heslop*, 8 Adol. & El. 577.

"After," as used in Sess. Laws 1840, p. 334, § 24, prohibiting the issuance of a *fi. fa.* until after the expiration of 30 days from the entry of judgment, construed to exclude the day on which the judgment was rendered. *Commercial Bank of Oswego v. Ives* (N. Y.) 2 Hill, 355.

The words "after date" and the words "from the day of the date" bear the same legal signification, as the law rejects fractions of a day. It views it for most purposes as an indivisible point, and consequently, "after date" or the "day of the date" being coextensive with the entire day, excludes it when it occurs in a bill, note, or bond, and to say that the day of payment in a note payable one day after date is not the day after the date, but the day of the date itself, would be contrary to the plain meaning of the words and the obvious design of the parties, who evidently intended that the note should be payable on the second day. *Taylor v. Jacoby*, 2 Pa. (2 Barr) 495, 497, 45 Am. Dec. 615.

In a contract for the sale of real estate, requiring the vendor to deliver a good deed one year "after" the date of the agreement will be held to exclude the day on which the agreement is made, and include the day at the end of the year. Thus, one year after the 24th day of June, 1887, would be the 24th day of June, 1888, and the failure of the vendor to deliver the deed on such day amounted to a breach of the contract. *Vorwerk v. Nolte* (Cal.) 24 Pac. 840, 841.

Under St. 1821, c. 122, relating to the settlement and support of paupers, and providing for the removal of paupers who are found in a town where they have no settlement to the proper town, upon notice given to such town, "and if such removal is not effected nor objected to in writing after such notice, to be delivered in writing, within two months after such notice to the overseers of the town," the day of the service of such

notice is to be excluded in the computation of the two months, and an objection made on the 20th day of December to a notice served on the 20th day of October is within time. The Legislature must have intended that the town notified should have two whole months in which to answer such notice, but, if the day on which the notice was served should be included in the two months, such town would not have two months in which to object. *Inhabitants of Windsor v. Inhabitants of China*, 4 Me. (4 Greenl.) 298, 302 (cited and approved in *Moore v. Bond*, 18 Me. [6 Shep.] 142, 143).

Under a statute authorizing an appeal from an award of arbitrators to be taken within 20 days after the entry of the award on the docket of the prothonotary, the party has a right of appeal for 20 days after the day on which the rule is so entered, and, where the award was entered on the second day of the month, an appeal taken on the 22d day of the same month was held within time. *Sims v. Hampton* (Pa.) 1 Serg. & R. 411, 412.

A patent providing that a specification should be enrolled within one calendar month next and immediately "after the date" thereof meant that the month did not begin to run until the day after the date of the patent, and a specification filed on the 10th of June for a patent dated on the 10th of May was in sufficient time. *Watson v. Pears*, 2 Camp. 294, 296.

Where the time for redemption was fixed at one day after the sale, that day cannot be the day of the sale, for the sale might be made at the last moment of the day, and the owner thus be prevented from tendering on that day, and therefore the time mentioned must be the following day; and the same is true of one or two years after. *Edmundson v. Wragg*, 104 Pa. 500, 502, 49 Am. Rep. 590.

"After," when used in a statute providing for redemption of land a certain time after judicial sale, is held to exclude the day of sale, on the ground that a day is an indivisible point of time, the day of sale being therefore a full day, and "after" it necessarily begins on the next day. *Cromellen v. Brink*, 29 Pa. (5 Casey) 522, 524 (citing *Bigelow v. Willson*, 18 Mass. [1 Pick.] 485, which provided for redemption within one year after execution of deed, and *People v. Sheriff of Broome* [N. Y.] 19 Wend. 87, where the period of redemption was three months after one year after sale on execution).

In statutes of limitations providing that suit must be brought within six years "after" the cause of action accrues, "after" will be construed as excluding the day on which the cause accrued (citing *Appeal of Green* [Pa.] 6 Watts & S. 327; *Cromellen v. Brink*, 29 Pa. [5 Casey] 522; *Mark's Ex'rs v. Russell*, 40 Pa. [4 Wright] 372; *Brisben v. Willson*, 60 Pa. [10 P. F. Smith] 452; *Duffy v.*

Ogden, 64 Pa. [14 P. F. Smith] 240)—which are to the effect that “from and after” exclude the first day. In the discussions of the subject no distinction seems to be made between “after,” “from and after,” or “within,” as to the question of the exclusion of the first day. *Menges v. Frick*, 73 Pa. (23 P. F. Smith) 137, 140, 13 Am. Rep. 731.

In Code 1844, c. 112, § 1, providing that where a debtor has assigned his property for the benefit of creditors his estate shall be distributed among his creditors “after” three months’ notice has been given to his creditors to become parties to the proceedings, “after” means that the creditors must be allowed three months to become parties to the assignment, and not that the distribution shall be made three months from the date of the assignment, but three months after notice was given, and, in computing the three months, the day on which the notice was given must be excluded. *Page v. Weymouth*, 47 Me. 238-244.

Const. art. 6, § 10, declaring that, in case the office of any judge shall become vacant before the expiration of the regular term for which he is elected, the vacancy shall be filled by appointment by the Governor until a successor is elected and qualified, and such successor shall be elected at the first annual election that occurs more than 30 days “after” the vacancy shall happen, means more than 30 days excluding the day on which the vacancy happens and the day on which the election occurs. *State v. Brown*, 22 Minn. 482, 483.

Cr. Code, § 891, declaring that a person held in custody from criminal prosecution shall be discharged unless he is brought to trial before the end of the third term “after” the indictment, must be construed as excluding the term at which the indictment is found. *Hammond v. State*, 58 N. W. 92, 93, 39 Neb. 252.

#### Day included.

The word “after,” like the words “from,” “succeeding,” “subsequent,” and other similar words, in a devise of property to a beneficiary on condition that he shall pay to another a certain sum within one year after the testator’s decease, or from, succeeding, or subsequent to his decease, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations, and is used in different senses, and with an exclusive or inclusive meaning according to the subject to which it is applied, and, as it would deprive it of some of its proper significations to affix one invariable meaning to it in all cases, it would of course in many of them pervert it from the sense of the writer or speaker. Its true meaning, therefore, in any particular case, must be collected from its context and subject-matter, which are the only means by

which the intention is ascertained. *Sands v. Lyon*, 18 Conn. 18, 27.

All the best authorities hold that the word “after” may be construed to include or exclude the day of the act as will best serve to carry out the intent of the Legislature, subserve public policy, avoid forfeiture, and validate a proceeding rather than to annul the same, and, when the statute provided that the term of office of a jury commissioner should commence on the 1st day of June after his appointment, an appointment made by the judge on the 1st day of June conferred on the appointee the office of jury commissioner, and his term commenced on the said 1st day of June. *State v. Mounts*, 14 S. E. 407, 36 W. Va. 179, 190, 15 L. R. A. 243.

The word “after,” like “from,” “succeeding,” “subsequent,” and similar words, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations, and is used in different senses, and with an exclusive or inclusive meaning according to the subject to which it is applied. *Sands v. Lyon*, 18 Conn. 18, 27.

#### Enjoyment of estate devised referred to.

The cases are common which hold that adverbs of time, such as “when,” “then,” “after,” “from and after,” etc., in the devise of a remainder limited upon a life estate, are to be construed merely as relating to the time of the enjoyment of the estate, and not to the time of its vesting in interest, and that the law favors such a construction of a will as will avoid the disinheritance of remaindermen who may happen to die before the determination of the precedent estates. In *Connelly v. O’Brien*, 60 N. E. 20, 166 N. Y. 406, the Court of Appeals carried this doctrine so far as to hold that where testator gave his property to his widow during her life, and to such of his children that may “then” be alive, the adverb was intended by him to refer to the time of his own death, and not to that of his widow, and that consequently a daughter who survived him, but died before the widow, took a vested share. *Ackerman v. Ackerman*, 71 N. Y. S. 780, 781, 63 App. Div. 370.

When used in a devise of a remainder, limited upon a particular state and terminable on an event which may necessarily happen, “after” will be construed to relate merely to the time of the enjoyment of the estate, and not to the time of its vesting. *Canfield v. Fallon*, 57 N. Y. Supp. 149, 154, 26 Misc. Rep. 345, 43 App. Div. 561 (citing *Moore v. Lyons*, 25 Wend. 119, 144; *Sheridan v. House*, \*43 N. Y. [4 Keyes] 509; *Livingston v. Greene*, 52 N. Y. 118, 123; *Ackerman v. Gorton*, 67 N. Y. 63, 66; *Nelson v. Russell*, 135 N. Y. 137, 31 N. E. 1008; *Haug v. Schumacher*, 60 N. E. 245, 247, 166 N. Y. 506; *Vanderheyden v. Crandall* (N. Y.) 2 Denio, 919; *Lamb v. Lamb*, 28 Mass. (11 Pick.) 371, 379; *In re Tienken*,

15 N. Y. Supp. 470, 473, 60 Hun. 417 (citing *Stevenson v. Lesley*, 70 N. Y. 512, 515).

In Rev. Laws, p. 774, § 1, providing that where lands, tenements, etc., are devised to any person for life, the remainder at the death of such person to go to his or her heirs, or to his or her issue, or to the heirs of his or her body, then in such case, "after the death of" such devisee for life, the said lands, etc., shall go and be vested in the children of such devisee as tenants in common in fee, "after the death of" construed as referring to the time of enjoyment rather than the time of vesting of the title. *Hopper v. Demarest*, 21 N. J. Law (1 Zab.) 525, 539.

Generally a bequest "after" the death of the particular person to whom an antecedent interest is given in the same will does not denote a condition that the legatee shall survive such a person, nor define when the interest shall vest, but only marks the time that the act shall take effect in possession, that possession being deferred merely on account of the life interest limited to the person on whose death the gift is to take effect. *Appeal of Chew*, 37 Pa. (1 Wright) 23, 29.

A will giving testatrix's husband the interest, rents, and profits of one-third of the residue of testatrix's estate during his natural life, and devising the remainder of said one-third to my stepchildren "after the decease of my said husband," gives a vested interest to the stepchildren. In *re Allen's Estate*, 109 Pa. 489, 496, 1 Atl. 82.

"After his death to his children," as used in a devise, means that the devisee shall take only a life estate, and that the devisee's children in being at the death of the testator shall take a vested remainder, which opened to let in any after-born children of the devisee. *Gernet v. Lynn*, 31 Pa. (7 Casey) 94, 97.

#### **As immediately after or upon.**

The phrase "after his death," as occurring in a devise "my will is that if my son J. D. should not marry and have lawful issue of his own body, after his death all the real estate that I have given him shall be equally divided between his three brothers," means "upon his death," "as soon as he is dead"; and therefore fixes a definite time for the failure of issue upon which the limitation over should take effect, and so renders it valid. *Downing v. Wherrin*, 19 N. H. 9, 86, 49 Am. Dec. 139.

The words "after her death," in a bequest of all of testator's estate to her daughter for life, with a remainder over, if the daughter die without issue, of a certain sum to a certain seminary, to be paid after the death of the daughter, indicate that the legacy is to take effect on the death of the daughter or not at all, and therefore the legacy is not

void because limited on the happening of a contingency which is too remote. *Theological Seminary v. Kellogg*, 16 N. Y. 83, 87.

"After their death," as used in a will bequeathing property to testator's children, and "after" their death to his then living heirs, means immediately after their death, not an indefinite length of time afterwards; the words being introduced to fix definitely the time at which the bequest over is to take effect. In *re Swinburne*, 14 Atl. 850, 852, 16 R. I. 208 (citing *Pinbury v. Elkin*, 1 P. Wms. 563; *Wilkinson v. South*, 7 Term R. 555, 558; *Trotter v. Oswald*, 1 Cox, 317).

The words "after her death," in a devise of a negro slave to testator's daughter, directing that "after her death, if no lawful issue," the slave should be divided among testator's children, are to be construed to mean at or immediately after the death of the daughter. *Atwell's Ex'rs v. Barney* (Ga.) Dud. 207, 208.

"After the death of my two daughters," as used in a will in which testator directed that "from and immediately after the death of my two daughters I give and bequeath all my estate unto the child or children of my said two daughters share and share alike," means at the death of the two respectively, and not the death of the survivor of the two. *Appeal of Pennsylvania Co. (Pa.)* 10 Atl. 130, 132.

In a devise of testator's farm to his nephew, providing that if he has no lawful issue "after him" the farm should go to other designated parties, means no more than "if he leaves no lawful issue," and hence the language imports an indefinite failure of issue, and not at the death of the nephew. *Whitford v. Armstrong*, 9 R. I. 394, 395.

#### **As of.**

In *Ex parte Fallon*, 5 Term R. 283, the annuity act (17 Geo. III, c. 26, § 1), directing that a memorial of a deed shall within 20 days "or" the execution thereof be enrolled, etc., was held to mean 20 days exclusive of the day of execution. 3 Geo. IV, c. 39, § 1, provides that warrants of attorney to confess judgment shall be filed within 21 days "after" the execution thereof. Section 2 provides that, unless they be so filed within the said space of 21 days from the execution, they shall be void, etc. Held, that the decision in *Ex parte Fallon* was applicable to the statute under consideration, the words "after" and "of," as used in the two statutes, having the same meaning. *Williams v. Burgess*, 12 Adol. & El. 635.

#### **As simultaneously.**

A contract providing that the title should remain in the plaintiff until "after" the purchase price and interest aforesaid shall be paid is equivalent in law to a sale simul-

taneously with payment; in other words, it amounts to a sale on payment. *Hawley v. Kenoyer*, 1 Wash. T. 609, 611.

#### As subject to.

A will provided that, "after settling my estate, my wife shall have the 'interest' of the remainder of my personal estate, and the judge of probate shall appoint a disinterested person to take charge of said personal estate, and pay the interest to her so long as she remains my widow," etc. Held, that the word "interest" should be construed to include the interest of the personal property not applied to the payment of debts and charges of administration from the death of the testator, and not merely from the time when the estate should be settled. The word "after," being construed in connection with the word "settling," is equivalent to "subject to," and does not refer to time. *Lamb v. Lamb*, 28 Mass. (11 Pick.) 371, 378.

#### As thereafter.

"After," as used in schedule to the new Constitution (section 16), providing that, "'after' the expiration of the term of any president judge of any court of common pleas in commission at the adoption of this Constitution the judge of such court learned in the law and oldest in commission shall be the president judge thereof," does not mean "upon," and thereby limit "the application of the rule of succession to the single event of the expiration of each commission in force at the adoption of the Constitution. It was evidently used in the sense of 'thereafter,' referring not only to the expiration of the respective commissions then in force, but to the expiration of every subsequent commission." *Commonwealth v. Pattison*, 109 Pa. 165, 170.

#### AFTER-ACQUIRED PROPERTY.

"After-acquired property," as used in reference to the estate of a married woman in whose marriage settlement her property designated as the "presently acquired property" included all of the property possessed by her at the time of her marriage, means such property as she became owner of after the time of her marriage. *Hughes-Hallett v. Hughes-Hallett*, 26 Atl. 101, 102, 152 Pa. 590.

#### AFTER-BORN CHILD.

As included in term child, see "Child—Children."

"An after born child," as used in Act April 8, 1833, making a will void as to such child, means physical birth, and does not apply to a case where a child is born before the marriage of its parents and the father makes his will two days before the marriage which legitimates the child. *Appeal of McCulloch*, 6 Atl. 253, 255, 113 Pa. 247.

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#### AFTER CONVICTION.

See "Convicted—Conviction."

#### AFTER DATE.

See "After."

#### AFTER THE DEATH.

See "After."

#### AFTER DUE PUBLICATION.

See "Due Publication."

#### AFTER THE FIRE.

A provision in a policy of insurance that the proof shall be filed within 60 days "after the fire" does not mean 60 days after the fire commenced, but within 60 days after the fire has ceased to burn. *National Wall Paper Co. v. Associated Manufacturers' Mut. Fire Ins. Corp.*, 67 N. E. 440, 441, 175 N. Y. 226.

#### AFTER JUDGMENT.

The phrases "after judgment entered of record," "next after judgment," "next after the rendering of judgment," "from the rendition of judgment," and "after entering up final judgment," occurring in various statutes providing that certain proceedings may be had within fixed times after the event designated by such phrase, all refer to the same time. And this, according to an intendment of law and the practice of the New Hampshire courts, is the last day of the term in which the record shows the judgment to have been rendered, unless the true time of entering the judgment appears upon the record. *New Hampshire Strafford Bank v. Cornell*, 2 N. H. 324, 331.

#### AFTER PAYMENT OF DEBTS.

See "After."

#### AFTER REFLECTION.

"After reflection," as used in an instruction that if defendant purposely killed deceased after reflection, with wickedness or depravity of heart, etc., the defendant was guilty of murder in the first degree, construed as equivalent to a statement of deliberation. *Lang v. State*, 4 South. 193, 195, 84 Ala. 1, 5 Am. St. Rep. 824.

#### AFTER SALE.

See "After."

#### AFTER SIGHT.

The term "after sight," as used in a bill payable so many days after sight, means such number of days after legal sight. It is

not merely the fact of having seen the bill or known of its existence that constitutes a presentment to the drawee in legal contemplation; it must be presented to him for acceptance, and the time of the bill begins to run, not from the mere presentment, but from the presentment and acceptance. *Mitchell v. Degrand* (U. S.) 17 Fed. Cas. 494, 496.

## AFTERNOON.

"Afternoon" may mean the whole time from noon to midnight, or it may mean the earlier part of that time as distinguished from the evening. It was used in this latter sense in a statute prohibiting the opening of a public house during the usual hours of afternoon divine service, and did not include a service at 6 p. m. *Reg. v. Knapp*, 2 El. & Bl. 447, 451.

Though, accurately and properly speaking, "afternoon" signifies from noon till evening, an indictment charging the violation of *Sess. Laws 1881*, p. 350, No. 259, prohibiting saloons from keeping open after 9 o'clock at night, which alleges that a saloon was kept open at 11 o'clock in the "afternoon," will be construed as sufficiently alleging the keeping open of the saloon after 9 o'clock at night. *People v. Husted*, 18 N. W. 888, 389, 52 Mich. 624.

## AFTERWARDS.

In a count in a declaration, after stating an assault by defendant alleging "and thereafterwards the said B. continuing his assault," "afterwards" may be understood to imply nothing more than a continuance of the trespass without intermission of time. *Benson v. Swift*, 2 Mass. 50, 53.

"Afterwards," as used in *Civ. Code*, § 139, defining separate property as that owned before marriage and that acquired by certain means "afterwards," means after the marriage but during the existence of community rights in property. In *re Spencer*, 23 Pac. 37, 38, 82 Cal. 110.

"Afterward die leaving no issue" in a bequest of property by a testator to his wife for life, and if his daughter M. should be dead at the death of the wife without issue, or should "afterwards die leaving no issue," then to the beneficiaries, is to be construed as importing the failure of issue at the death, and not an indefinite failure of issue. *Griswold v. Greer*, 18 Ga. 545, 546.

## AGAINST.

"Against bonds," as used on ballots in an election to determine the question of the issuance of bonds, is equivalent to the phrase "against the bonds," as used in the order authorizing the election, which required that

those voting against the bonds should deposit ballots "against the bonds." *State v. Metzger*, 26 Kan. 395, 396.

The ballots at a public election in which the question of a bond issue was to be voted on had the words "for the bonds" printed thereon. Ballots were cast on which such words were stricken out with a lead pencil, and the word "against" written directly underneath. Held, that the word "against" was to be construed as "against the bonds," and should have been counted as such. *Clark v. Montgomery County*, 6 Pac. 311, 313, 33 Kan. 202, 52 Am. Rep. 526.

A settlement of a statement of facts at the request of defendant in a criminal prosecution, and the hearing of a bill brought on by him, are not "proceedings against" him, within the meaning of *Rev. St. U. S. § 768* [U. S. Comp. St. 1901, p. 597], providing that, pending habeas corpus proceedings in the federal courts, any proceedings against the person imprisoned in any state court shall be deemed void, the defendant having moved for the proceedings himself, and the act of settling the statement being performed solely for his benefit. *State v. Humason*, 30 Pac. 718, 719, 4 Wash. 413.

An assignment for the benefit of creditors is a proceeding by and not against a debtor, within *Pub. Laws*, c. 723, § 4, providing that "proceedings against a debtor" under the insolvent act for the purpose of procuring a preference shall be void. *James v. Mechanics' Nat. Bank*, 12 R. I. 460, 461.

### Competency of witness.

Within a statute providing that no party, as to certain transactions, shall be competent as a witness against certain other persons, does not mean by "against" on opposite sides of a suit, but as having opposing interests in a suit, though they may be on the same side as coplaintiffs or codefendants. *Seabright v. Seabright*, 28 W. Va. 412, 465; *Coffman v. Hedrick*, 9 S. E. 65, 67, 33 W. Va. 124.

Within the statute making husband and wife competent witnesses in all cases, except that in divorce on account of adultery neither shall be competent or compellable to give evidence for or "against" the other, a wife, when accused of adultery in divorce proceedings against her, by denying her guilt does not give evidence against the husband merely because it tends to defeat his action. *Broom v. Broom*, 41 S. E. 673, 674, 130 N. C. 562.

*Code 1873*, § 3641, providing that neither husband nor wife shall in any case be a witness against the other, except in a criminal proceeding for a "crime committed by one against the other," etc., is not confined to crimes committed against the person, but would include incest committed by the husband with the wife's sister. *State v. Cham-*

bers, 53 N. W. 1090, 1091, 87 Iowa, 1, 43 Am. St. Rep. 349.

#### Contact implied.

"Against," as used in an indictment charging that the defendant did make and assault at and "against" the said B., and did shoot a certain pistol, with intent, etc., was to be construed in its usual acceptation, in which it means to push or run against and coming in contact or collision, and the indictment was sufficient to charge an assault and battery. *State v. Prather*, 54 Ind. 63, 64.

The word "against" does not always import physical contact, so the word "against," as used in a declaration alleging that defendant negligently drove its locomotive upon and "against" plaintiff and his horse and wagon, in which he was then driving, does not necessarily import a physical contact, and therefore there is no variance between the declaration and the proof showing that the train ran at a high rate of speed very close to the horse and wagon, thereby frightening the horse, though not actually striking either the horse or the wagon. *Beyel v. Newport News & M. V. R. Co.*, 34 W. Va. 538, 546, 12 S. E. 532.

#### As without consent.

A will providing that, if the testator's daughter should marry "against" the consent of the testator's executors and her mother, she should receive but \$5,000, does not mean that the condition in the will could be broken only where there was an affirmative prohibition of the marriage before it took place, since such a construction would permit a clandestine or secret marriage to be contracted without involving a forfeiture, and the word must be read in the sense of "without," and a marriage without the consent of either the executor or the devisee's mother was a breach of the condition. *Hogan v. Curtin*, 88 N. Y. 162, 169, 42 Am. Rep. 244.

#### AGAINST EVIDENCE.

A finding which negatives the existence of a fact admitted by the pleadings is a finding "against evidence," and the judgment rendered thereon is erroneous. *Silvey v. Neary*, 59 Cal. 97, 98.

A ruling that the verdict is "against the evidence" amounts to a decision that the verdict is against the weight of evidence. *Laclede Power Co. v. Nash-Smith Tea Co.*, 69 S. W. 27, 28, 95 Mo. App. 412 (citing *Parker v. Cassingham*, 130 Mo. 348, 32 S. W. 487).

In the statement by a trial judge in setting aside a verdict as "against the evidence," where the verdict was in favor of the party who sought to have it set aside, the phrase "against the evidence" can have no other meaning than that the verdict was not sufficiently large in the opinion of

the court. *Jenkins v. Hankins*, 41 S. W. 1028, 1029, 98 Tenn. 545.

A finding against evidence is one which cannot be supported by the evidence approved or admitted; in other words, a finding that is so palpably in conflict with the proof that the conclusion stated in the finding could not have been arrived at by properly construing the evidence in any light in which it might be viewed. *Harris v. Harris*, 59 Cal. 620, 621.

The phrase "against and contrary," as used in a motion for new trial because the finding of the court is against and contrary to the weight of the evidence and the law of the case, challenges the sufficiency of the evidence to sustain the decision. *Adams v. Smith* (Wyo.) 70 Pac. 1043.

#### AGAINST HER WILL.

"Against her will," as used in an indictment charging rape, is equivalent to an allegation that the act was committed without the prosecutrix's consent. *State v. Gaul*, 50 Conn. 578, 579.

Gen. St. art. 4, c. 29, § 9, providing that whoever shall unlawfully take or detain any woman "against her will," with intent to have carnal knowledge with her, shall be guilty of a felony, should be construed to include the taking and detaining of a woman who was asleep and incapable of exercising her will at the time. *Malone v. Commonwealth*, 15 S. W. 856, 91 Ky. 307.

An act is against the will where it is not approved by the will, or the will did not concur with the act. In all cases where there is no sensibility or consciousness or freedom of the will, the act is said to be against the will. It may be that in a similar sense the word "consent" has sometimes been unguardedly used, in cases where the will has been overcome by fear of personal violence and has no power of action whatever and no power to oppose or dissent, as passive consent, and not dissenting as consenting. To "will" or "consent" is an operation of the mind, and implies positive mental action, and when these words are used as the ground of responsibility for any given act their meaning is the same. Consenting is to be willing, as a condition of the mind. In the law, and in defining crime the terms "against the will" and "without consent" are used convertibly. When the mind is subjugated as well as the body, so that the power of volition and mental capacity to either consent or dissent is gone, then the act is against the will, and so also it may be said to be without consent. *Whitaker v. State*, 7 N. W. 431, 432, 50 Wis. 521, 36 Am. Dec. 856.

"Against her will," as used in Gen. St. c. 160, § 26, defining rape to be the ravishing and carnally knowing a woman by force



and "against her will," should be construed as synonymous with the phrase "without her consent," meaning the enforcement of a woman without her consent; and hence a man who had carnal intercourse with a woman without her consent when, as he knew, she was drunk, and wholly insensible, so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was guilty of rape. *Commonwealth v. Burke*, 105 Mass. 376, 377, 7 Am. Rep. 531.

"Against her will," as used in Gen. St. c. 29, art. 4, § 9, providing that whoever shall unlawfully take or detain any woman "against her will," etc., "shall be punished," etc., when applied to the case of an insane woman, includes "any act done toward the alleged victim by the defendant, other than acts of kindness, courtesy, or friendship." *Higgins v. Commonwealth*, 21 S. W. 231, 94 Ky. 54.

2 Rev. St. p. 664, § 25, prescribing a punishment for the offense of taking a woman unlawfully, "against her will," with the intent to compel her, by force, menace, or duress, to be defiled, means that the person defiled did not go of her own volition with any such purpose, and that she did not willfully assent to her own defilement, and imports a case where a person, contrary to her will, and without her knowledge of the purpose in contemplation, was induced to go with another for a lawful object, and afterward, in accordance with the original intent, and by force, menace, or duress, was unlawfully defiled. It means that the person defiled was an unwilling victim of misrepresentation, fraud, and falsehood, and that she in no way assented to the act; and hence, where a person falsely represented to the prosecutrix that he had procured her a situation as a servant in a respectable family, and that, unsuspecting of the object he had in view, and relying upon his statement, she was induced to proceed with him to a disreputable house, the crime was consummated against her will. *Beyer v. State*, 86 N. Y. 369, 373.

#### AGAINST LAW.

The statute authorizing a new trial on the ground that the verdict is "against law" does not intend to include in that phrase all or any other of the several distinct and separate grounds of the motion which are specified in the act, but presents the question whether the finding of the jury is in accord with the law embodied in the instruction. *Drexel v. Daniels*, 68 N. W. 399, 49 Neb. 99.

A verdict in disobedience to the instructions of the court upon a point at law is a verdict "against law." *Declez v. Save*, 71 Cal. 552, 553, 12 Pac. 722, 723; *Emerson v. Santa Clara County*, 40 Cal. 543, 545.

The words "against law," as used in a notice of a motion to set aside a judgment and verdict as "against law," are too vague to mean anything more than that they were erroneous. *Carpenter v. San Joaquin County*, 19 Pac. 174, 175, 75 Cal. 596.

Within the provisions of the statute that a verdict or other decision of facts may be set aside and a new trial granted if such verdict or decision of fact is "against law," "against law" meant if error of law be committed resulting from an erroneous decision of fact. While a verdict may be set aside as against law, a new trial will not be granted on the ground that a judgment is against law. *Froman v. Patterson*, 24 Pac. 692, 694, 10 Mont. 107.

Where it appears that the jury must either have disregarded the law as given in the instructions, or else must have found a fact wholly contrary to the evidence, the verdict was "against law." *Sweeney v. Central Pac. R. Co.*, 57 Cal. 15, 18.

#### AGAINST THE PEACE.

An allegation in a criminal complaint that the acts are against the peace and contrary to the statute is equivalent to an allegation that the act was unlawfully or maliciously done. *State v. Tibbetta*, 29 Atl. 979, 86 Me. 189.

#### AGAINST THE STATUTE.

The office of the words "against the statute," as used in indictments, is to show that the offense is statutory, and will be read as a part of the charge, if the charge without them would not set forth the offense with completeness. *State v. Murphy*, 10 Atl. 585, 589, 15 R. I. 543.

#### AGAINST US.

See "Us."

#### AGE.

See "Full Age"; "Lawful Age."

#### AGE OF CONSENT.

"Age of legal consent," within the meaning of the statute providing for the annulment of a marriage when either party had not at the time of the marriage attained the age of legal consent, was construed to mean the age of legal consent according to the common-law definition of the term, and not the age of consent established by a statute increasing the age of consent, in cases of unlawful carnal knowledge, to 14 years, there being no difficulty in believing that the Legislature intended to guard a female child from carnal knowledge for a time after she was capable of contracting a marriage. *Fisher v. Bernard*, 27 Atl. 316, 317, 65 Vt. 663.

**AGED.**

"Mr. Webster defines 'aged' as follows: 'Old; having lived long; having lived almost the usual time allotted to that species of being.' Therefore the term does not characterize a person only 37 years of age." Hall v. State, 16 Tex. App. 6, 11, 49 Am. Rep. 824.

While the term "aged" as applied to human beings is not for all purposes susceptible to precise definition, and while it is not practicable to arbitrarily fix a period of life at which the condition of being aged may be said to have certainly begun, a man of 66 years is entitled to an exemption of his property under Civ. Code, § 5912, allowing this right to every aged or infirm person, and this though the applicant may be a hale and hearty man. Allen v. Pearce, 28 S. E. 859, 860, 101 Ga. 316, 39 L. R. A. 710, 65 Am. St. Rep. 306.

**AGENCY.**

See "Actual Agency"; "Commercial Agency"; "Contract of Agency"; "Exclusive Agency"; "Intervening Agency"; "Mercantile Agency"; "Ostensible Agency"; "Special Agency or Agent."

An "agency" is created by contract, express or implied. It "is a legal relation by virtue of which one party (the agent) is employed and authorized to represent and act for the other (the principal) in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority." Sternaman v. Metropolitan Life Ins. Co., 62 N. E. 763, 765, 170 N. Y. 13, 57 L. R. A. 318, 88 Am. St. Rep. 625.

"Agency" is the relation, created either by express or implied contract or by law, whereby one party *sui juris*, called the principal, constituent, or employer, delegates the transaction of some lawful business with more or less discretionary power to another party, called the agent, attorney, proxy, or delegate, who undertakes to manage the affairs and render to him an account thereof. State v. Hubbard, 51 Pac. 290, 292, 58 Kan. 797, 39 L. R. A. 860.

"Agency," in its *prima facie* sense, implies the relationship of principal and agent, but is often used in commercial matters where the relationship is that of vendor and purchaser. Robinson v. Easton, Eldridge & Co., 28 Pac. 796, 797, 93 Cal. 80, 27 Am. St. Rep. 167.

A contract of partnership is a contract of agency, and it differs from a pure agency only in this: that in a pure agency the agent binds his principal only; in a partnership all of the principals or partners are bound, which, of course, includes the actor. Person v. Carter, 7 N. C. 321, 324.

"Agency," in its legal sense, always imports commercial dealings between parties through the medium of another. An agent negotiates with third parties in commercial matters for another, while the word "servant" relates more to matters of manual or mechanical execution. Kingan & Co. v. Silvers, 37 N. E. 413, 416, 13 Ind. App. 80.

It is laid down as a universal principle that, whether the agency be of a special or general nature, it includes, unless the inference is expressly excluded by other circumstances, all the usual modes and means of accomplishing the end and objects of the agency. Story, Ag. § 85. And, if the agency arises by implication from numerous acts done by the agent with the tacit consent or acquiescence of the principal, it is deemed to be limited to acts of a like nature. Michigan Southern & N. I. R. Co. v. Day, 20 Ill. 375, 378, 71 Am. Dec. 278 (citing Story, Ag. § 87; Paley, Ag. 209, 210).

In all agencies there is a relation of trust and confidence by reason of which the legal right to discontinue that relationship is more strongly implied, and any stipulation providing for its continuance must be the more clearly stated; and where plaintiff contracted to sell and to continue to sell defendant a certain variety of wine at a certain price, and that defendant should have the sole agency for such wine in the town where he was located, the contract was one of purchase and sale, and did not create the relation of principal and agent. Roosevelt v. Nusbaum, 77 N. Y. Supp. 457, 459, 75 App. Div. 117.

The term "agency," in an ordinance imposing a license on every insurance agency doing business in the state, or any insurance company or companies not therein located, for each and every company represented by the agent, the sum of \$10, is to be construed as fixing the license on the agent and not the companies represented by him, and they enter into the question only as an element of calculation, and measure the license to be paid by the agency. The ordinance is invalid for the reason that such a rule violates the rule of equality and uniformity. City of New Orleans v. Rhenish Westphalian Lloyds, 31 La. Ann. 781, 784.

**As place of business.**

The word "agency," according to its strict legal signification, refers to the relation existing between the principal and agent, and which is created by the contract entered into between them. In this sense it applies rather to the person occupying the position of agent than to the place at which the business of the company is transacted by the agent. There is another sense, however, in which the word "agency" is employed colloquially, and in this sense it designates the place at which the business of

the company is to be transacted by the agent. And in this latter sense the word "agency" is used by the statute which provides that suit against insurance companies may be brought in any county where such insurance company may have an agency or place of doing business. *Atlanta Acc. Ass'n v. Bragg*, 29 S. E. 706, 707, 102 Ga. 748.

The word "agency" in a statute authorizing suit against a company in any county where such company may have an "agency" or place of business, is intended to designate a place at which the company's business was transacted by an agent. Thus, an allegation that defendant had an office in the county, and had also an agent in the county, and was doing business therein, is sufficient allegation that it had an agency in the county. *Western Union Telegraph Co. v. Bailey*, 42 S. E. 89, 90, 115 Ga. 725, 61 L. R. A. 933.

#### In treatment of disease.

In construing the word "agency" as used in 62 Ohio Laws, p. 44, which forbids the prescribing of any drug or medicine or other agency for the treatment of diseases by a person who has not received a certificate of qualification, its meaning must be limited by that of the associate words "drugs and medicine," and it does not include the system of rubbing and kneading the body, commonly known as "osteopathy," for the treatment, cure, and relief of diseases. *State v. Liffing*, 55 N. E. 168, 169, 61 Ohio St. 39, 46 L. R. A. 334, 76 Am. St. Rep. 358.

#### AGENCY COUPLED WITH AN INTEREST.

To constitute an "agency coupled with an interest," both agency and interest must be derived from the same source. *Black v. Harsha*, 54 Pac. 21, 7 Kan. App. 794.

The word "interest," as used in the statement of the rule that, in order to render an agent's authority irrevocable, it must be coupled with an interest, signifies the interest in the thing itself on which the authority is to be exercised, and not merely an interest in that which is to be produced by the exercise of the authority. *Attrill v. Patterson*, 58 Md. 226, 250.

#### AGENCY OF NECESSITY.

The law is well settled that a wife is entitled to procure what is reasonably necessary for her support and maintenance on her husband's credit, when he fails to make proper provision for her necessities. Although the wife is sometimes described as his agent for that purpose, such a characterization is apt to be misleading, as the power is not only in no wise dependent upon the authority of the husband, but, in a proper case, may be exercised against his consent and in spite of his protest. Hence

it has been called an "agency of necessity," and the husband is said to be estopped from disputing it by reason of his misconduct in failing to perform his legal obligation. *Bostwick v. Brower*, 49 N. Y. Supp. 1046, 1047, 22 Misc. Rep. 709.

#### AGENT.

See "Business Agent"; "Commercial Agent or Broker"; "Emigrant Agent"; "Fiscal Agent"; "General Agency or Agent"; "Inferior Agents"; "Innocent Agent"; "Local Agent"; "Managing Agent"; "Mercantile Agent"; "Particular Agent"; "Permanent Agents"; "Real Estate Broker"; "Rental Agent"; "Soliciting Agent"; "Special Agency or Agent"; "State Agent"; "Station Agent"; "Universal Agent"; "Vice Commercial Agent." Agent or otherwise, see "Otherwise."

The term "agent" is one of wide signification. It is defined to be one who acts for another by authority from him (Webst. Int. Dict.); one who undertakes to transact some business or manage some affair for another by authority and on account of the latter, and to render an account of it. The term "agent" may therefore be said to apply to any one who by authority performs an act for another. *Wynegar v. State*, 62 N. E. 38, 39, 157 Ind. 577; *Metzger v. Huntington*, 37 N. E. 1084, 1088, 39 N. E. 235, 236, 139 Ind. 501; *Nichols v. State*, 63 N. E. 783, 784, 28 Ind. App. 674. An "agent" is a person authorized by another to act for him. *Barr v. Rader (Or.)* 49 Pac. 962, 963, 31 Or. 225; *Norfolk & W. R. Co. v. Cottrell*, 3 S. E. 123, 125, 83 Va. 512. The term "agent," as used in Code, § 8143, which provides for the punishment of any "agent" of any private person who embezzles or fraudulently converts to his own use any property of another which comes into his possession by virtue of his employment, means "one who is authorized to act for another; a substitute; a deputy; a factor." *Hinderer v. State*, 38 Ala. 415, 419.

An agent is a person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified. *Flesh v. Lindsay*, 21 S. W. 907, 911, 115 Mo. 1, 37 Am. St. Rep. 374.

An agent is one who has been intrusted with the business of another. *Wilson v. Menachas*, 20 Pac. 468, 469, 40 Kan. 648.

St. 52 Geo. III, c. 63, for preventing the embezzlement of securities by agents, only includes persons to whom such securities are intrusted in the exercise of their functions or business. *Rex v. Prince*, 2 Car. & P. 517, 519.

The term "agents" in a general sense applies to persons in the service of another, but in a legal sense an agent is one who stands in the place of his principal and is

his representative. *Turner v. Cross*, 18 S. W. 578, 579, 83 Tex. 218, 15 L. R. A. 262.

The agent is the representative of the principal in the transaction of business embraced within his agency. Whatever he does lawfully in a transaction of that business is the act of the principal. *First Nat. Bank of Portland v. Linn County Nat. Bank*, 47 Pac. 614, 615, 30 Or. 296; *Zeigler v. Commonwealth (Pa.)* 14 Atl. 237, 239.

The term "agent," in general, designates those employments where the persons exercising them are not under the immediate control of a superior. *State v. Sarila*, 84 N. E. 1129, 1130, 135 Ind. 195.

An agent is a person appointed to act for another in the transaction of some lawful business, and, in general, the power conferred upon an agent is based upon special confidence or trust reposed in the agent, and such power, in the absence of authority, express or implied, cannot be redelegated by the agent so as to bind the principal. *Williams v. Moore*, 58 S. W. 953, 954, 24 Tex. Civ. App. 402.

"The term 'agent' is one of very wide application, and includes a great many classes of persons, to which distinctive appellations are given, as 'factors,' 'brokers,' 'attorneys,' 'cashiers of banks,' 'clerks,' 'consignees,' etc." *Norfolk & W. R. Co. v. Cottrell*, 8 S. E. 123, 125, 83 Va. 512; *Porter v. Hermann*, 8 Cal. 619, 624.

An "agent" is one who represents another, called the "principal," in dealings with third persons. Such representation is called "agency." *Rev. Codes N. D.* 1899, § 4303; *Civ. Code S. D.* 1903, § 1656; *Civ. Code Mont.* 1895, § 3070; *Civ. Code Cal.* 1903, § 2295.

The word "agent," as employed in the provision relating to the service of process on the agent of certain corporations, shall be construed to include a telegraph operator, telephone operator, depot or station agent of a railway company, and toll gatherer of a canal or turnpike company. *Code Va.* 1887, § 3227.

The term "agent" or "agents," used in the title relating to insurance, shall include an acknowledged agent or surveyor, and any person who shall in any manner aid in transacting the business of an insurance company. *Gen. St. Conn.* 1902, § 3620.

The term "agent" or "agents," as used in a provision of the title relating to insurance, requiring every agent of any insurance company to publish in all advertisements of his agency the location of the company, includes an acknowledged agent or surveyor, or any other person or persons who shall in any manner, directly or indirectly, transact, or aid in transacting, the insurance business of

any insurance company not incorporated by the laws of this territory. *Comp. Laws N. M.* 1897, § 2120.

The term "agent," as used in the act relating to mines, is defined to mean any person, other than the owner thereof, having the care and management of any coal mine, or any part thereof, and, in case the mine is owned or occupied by a corporation, then any of its officers shall be deemed its agent. *Horner's Rev. St. Ind.* 1901, § 5463.

Every person who shall receive or transmit applications for suretyship, or receive for delivery bonds founded on applications forwarded from the state, or otherwise procure suretyship to be effected by such company upon the bonds of, or the bonds given to, persons or corporations in the state, shall be deemed an agent of such company. *Gen. St. Conn.* 1902, § 3646.

Any person who shall, directly or indirectly, receive or transfer money or other valuable things to or for the use of foreign corporations, or who shall in any manner make, or cause to be made, any contract, or transact any business, for or on account of any such foreign corporation, shall be deemed an agent of such corporation. *Horner's Rev. St. Ind.* 1901, § 3026.

An allegation that one is an agent in a prosecution under *Burns' Rev. St.* 1901, § 2171, making it criminal to act as "agent" for any lottery scheme or gift enterprise, is proper as an allegation of fact, and is not a mere conclusion. *Nichols v. State*, 63 N. E. 783, 784, 28 Ind. App. 674.

The word "agent," following the name of one who has signed a contract, is prima facie descriptive only, and does not tend to show that the contract was executed in such capacity. *Peterson v. Homan*, 44 Minn. 166, 46 N. W. 303, 304, 20 Am. St. Rep. 564.

The word "agent," as used in the Delaware insurance act (Act March 24, 1879, § 1, as amended by Act March 17, 1881), providing that the Insurance Commissioner shall not be a director, officer or "agent" of, or directly or indirectly interested in, any insurance company, except as an insured, creates a legal inability in one, while holding the office of Insurance Commissioner, to be or act as the agent of any insurance company of another state for the receipt of service of process in Delaware, as required by section 7 of said insurance act, which prohibits any insurance company from doing business within the state of Delaware without first having obtained authority therefor, and without having filed a certificate containing the name and residence of some person or "agent" within the state upon whom service of process may be made. *Equitable Life Assur. Soc. v. Fowler (U. S.)* 125 Fed. 88, 90.

**As acting in fiduciary capacity.**

See "Fiduciary Capacity or Character."

**Advertising solicitor.**

An employé who is sent into the state as traveling solicitor of advertisements, whose only authority is to take orders at rates dictated by the home company, and for space, subject to the approval of the home company, and without authority to make definite contracts, is not an "agent," within the meaning of the Minnesota statutes, upon whom service of process is binding upon the corporation. *Boardman v. S. S. McClure Co.* (U. S.) 123 Fed. 614, 616.

**As agency coupled with interest.**

The word "agent," as used in Civ. Code, § 3038, providing that an "agent" having possession, actual or constructive, of the property of his principal, has a right of action for any interference with that possession by third persons, will be held to mean an agent who has a special interest or property in the chattel. *Mitchell v. Georgia & A. Ry.*, 36 S. E. 971, 975, 111 Ga. 760, 51 L. R. A. 622.

**Attorney at law.**

The term "agent," as used in Pasch. Dig. arts. 2421-2423, limiting the embezzlement of property by private persons to any clerk or "agent" of any private person or partnership, or any assignee or bailee of money or property, factor, or commission merchant, or carrier, cannot be construed to include one employed as an agent or attorney at law, who, while so employed, received and took possession of certain money which he embezzled, for he was only such an agent as an attorney at law may be; but it means one who is an agent in fact. *State v. McLane*, 43 Tex. 404, 405.

The word "agent," as used in How. Ann. St. Mich. § 9151, authorizing the punishment of any agent for embezzlement, will be construed to include attorneys at law. In re *Converse* (U. S.) 42 Fed. 217, 219; *People v. Converse*, 42 N. W. 70, 71, 74 Mich. 478, 16 Am. St. Rep. 648.

Wag. St. p. 734, § 37, forbids a superintendent of insurance of the state to employ in any capacity any agent or employé of any insurance company. Held, that the term "agent or employé" applied to and included an attorney who was a salaried officer of such company. In re *Bowman*, 7 Mo. App. 569.

The word "agent," as used in Const. art. 6, § 24, declaring a suitor in any cause in any court of the state shall have the right to prosecute or defend either in his own person or by an "agent" or attorney, is synonymous with attorney at law. *Cobb v. Judge of Superior Court*, 5 N. W. 309, 310, 43 Mich. 289.

**Attorney in fact.**

"The term 'agent' is not synonymous with 'attorney in fact.' All attorneys in fact are agents, but all agents are not necessarily attorneys in fact. 'Agent' is the general term, which includes brokers, factors, consignees, shipmasters, and all other classes of agents. By 'attorneys in fact' are meant persons who are acting under a special power created by deed. It is true, in loose language, that the terms are applied to denote all agents employed in any kind of business, except attorneys at law, but in legal language they denote persons having special authority by deed." *Porter v. Hermann*, 8 Cal. 619, 624.

**Bailee.**

The word "agent," as used in an indictment charging embezzlement by the defendant as "agent," will be construed to include bailees, and the indictment held sufficient under Pen. Code, § 507, declaring that any bailee fraudulently converting the bailed property shall be guilty of embezzlement. *People v. Johnson*, 12 Pac. 261, 262, 71 Cal. 384.

Rev. St. c. 126, § 29, providing that if any "agent or servant" of any private person shall embezzle or fraudulently convert to his own use the property of the principal which shall have come to his possession or be under his care by virtue of his employment, is to be construed as only including those who stood in the relation of an agent to a principal, and cannot be construed as including a case of a mechanic or manufacturer to whom articles are sent for the purpose of being manufactured into articles for use, he not being the "agent or servant" of the person sending him the materials to be manufactured. *Commonwealth v. Young*, 75 Mass. (9 Gray) 5, 6.

Where a person entered a saloon kept by defendant, and requested him to keep money for him in the safe until a following day, and defendant appropriated the money to his own use, he was an "agent" of such person, within *Burns' Rev. St.* 1901, § 2022, declaring that every officer, agent, or employé who shall, while in such employment, take any money belonging to the person in whose employment said agent may be, shall be deemed guilty of embezzlement. *Wynegar v. State*, 62 N. E. 38, 39, 157 Ind. 577.

**Bridge.**

Laws 1850, c. 140, § 44, and Laws 1854, c. 282, § 8, making a railroad company which fails to fence its right of way liable for any damages done by its engines or agents to any cattle, horses, etc., thereon, construed not to include a railroad bridge which the horses ran into and injured themselves. *Knight v. New York, L. E. & W. R. Co.*, 1 N. E. 108, 110, 99 N. Y. 25.

**Broker.**

A "broker" is defined as an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation, for a compensation commonly called "brokerage." Story, Ag. (8th Ed.) § 28. Every broker is in a sense an agent, but every agent is not a broker. There are, however, so many incidents common to both relations that it is difficult to define the precise line of demarkation. We would say the idea of exclusiveness enters into an employment of agency, while in respect to the broker there is a holding out of one's self generally for employment in matters of trade, commerce, and navigation. It is the business or calling of acting or offering to act generally, as distinguished from isolated employment, not induced by or resulting from a general business or calling. In determining whether particular facts constitute one an "agent," strictly so called, or a "broker," the circumstances that the employments are many or few cannot be made the controlling test. *Stratford v. City Council of Montgomery*, 20 South. 127, 128, 110 Ala. 619.

The word "agent" may acquire a peculiar meaning in a certain business, and, when its construction arises in connection with such business or occupation it is to be taken according to its usage, as where it was proper to show that persons selling pianos of a particular make within a certain territory were called in such trade "agents," although they bought and sold on their own account. *Whittemore v. Weiss*, 33 Mica 348, 351.

In Comp. Laws, § 11,372, providing that whenever money shall be delivered to any person as agent, with written instructions as to the use to which it shall be applied, and such person shall intentionally appropriate the money in any other manner than as directed, he shall be guilty of a felony, the term "agent" as so used included a broker, and justified his conviction for misapplying money deposited with him to be used in the purchase of stock. *People v. Karste* (Mich.) 93 N. W. 1081, 1082.

**Clerk or collector.**

Clerk synonymous, see "Clerk."

Code Civ. Proc. § 542, subd. 5, declaring that personal property not capable of manual delivery may be attached by leaving a copy of the writ with the person having possession of the property, or his "agent," does not embrace a clerk, in a store belonging to a mining corporation, who has charge of certain funds, keeps the pay roll, and pays the miners. *Blanc v. Paymaster Min. Co.*, 30 Pac. 765, 767, 95 Cal. 524, 29 Am. St. Rep. 149.

A bartender is the agent of the saloon keeper. *Zeigler v. Commonwealth* (Pa.) 14 Atl. 237, 239.

As used in Rev. St. § 1944, providing that any "agent," clerk, servant, or employé who shall appropriate moneys in his control belonging to his employer shall be guilty of embezzlement, includes a person engaged in making collections for others on commissions, since the term "agent" designates those employments where the persons exercising them are not under the immediate control of a superior. *State v. Sarilis*, 34 N. E. 1129, 1130, 135 Ind. 195.

**Contractor.**

The term "agent," as used in a statute giving a lien for all debts contracted by the master, owner, agent, or consignee of a boat or vessel on account of supplies or stores furnished, is construed to mean only a person who is authorized to contract on behalf of the owners of the boat and bind it by his agreements, and hence cannot be construed to include a ship carpenter who contracts to repair a boat and furnish materials, and purchases the lumber with which to make the repairs from the claimants of the lien, he having no authority to represent the owner of the vessel in the purchasing thereof. *Childs v. The Brunette*, 19 Mo. 518, 520.

The term "agent," as used in Code, § 1957, providing that every person performing labor upon or furnishing materials to be used in the construction of a building has a lien thereon, whether furnished at the instance of the owner or his agent, and that for the purpose of the act every contractor, etc., shall be held to be the owner's agent, "has an accepted legal and popular meaning, and makes all contracts, notices, and knowledge of the main contractor that of the owner himself. It makes the owner privy with both contractor and subcontractor." *Spokane Mfg. & Lumber Co. v. McChesney*, 21 Pac. 198, 200, 1 Wash. St. 609.

As used in General Railroad Act, Comp. Laws, § 1987, requiring every corporation formed under it to "erect and maintain fences," and providing that, until such fences shall be duly made, the corporation and their "agents" shall be liable for all damages which shall be done by their agents or engines, and to animals thereon, and all other damages which may result from neglect of such corporation to erect and maintain fences, should be construed to apply to a contractor with the company for grading the track. He "was an agent within the law and spirit of the act." It was evidently intended to embrace under the term "agents" every one in the employment of the company. The word is to be taken in the enlarged sense to include those who exercise the power of the company upon or over the road, as well as those acting as engineers or in any other subordinate capacity, and who may be connected with the commission of the injury. *Gardner v. Smith*, 7 Mich. 410, 441, 74 Am. Dec. 722.

### One in control or management of property.

The term "agent," as used in Code, art. 3, § 4, providing that any person may contract with any "agent" or factor intrusted with any goods for the purchase thereof, and may receive from and pay for the same to such agent, and that such contract and payment shall be good against the owner notwithstanding such person shall have notice that the person making the contract is an agent or factor, does not mean a mere servant or caretaker, or one who has possession of goods for carriage, safe custody, or otherwise, but one whose employment corresponds to that of some known kind of commercial agent, such as a factor. *Levi v. Booth*, 58 Md. 305, 317, 42 Am. Rep. 332.

In Rev. St. art. 1040, providing that personal property of a nonresident who has an "agent" residing in the state in charge of such property shall be assessed in the district in which the agent resides, the word "agent" means one who has charge or possession of the property for any purpose, and it is not essential that he should be a general agent to sell the property, or that he should have authority to act for the owner in all matters relating to the property, but the possession or care, custody, or management of the property by another is sufficient to sustain the tax. *City of Merrill v. P. B. Champagne Lumber Co.*, 43 N. W. 653, 654, 75 Wis. 142.

A company which has in its possession notes and mortgages executed to it, and by it assigned to third persons under assignments stipulating that the notes and mortgages shall remain with it for safe-keeping and collection, and that it shall retain all interest in excess of a specified per cent. as compensation for its services, is an "agent" within Code 1897, § 1320, providing that any person acting as agent for another, and having in his "possession or under his control or management any money, notes, credits," etc., of such other person, "with a view to investing or loaning or in any other manner using or holding the same for pecuniary profit for himself or the owner," shall list the same for taxation. *German Trust Co. v. Board of Equalization of City of Davenport Tp. (Iowa)* 96 N. W. 878.

### Debtor.

Process in an action was issued and served on a debtor of the defendant, and on no one else. To serve a notice on a man's debtor is no notice to the man of a claim against him. The debtor is in no sense his agent. *Martin v. Central Vt. R. Co.*, 3 N. Y. Supp. 82, 83, 84, 50 Hun, 347.

### As employé.

See "Employé."

### Engineers and firemen.

The word "agent," as used in Rev. Laws, § 3412, requiring railroad companies to maintain sufficient fences and cattle guards, and making them and their "agents" responsible for the failure to do so, has a broad meaning, and was entitled to embrace such servants as engineers and firemen, and is not limited to those who, by lease or other contract, stand in place of the company, and control and operate the road. *St. Johnsbury & L. C. R. Co. v. Hunt*, 7 Atl. 277, 278, 59 Vt. 294; *Clement v. Canfield*, 28 Vt. (2 Williams) 302, 304.

### Guardian or committee.

An "agent" is one who has been intrusted with the business of another. The natural guardian of a minor is, for the purpose of making an affidavit in replevin, the "agent" of such minor. *Wilson v. Menchias*, 20 Pac. 468, 469, 40 Kan. 648.

The committee of a lunatic who is a resident in the same county with the lunatic cannot be regarded as his agent, within the meaning of 1 Rev. St. tit. 2, pt. 1, c. 13, art. 1, § 5, providing that personal property under the control of persons as "agents," trustees, executors, or administrators, must be assessed against such person, since the term "agent," as used in the statute, applies only to one whose principal is not a resident of the state. *Boardman v. Tompkins County Sup'rs*, 85 N. Y. 359, 362; *People v. Tax Com'r's*, 3 N. E. 85, 86, 100 N. Y. 215.

### Implied agent.

Under statutes authorizing the service of process on "agents" of foreign corporations in order that the service will constitute due process of law, the agent must be one having in fact a representative capacity and a derivative authority. Such agent must be one actually appointed and representing the corporation as a matter of fact, and not one created by construction or implication contrary to the intention of the parties. *Mikolas v. Hiram Walker & Sons*, 76 N. W. 36, 73 Minn. 305.

The definition of an "agent" at the common law, as quoted in Story, Ag. § 3, is: "An attorney is he who is appointed to do anything in the place of another." The appointment need not be in writing; it may be inferred from the words or acts of the principal. These words or acts must, however, be such as point clearly to the agent as such. In *Evans on Agency* (Ewell's Ed.) the definition given is: "An agent is a person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified." *Metzger v. Huntington*, 39 N. E. 235, 236, 139 Ind. 501.

### As laborer.

See "Laborer."

**Lessee.**

The term "agent," as used in Comp. St. c. 26, § 41, making a railroad company and its agents liable for damages occasioned by want of fences and cattle guards, is a very extensive term, and may be fairly applied to almost any one who performs the office of another, and includes a lessee of the company, since such lessee must be an agent of the company performing the company's functions, or he could not be allowed to collect tolls and fare, or to run engines. *Clement v. Canfield*, 28 Vt. 302, 304.

**As managing agent.**

Within the provisions of an act fixing a tax on all "agents" of packing houses doing business in this state, the word "agents" means managing or superintending agents, and includes every agent who is the alter ego of the principal by whom he is employed. *Stewart v. Kehrer*, 41 S. E. 680, 682, 115 Ga. 184.

The mining law recognizes agents by name as known representatives upon whom process may be served. They are the persons who have charge personally of the local business at the mines, and are necessarily to be treated in law as general agents, to do all that is fairly within the scope of corporate business in conducting the operations in that locality. *Adams Min. Co. v. Senter*, 26 Mich. 73, 76 (cited in *Sacalaris v. Eureka & P. R. Co.*, 1 Pac. 835, 836, 18 Nev. 155, 51 Am. St. Rep. 737).

**Temporary employé.**

The term "agent," in Gen. St. c. 257, § 8, fixing a punishment for embezzlement by the clerk, servant, or agent of any person, is not limited to agents engaged in a general or continuous agency or service, but applies to a person authorized on a single occasion by the maker of certain notes to exchange them in renewal of others. The person authorized to make the exchange may be an agent for that purpose, within the meaning of the statute, although the notes are made for his accommodation as well as the maker's. *State v. Barter*, 58 N. H. 604, 605.

Act Cong. Jan. 16, 1883, 22 Stat. 405, c. 27, § 6 [U. S. Comp. St. 1901, p. 1221], requiring every clerk, agent, or person employed to undergo a competitive examination, does not apply to a merchant appraiser selected to appraise the market value and wholesale price of imported goods, where the position of such appraiser was not for any certain duration, continuing emolument, or of continuous duties, and where he acted only occasionally and temporarily. *Auffmordt v. Hedden*, 11 Sup. Ct. 103, 108, 137 U. S. 310, 34 L. Ed. 674.

Code, § 4377, providing that any clerk, "agent," or servant or apprentice who embezzles or converts to his own use any mon-

ey or property deposited with him must be punished as if he had stolen it, means any one who undertakes to transact business or to manage some affair for another by the authority and on the account of the latter, and to render an account of it, and imports a principal, and implies employment, service, delegated authority to do something in the name and stead of the principal, and an employment by virtue of which the money or property came into his possession, the employment need not be permanent, but may be temporary or occasional, and general to transact any business, or special to make a single transaction. *Pullam v. State*, 78 Ala. 31, 34, 56 Am. Rep. 21.

**Officers of corporation.**

In Rev. St. c. 133, § 10, providing that in a prosecution for embezzling money of any person by his "agent," it shall be sufficient to allege generally the sum embezzled, the word "agent" is not synonymous with "president" or "director," but includes persons employed in the management or transmission of the funds of a bank, but who were not officers of the bank. *Commonwealth v. Wyman*, 49 Mass. (8 Metc.) 247, 259.

Comp. Laws, § 6463, providing that summons on a corporation garnishee may be served on its general or special "agent," does not mean every man who is intrusted with a commission or employment, but designates the principal officers of the corporation who, either generally or in respect to some particular department of the corporate business, have a controlling authority, either general or special. *Lake Shore & M. S. Ry. Co. v. Hunt*, 39 Mich. 469, 471.

The vice president of a corporation is an agent within the purview of Rev. St. 1874, c. 110, § 5, allowing service, when the president of the county cannot be found, to be made upon "any agent of said company." *Cook v. Imperial Bldg. Co.*, 38 N. E. 914, 152 Ill. 638.

Under Acts 1883-84, p. 701, providing that in certain cases process may be served on a corporation by serving it on any agent thereof, it was held that the word "agent" included a railroad general superintendent, and also the vice president of the railroad. *Norfolk & W. R. Co. v. Cottrell*, 3 S. W. 123, 125, 83 Va. 512.

The term "agent" in Rev. St. 1879, § 2882, providing that a statement in replevin shall be verified by the affidavit of the superintendent, his "agent" or attorney, includes the superintendent of a company, as the superintendent is the managing agent; and therefore an affidavit signed by a person who designates himself as a superintendent is a sufficient compliance with the statute. *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360, 361.



Though it be conceded that a vice president is not an officer generally known to the law creating corporations, but that he comes under the class usually known as "such other officers and agents as shall be determined by the directors or managers," yet the vice president of a corporation may act as its agent, and, if he is by it so recognized and treated or held out to the world, his acts within the scope of the authority given to him are as binding as those of any other agent. *Union Inv. Ass'n v. Geer*, 64 Ill. App. 648, 650, 654.

#### **Officer of county or state.**

Within Laws 1873, p. 177, § 1, providing that any officer, "agent," clerk, or servant of any corporation, or person employed in such capacity, who has embezzled or converted to his own use any goods or valuable security belonging to any person or corporation, shall, on conviction, be punished as for stealing the property, the term "agent" includes every "agent," whether of an individual, a partnership, a corporation, or the state, and is broad enough to include an officer or "agent" of the state. *State v. Bancroft*, 22 Kan. 170, 204, 205.

2 Rev. St. p. 678, § 59, making it criminal for any clerk or servant of any private person or of any copartnership, or any agent, clerk, or servant of any incorporate company, to embezzle funds, etc., construed not to include agents or servants of any public body, either politic or corporate, and hence not to include a county superintendent of the poor. *Coats v. People*, 22 N. Y. 245, 247.

#### **As owner.**

See "Owner."

#### **Partner.**

A partner virtually embraces the character both of principal and of agent. So far as he acts for himself and his own interests in the common concern of the partnership he may properly be deemed a principal, and so far as he acts for his partners he may as properly be deemed an agent. *Eastman v. Clark*, 53 N. H. 276, 290, 16 Am. Rep. 192 (citing *Story*, Partn. § 1).

Partners are the general agents of each other and of the firm, within the scope of the business of the partnership. *Commonwealth v. Rovnianek*, 12 Pa. Super. Ct. 86, 93.

Gen. Laws, c. 275, § 8, declaring that if the clerk, servant, or "agent" of any person shall embezzle to his own use any property of such person he shall be fined not exceeding \$2,000 or imprisoned not exceeding five years, cannot be extended to mean a partner, acting as the agent for his firm, who embezzles the property of the firm. If

the Legislature had intended to use the word "agent" in such sense, it would seem to have been unnecessary to insert the words "officer," "clerk," or "servant," inasmuch as an officer or clerk of a corporation is their agent for some purposes, and the clerk or servant of a person is his agent for the discharge of duties within the sphere of his employment. If it was the legislative intent to include partners, they would probably have been specified in the statute. *State v. Butman*, 61 N. H. 511, 516, 60 Am. Rep. 332.

#### **As personal representative.**

See "Personal Representative."

#### **Principal distinguished.**

The county court directed the selectmen of a town, within a specified time, to put a certain highway in good repair, and, in case of their neglect, appointed the defendant as agent to do it at the expense of the selectmen. In performing this duty the defendant employed plaintiff to do certain work on the highway. In considering the claim of plaintiff that defendant was acting not as agent but as principal in doing such work, the court said: "I feel constrained by civility to take notice of an objection which, if it had not been distinctly made, would never have occurred to me. It has been said that from the facts stated the defendant was not an agent but a principal. Who, then, is a principal? I answer, one primarily and originally concerned, and who is not an accessory or auxiliary. Who is an agent? A substitute, or a person employed to manage the affairs of another. The test on this inquiry is, Who derives the benefit? The person receiving goods or employing workmen for his own advantage is a principal, and he who receives or employs workmen for another is an agent. It contradicts the plainest meaning of language to assert that the defendant, who derives no more advantage from the repaired highway than every other man in the state, and whose only business it is to act by an appointment, was other than an agent. *Adams v. Whittlesey*, 3 Conn. 560, 567.

#### **Relation to principal implied.**

The provision of Comp. St. p. 274, § 10, that no "agent or attorney" shall write or draw up the deposition of any witness, includes an agent or attorney employed to attend to the taking of the deposition, although not otherwise employed in the case, but does not extend to one employed to assist the magistrate in drawing up the deposition, who has no other agency in the matter, although he is paid by the party. *Moulton v. Hall*, 27 Vt. (1 Williams) 233, 234.

As used in Act 1886, § 3797, punishing embezzlement by an "agent" or servant, im-

ports a correlative idea of principal or master, and implies employment, service, delegated authority to do something in the name or stead of the principal, or an employment by virtue of which the money or property came into the agent or servant's possession; and hence a mail rider in the employment of the United States is not an agent or servant of the person who sent the letter. *Brewer v. State*, 8 South. 816, 83 Ala. 113, 3 Am. St. Rep. 693.

#### **Receiver.**

The term "agent" is one of wide application, and, as used in the statute relating to embezzlement by agents, seems to fairly include receivers. Thus Webster defines an agent as one who acts for or in the place of another, or by authority from him. To constitute agency in its broader sense, it is not essential that it should be created by agreement or contract. It may arise under the law, and any one who represents another or undertakes to do something for him or on his authority is properly designated as an "agent." Though such construction of the word "agent" is given by the writer of the opinion, the court held that a receiver was not included within such a term. *State v. Hubbard*, 51 Pac. 290, 292, 58 Kan. 797, 39 L. R. A. 860.

In an action against a bank it was contended that its receiver was its agent, so as to bind it by his admissions by letter. The court, however, said, conceding but not deciding that the receiver was an agent, the letter was not admissible for other reasons. *First Nat. Bank v. Linn County Bank*, 47 Pac. 614, 615, 30 Or. 296.

#### **Scrivener.**

Within Rev. St. 1881, § 500, declaring that a living party may testify as a witness to a transaction with the decedent when the "agent" of the deceased has testified concerning it, the word "agent" does not include a scrivener employed by deceased to prepare a deed. *Kenney v. Phillipy*, 91 Ind. 511, 514.

#### **Servant distinguished.**

The words "agent" and "servant" are not wholly synonymous; both, however, relating to voluntary action under employment, and each expressing the idea of service. The service performed by a servant for his employer may be inferior in degree to work done by an agent for his principal. A servant is a worker for another under an express or implied agreement; so also is an agent, only he works not only for but in place of his principal. In the sense of service, an agent is the servant of his principal; therefore designating him in an information or indictment for embezzling as agent and servant is not such a misnomer of his capacity

as affects any of his substantial rights. *People v. Treadwell*, 10 Pac. 502, 508, 69 Cal. 226.

The words "agent" and "servant," in a general sense, both apply to persons in the service of another; but in the legal sense, an agent is one who stands in the place of his principal—his representative—while a servant is one in the master's employment, but not clothed with any representative character. *Turner v. Cross*, 18 S. W. 578, 579, 83 Tex. 218, 15 L. R. A. 262.

Mr. Wharton, in speaking of the introduction of the word "agent" in the embezzlement statutes, in reference to embezzlement by agents, servants, or clerks, says: "As used in the Massachusetts Statutes, the term 'agents' is much wider in its significations than servants or clerks. The latter are restricted to the performance of specific acts in a specific way; the former may or may not be restricted, and may in fact be clothed with full power to represent their principal, with the same discretion as he might exercise himself." *Territory v. Maxwell*, 2 N. M. 250, 262 (citing 1 Whart. Cr. Law, § 1022).

There is a distinction between an "agent" and a servant. An agent has more or less discretion, while a servant acts under the master's control and direction. *McCroskey v. Hamilton*, 34 S. E. 111, 112, 108 Ga. 640, 75 Am. St. Rep. 79. See, also, *Kingan & Co. v. Silvers*, 37 N. E. 413, 416, 13 Ind. App. 80.

In legal essence there is no difference between the relation of master and servant and that of principal and agent, the terms "servant" and "agent" being fundamentally interchangeable, and the distinction between them evidential only. *Brown v. German-American Title & Trust Co.*, 34 Atl. 335, 339, 174 Pa. 443.

#### **Station agent.**

In common acceptance the agent of a railroad company is the person representing the company at a station or depot on its line, and such is its meaning in the statute requiring an application for cars from a railroad company for loading, in order to subject the company to liability for the penalty for failure to furnish them, to deposit with the agent of the company at the time of making the application one-fourth the amount of the freight charges. *Houston, E. & W. T. R. Co. v. Campbell* (Tex.) 40 S. W. 431, 433.

The word "agent," as used in relation to whether notice to an agent is notice to the principal, means the person who has power to act for the principal with reference to the very subject-matter to which the notice relates, and does not include a person who has no such power, though he may have power to act for the principal with reference to similar subjects. Thus a station agent at one

station cannot be said to be an agent of the company in relation to a contract of shipment from another station. *Missouri, K. & T. Ry. Co. of Texas v. Belcher*, 32 S. W. 518, 519, 88 Tex. 549.

#### **Superintendent.**

Where, in an action to foreclose a laborer's lien under Code, § 991, par. 1, the affiant averred that he demanded payment of a debt due him as a laborer of the general superintendent of the defendant corporation, "whose duty it was to settle with laborers in and around said sawmill," this was a sufficient allegation of demand "on the owner, agent or lessee of the property," as required by the Code. *Hobbs v. Georgia Lumber & Turpentine Co.*, 74 Ga. 371, 372.

#### **Trustee.**

As trustee of an express trust, see "Express Trust."

"A trustee is not an agent." An agent represents and acts for his principal, who may be either a natural or artificial person; but a trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts, and is bound, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal; and the contract is therefore the personal undertaking of the trustee. He is personally bound by the contracts he makes as trustee, even when designating himself as such. *Taylor v. Mayo*, 4 Sup. Ct. 147, 150, 110 U. S. 330, 28 L. Ed. 163.

#### **Wharfinger.**

A wharfinger receiving goods in that capacity, without authority to sell, is not an "agent" within Act 6 Geo. IV, c. 94, § 4, protecting purchases made innocently, and in the ordinary course of business, from "agents intrusted with goods." *Monk v. Whittenbury*, 2 Barn. & Adol. 484.

#### **AGER.**

The word "ager" was sometimes employed to signify something different from a tilled field. Its primitive signification is soil, ground, and it sometimes means a country or territory. *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 167, 36 Am. Dec. 624.

### **AGGRAVATED ASSAULT.**

As a misdemeanor, see "Misdemeanor."

An "aggravated assault" at the common law is one that has, in addition to the mere intention to commit, another object, also criminal; as, an assault with intent to kill

or wound, or the like. *Norton v. State*, 14 Tex. 387, 393.

An "aggravated assault" is, at the common law, one that has, in addition to the mere intent to commit it, another object, which is also criminal; but it may be doubted whether at common law the term had a technical and definite meaning. It seems rather to have been a phrase used by the commentators and text-writers, in contradistinction to "common assault," to include all those species of assault which, for various reasons, have come to be regarded as more heinous than common assaults, or had been singled out and made the subject of special legislative provisions. In the criminal codes of some of the states of the Union, the term "aggravated assault" is given a definite and peculiar meaning of its own. *Norton v. State*, 14 Tex. 387, 393. Using the term in the large and general sense, not only assaults with certain prescribed intents, but also assaults by stabbing, wounding, shooting, or by any use of a deadly weapon, are aggravated assaults—in some states made felonies. By statute, in most of the states, one class of aggravated assaults is made to depend upon the character of the weapon used in the assault. The provisions of the statutes are varied. Some statutes are directed against the use of deadly or dangerous weapons with intent to kill a human being or to commit a felony upon the person or the property of the one assaulted, or with intent to inflict grievous bodily harm, while under other statutes the mere use of the weapon, without reference to the intent with which it is employed, is sufficient. Under statutes which make the intent with which the weapon is used a constituent element, the use of the dangerous or deadly weapon, with intent to inflict bodily harm, constitutes the gist of the offense, as distinguishing the act from an ordinary assault. Therefore the mere possession of a deadly weapon, without using it or the intent to use it, will not constitute the offense, nor will the intent without the use. But, under statutes which declare the crime complete by the mere use of a dangerous or deadly weapon, it is unnecessary to allege or prove any intent whatsoever. Aggravated assault includes the offense described in Ann. St. Ind. T. § 909, which provides for the punishment of an assault with intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition. In *re Burns* (U. S.) 113 Fed. 987, 992.

An assault becomes aggravated when committed by an adult male on the person of a female or child. *Ellers v. State* (Tex.) 55 S. W. 813.

Under the statutes of Texas an assault with a whip is an aggravated assault, and therefore, on a prosecution for an aggravated

assault with a whip, it is not necessary to show that disgrace resulted to the assaulted person, as that fact is conclusively presumed. *Coolidge v. State* (Tex.) 24 S. W. 904.

Under Rev. Code 1895, art. 601, subd. 6, defining an "aggravated assault" as one that "inflicts disgrace on the person assaulted, as an assault and battery with a whip or cowhide," a male is guilty of an aggravated assault by forcibly feeling the private parts of a chaste female against her will. *Slawson v. State*, 45 S. W. 575, 39 Tex. Cr. R. 176, 73 Am. St. Rep. 914.

## AGGRAVATION.

See "Matter of Aggravation."

## AGGREGATE.

"Aggregate" is defined as a sum, mass, or assemblage of particulars; a total or gross amount. It implies a plurality of units, whose total amount it represents, and, hence as used in St. 1893, p. 499, § 204, providing that certain supervisors shall receive a per diem and mileage, all of which compensation in the "aggregate" shall not exceed a certain sum, will include both per diem and the mileage, in making up the aggregate. *Chapin v. Wilcox*, 46 Pac. 457, 458, 114 Cal. 498.

The expression "aggregate amount of tax," in a statute providing that the "aggregate amount of tax" to be voted under the act shall not exceed a certain per cent. of the assessed value of the taxable property, means the sum of the taxes—the whole amount voted and levied as made by the addition of the several taxes. *Dumphy v. Humboldt County Sup'rs*, 12 N. W. 306, 307, 58 Iowa, 278.

## AGGREGATE CORPORATION.

See "Corporation Aggregate."

## AGGREGATE MARKET VALUE.

The aggregate market value of the stock of a business corporation approximates an amount reached by capitalizing the aggregate annual dividends on a basis of something higher than the usual rate of interest for money loaned, the rate varying as interest of money loaned varies with the risk of the investment and the certainty of annual payments. *Western Union Tel. Co. v. Poe* (U. S.) 61 Fed. 449, 456.

## AGGREGATE PAYMENT.

St. Louis City Charter 1870, art. 8, § 18, requires every ordinance requiring work to be done to provide a specific appropriation based upon an estimate of the cost, and that every contract for such work shall contain a

clause to the effect that it is subject to the provisions of the charter that the "aggregate payments" thereon shall be limited by the amount of the specific appropriation for such work. It was held that the words "aggregate payment" do not include the payment made by the property owners to the contractor, but is limited to the amounts which are to be paid on the contract out of the city treasury. *Seibert v. Cavender*, 3 Mo. App. 421, 424.

## AGGREGATE VALUE.

See "Fair Aggregate Value."

## AGGREGATION.

It is a commonly accepted rule of the law of patents that the inventive idea is not ordinarily present in the conception of a combination which merely brings together two or more functions to be availed of independently of each other. The mechanism which accomplishes such a result and no more is ordinarily spoken of as a mere "aggregation," although this expression is misleading when not used with great discrimination. *Osgood Dredge Co. v. Metropolitan Dredging Co.* (U. S.) 75 Fed. 670, 672, 21 C. C. A. 491.

## AGGRESSOR.

The term "aggressor," in the rule that the aggressor cannot kill his opponent in self-defense, necessarily imports that the aggressor must provoke the difficulty with the intent to kill his adversary, or do him great bodily harm, or to afford him a pretext for wrecking his malice upon his adversary. The use of opprobrious language to another does not render the person using the language an aggressor. *State v. Foutch*, 34 S. W. 423, 424, 95 Tenn. (11 Pickle) 711, 45 L. R. A. 687.

## AGGRIEVED.

As determining right to appeal, see "Aggrieved Party."

"Aggrieved," as used in Wag. St. 1272, § 15, providing that, if a Secretary of State shall at any time neglect or refuse to perform any of the duties enjoined on him by law, he shall be liable to the person aggrieved, means any person whose rights have been denied. *Switzler v. Rodman*, 48 Mo. 197, 199.

The terms "party aggrieved" and the "person entitled thereto" held to refer to the same person and to mean the same thing in Rev. St. c. 60, § 64, making an officer selling property under execution, and not having the amount of such sale and paying over the same according to the law, liable to pay the

whole amount thereof to the "person entitled thereto," with lawful interest thereon, and damages in addition at the rate of 10 per cent. to be recovered in an action against such officer, "or the party aggrieved may proceed against such officer by motion before the court." *Humphries v. Lawson*, 7 Ark. (2 Eng.) 344, 347.

The statute directing proceedings against forcible entry and detainer, giving a right of action for trespass to the "party aggrieved," by irresistible implication gives a right to the person forcibly ejected, though the title of the party committing the offense is superior to that of the person ejected. *Bliss v. Bange*, 6 Conn. 78, 80.

**Election of corporation directors.**

"Aggrieved," as used in 1 Rev. St. p. 603, § 5, providing that a proceeding for a new election of directors for a railroad company may be brought by any person that may be "aggrieved by or complain of the election," does not mean that any person whomsoever who chooses to make a complaint may institute the proceeding, but it must be some person whose rights have been infringed and who is justly entitled to the claim, who is not himself the author of the wrong complained of. In re *Syracuse, C. & N. Y. R. Co.*, 91 N. Y. 1, 2.

**Failure to receive or transmit telegram.**

The "aggrieved" party, under the statute allowing the recovery of a penalty of a telegram company for failure to receive or transmit a telegram, is the person whose message the telegram company has refused to receive or failed to transmit on the terms or in the manner prescribed by the statute. *Western Union Tel. Co. v. Ferguson*, 60 N. E. 679, 680, 157 Ind. 37 (citing *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845).

**Forfeiture of administrator's bond.**

Nix. Dig. p. 257, § 12, provides that if an administration bond shall become forfeited it shall be the duty of the ordinary to cause the same to be prosecuted at the request of any party "aggrieved" by such forfeiture. Held, that a general creditor of an estate was a party aggrieved within the terms of the statute, and this though he had not established his claim by a judgment. In re *Honnass*, 14 N. J. Eq. (1 McCart.) 493, 495.

**Fraudulent conveyance.**

"Aggrieved," as used in Comp. St. c. 104, §§ 23, 24 (Rev. St. c. 95, §§ 19, 20), providing that the party "aggrieved" by a fraudulent conveyance has the right to recover a penalty therefor, should be construed to include a surety for the grantor, he being an "aggrieved" party from the date of his suretyship and before he pays any portion of the debt, and his right to recover the penalty

is perfected by paying the debt, and dates from the time he became surety. He is more within the requisites of a prior creditor than even the primary creditor was, who may be supposed, as is commonly the fact, to look more to the surety for his indemnity than to the property of the debtor, and under these circumstances the surety is, far more obviously than the principal creditor, a party "aggrieved." He is, if responsible, the only party aggrieved in the general and popular sense. The grantor must be understood to have intended to defraud the surety by depriving him of all redress or indemnity for his undertaking. The party "aggrieved" must be the party and all the parties whose right, debt, or duty is attempted to be avoided. In popular language, and within the evil intended to be remedied by the statute, the surety has a right, and the principal owes him a duty, which is of the nature of a debt, to save him harmless. *Beach v. Boynton*, 26 Vt. 725, 726, 731.

**Refusal to enter payment of mortgage.**

A "party aggrieved," within the meaning of a statute giving a right of action for a penalty by a party aggrieved by the refusal of a mortgagee to enter the fact of payment on the margin of the record upon request, if within two months he fails to do so, means one who had himself made the request. *Jowers v. Brown Bros.*, 34 South. 827, 828, 137 Ala. 581.

**Sale of liquor.**

"Aggrieved," as used in a statute giving a right of action to the person aggrieved by the sale of liquor to a minor, means the father or mother of the minor, and has no other than the legal significance of designating the person to whom the right of action may be given. *Qualls v. Sayles*, 45 S. W. 839, 840, 18 Tex. Civ. App. 400.

In construing a statute giving a right of action to the one "aggrieved" for any injury to person or property by reason of a sale, to a person when drunk, the court said: "That a widow is a person aggrieved by the injury or death of her husband is a conclusion of law which rests, not upon the sudden sundering of the most interesting relation of human life, but upon the pecuniary advantages which were lost thereby. Her right of support from his industry; her right of dower from the accumulations of his life, giving her a fixed pecuniary interest in his existence; the loss of his society; of his assistance in rearing children and managing whatever estate they may have; and the consequent labor and trouble that have devolved on her—are circumstances to aggrieve her." *Fink v. Garman*, 40 Pa. (4 Wright) 95, 105.

Under a like statute it was held that where liquors were sold to a major son, in consequence of which injuries resulted to

him, his father was not an "aggrieved" person within the meaning of the statute, where neither a subsisting family relation nor that of master and servant was shown to exist between the father and the son. *Veon v. Creaton*, 20 Atl. 865, 138 Pa. 48, 9 L. R. A. 814.

"Aggrieved," as used in a statute providing that a liquor dealer's bond may be sued on at the instance of any person or persons "aggrieved" by the violation of its provisions, should be construed in its legal sense instead of its common acceptation; and in its legal sense it means "having suffered loss or injury; damnified; injured." Where the bond was conditioned that an open, orderly, and quiet house should be kept, a person residing in the vicinity who is disturbed and annoyed by music, dancing, and loud and indecent language occurring in such house, and whose sleep is often disturbed thereby, and whose boarders have left him on account thereof, is an "aggrieved" person. *Cunningham v. Porchet*, 56 S. W. 574, 575, 23 Tex. Civ. App. 80.

The words "any person aggrieved" are not in very frequent use in statutes relating to the right of appeal, and such words are generally construed as to mean any person having an interest, recognized by law in the subject-matter of the judgment, which he considered injuriously affected by the action of the court. In a legal sense, a person is aggrieved by an act when a legal right is invaded by the act complained of. A college has a direct interest in the enforcement of the law against the sale of intoxicants to students, and has the right to its enforcement, as, in addition to the moral responsibility resting upon the authorities of the institution, its financial success depends in a large measure on the influences which affect the characters of its students and which are manifested in their deportment, and a college may recover a statutory penalty for violation of a law prohibiting the sale of liquor to students. *Daniels v. Grayson College*, 50 S. W. 205, 206, 20 Tex. Civ. App. 562.

#### Scandalous pleading.

Code Civ. Proc. § 545, providing that scandalous matter contained in a pleading may be stricken out on motion of a person aggrieved thereby, is not limited to a party to an action, but motion may be made by plaintiff's attorney when he is the person aggrieved. *Wehle v. Loewy*, 21 N. Y. Supp. 1027, 1028, 2 Misc. Rep. 345.

#### AGGRIEVED PARTY.

As determining rights other than that of appeal, see "Aggrieved."

"Aggrieved," as used in a statute giving parties "aggrieved" the right to appeal,

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refers to a substantial grievance, and denial of some personal or property right, or the imposition upon a party of a burden or obligation. *McFarland v. Pierce*, 45 N. E. 706, 707, 151 Ind. 546. He must be a person who is a party to the action or proceeding, and will thereby be affected in some manner by a judgment authorized therein. *Phillips v. Levy*, 3 N. Y. Supp. 664, 56 N. Y. Super. Ct. (24 Jones & S.) 606. A person against whom some error has been committed. *Kinealy v. Macklin*, 67 Mo. 95, 99; *State ex rel. Kinealy v. Boyle*, 6 Mo. App. 57, 58. Any one against whom an unauthorized judgment has been rendered, as where defendant was convicted of a misdemeanor under an act which provided a penalty of not less than \$5, and he was fined \$4, he was aggrieved, owing to the unauthorized judgment, so as to authorize an appeal. *Taff v. State*, 39 Conn. 82, 85.

In legal acceptation, a party is aggrieved by a judgment or decree when it operates on his rights of property, or bears directly on his interests. *Lamar v. Lamar*, 45 S. E. 498, 500, 118 Ga. 684.

The word "party," as used in Gen. St. 1878, c. 66, § 283, authorizing an action to set aside a fraudulent judgment, etc., to be brought by the party aggrieved, means a party to the action in which the judgment was recovered. *Stewart v. Duncan*, 42 N. W. 89, 90, 40 Minn. 410.

The term "aggrieved," as used in a statute providing for a review of the admeasurement of dower, cannot be applied to a person not a party to the judgment. *Lowery v. Lowery*, 64 N. C. 110, 112.

The person whom the record shows to be aggrieved may appeal, although he has not appeared in the case. *In re Meade's Estate* (Cal.) 49 Pac. 5.

The mere fact that a person is hurt in his feeling, wounded in his affections, or subjected to inconvenience, annoyance, or discomfort, does not entitle him to appeal from it, so long as he is not concluded thereby from asserting or defending his claims of personal or property rights in any proper court. *Sherer v. Sherer*, 44 Atl. 899, 900, 93 Me. 210, 74 Am. St. Rep. 339.

No person can be said to be aggrieved by an order which, without affecting his rights of property or impairing his interests, simply facilitates the decisions of the questions before the court. The rule generally adopted in construing statutes on this subject is that a party is aggrieved by the judgment or decree when it operates on his rights of property or bears directly upon his interests. The word "aggrieved" refers to a substantial grievance, or denial of some personal or property right, or the imposition upon a party of a burden or obligation. The definition given in *Smith v. Bradstreet*, 33 Mass. (18 Pick.) 264, and adopted in *Bryant*

v. Allen, 6 N. H. 116, and approved in *Wiggin v. Swett*, 47 Mass. (6 Metc.) 194, 197, 39 Am. Dec. 716, viz.: "A party aggrieved is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested by the decree"—is enlarged in *Lawless v. Reagan*, 128 Mass. 592, where it is said: "In order to give a right of appeal from a judgment of the court, it must appear that the party appealing has some pecuniary interest or some personal right which is immediately or remotely affected or concluded by the decree appealed from." *Tillinghast v. Brown University*, 52 Atl. 891, 892, 24 R. I. 179.

Those not parties to an action, and not made parties to a motion for a writ of assistance issued therein, cannot be aggrieved by such writ, since it would be inoperative as to them, and hence have no right to appeal from an order granting such writ. *Miller v. Bate*, 56 Cal. 135, 136.

A party aggrieved is a party against whom an appealable order or judgment has been entered; therefore, when an order is made directing injunction on condition that an undertaking be issued and filed, the party against whom the order is made may appeal at once, without waiting until the injunction is issued. *Ely v. Frisbie*, 17 Cal. 250, 260.

Where plaintiff recovered less than the amount claimed in the declaration, he was aggrieved within St. 1893, c. 396, § 24, allowing the party aggrieved to appeal from the district to the superior court. *Kingsley v. Delano*, 51 N. E. 186, 172 Mass. 37.

In a suit wherein a receiver for a corporation had been appointed, a stockholder petitioned for an order directing the receiver to permit an examination of the books of accounts, and the court permitted the company to file a so-called "answer," which alleged that petitioner had acted, in the interests of a rival company, to hinder a contemplated reorganization, and to force a sacrifice of defendant's property. Under Acts 1895, p. 81, § 1, providing that an appeal lies in favor of "any party in a suit aggrieved" by a judgment or order, the company was not entitled to appeal from an order granting such permission, since the mere filing of an answer by courtesy, and not of right, did not constitute the company a party to the proceedings, and it was not aggrieved by the order, which related merely to the management and control of its property in the hands of the court, and did not affect its pecuniary or property rights, though a disclosure of its accounts might indirectly injure it. *State ex rel. People's Ry. Co. v. Talty*, 40 S. W. 942, 944, 139 Mo. 379.

The term "party aggrieved" is emphatically applicable to those who suffer from

the aggressions of others, but is inappropriate and rarely applied to plaintiffs and parties who prosecute on contracts and liabilities for debts and damages. *Corning v. McCullough*, 1 N. Y. (1 Comst.) 47, 69, 49 Am. Dec. 287.

A creditor is not a party aggrieved by the refusal of the insolvency court to permit certain creditors to withdraw their assent to the discharge of the insolvent, within the meaning of Pub. St. c. 157, § 15, giving the Supreme Judicial Court supervising jurisdiction of insolvency matters on proper process of any party aggrieved. *Clarke v. Stanwood*, 44 N. E. 537, 539, 166 Mass. 379, 34 L. R. A. 378.

In an action against R. and K., R. put in an answer and K. made default. Judgment was rendered making R. first liable, and K. after him. R. appealed, not serving any notice of appeal on K., and the judgment as to R. was reversed and he released from liability. After the judgment of reversal, plaintiff issued execution against K. In a motion by K. to set aside the execution on the ground that he was by the original judgment not liable until after R., and was not bound by the appeal, not being made a party thereto, it was held that K., not having put in an answer, was not a party to the question of R.'s prior liability, and could not litigate it, and was not a "party aggrieved" under Code, § 325, or an "adverse party" within section 327, and hence could not appeal, and was not a necessary party to an appeal on the issue between R. and the plaintiff. *Garnsey v. Knights* (N. Y.) 1 Thomp. & C. 259, 263.

Where the liability of a defendant on a judgment is joint, the fact that it is also several does not give him the right to appeal therefrom, although the right of appeal is given to the "person aggrieved." *Bassett v. Loewenstein* (R. I.) 48 Atl. 934.

An "aggrieved person," within the meaning of a constitutional provision for appeal, cannot be considered to include a stranger to partition proceedings before the orphans' court having no right that will be affected by a partition, and claiming the land by title paramount to that of the parties to such proceedings. *Raleigh v. Rogers*, 25 N. J. Eq. (10 C. E. Green) 506, 507.

"Person aggrieved," within Code, § 1296, authorizing an appeal from a judgment or order by the person aggrieved, means a person who is a party to, or entitled to be made a party to, the proceeding, and will be affected by the judgment or order. "In order that a person can be said to be aggrieved, within the meaning of the section, by an adjudication, it must have binding force against his rights, his person, or his property. But before one not a party can claim the right to appeal, he must not only be

aggrieved, but he must be entitled to be substituted; and hence a receiver who was no party to an action, and was in no way bound or affected by the order, and was not entitled to be substituted in the place of the defendant, was not a person aggrieved nor entitled to appeal. *Ross v. Wigg*, 3 N. E. 180, 181, 100 N. Y. 243, 246.

A "party aggrieved," within Code Civ. Proc. § 1257, providing that in a proceeding to redeem land for public purposes a "party aggrieved" may appeal from a final judgment, means either a party to the action or one prejudiced by the judgment; and hence a person permitted to intervene in a condemnation proceeding, but whose complaint is afterwards dismissed, and the order permitting such intervention revoked, is not aggrieved within the meaning of the Code. *People v. Pfeiffer*, 59 Cal. 89, 91.

#### Administrator or executor.

"Aggrieved," as used in the statute giving a right of appeal to a party aggrieved, includes an executor of a deceased plaintiff after such executor has caused himself to be made a party to the record for the purposes of appeal. *Beach v. Gregory* (N. Y.) 2 Abb. Prac. 203, 210.

The term, as so used, "does not necessarily in all cases mean a party who has a direct pecuniary interest in the question," and hence executors having no direct interest in a bequest may appeal from a judgment refusing to revoke such bequest. *Bryant v. Thompson*, 14 N. Y. Supp. 386, 387, 59 Hun, 627.

An executor whose application for the probate of a codicil is refused is an aggrieved party under such statute. A distinction is to be observed between directing an executor as to the precise manner in which he shall act and in denying him the right to act at all. In the latter case he becomes a "party aggrieved," because he is charged with the duty of probating the instrument by virtue of which he receives his office; and thus he is entitled to appeal from a decree which ousts him from the exercise of such functions, and which denies to the beneficiaries whom he represents the right to receive the property as set forth in the will or codicil. This principle was fully recognized in the authority, relied upon, of *Bryant v. Thompson*, 28 N. E. 522, 525, 128 N. Y. 426, 13 L. R. A. 745, wherein the court defined a "party aggrieved" as one "having an actual and practical, as distinguished from a mere theoretical, interest in the controversy," and said: "The case of *People v. Jones*, 110 N. Y. 509, 18 N. E. 432, is not contrary to these views. In that case the Commissioners of the Land Office, representing the state, made a grant of land under water to an individual. Subsequently the determination of the Com-

missioners \* \* \* was reversed by the Supreme Court on certiorari, and the commissioners appealed to this court, where a motion to dismiss was denied. The order appealed from in that case in effect nullified the grant made by the state, and the Commissioners, as public officers representing the state, were in duty bound to defend the grant against the effect of an erroneous decision, and so were aggrieved." And in *Bliss v. Fogg*, 27 N. Y. Supp. 1053, 76 Hun, 508, it was held (headnote) that: "Where a judgment is rendered for defendants in an action by executors to compel a transfer to them of certain property, the executors are parties 'aggrieved,' within Code Civ. Proc. § 1294." In considering similar language in *Green v. Blackwell*, 82 N. J. Eq. (5 Stew.) 768, 772, where the statute there gave an appeal to "any person aggrieved," the court said: "Whoever stands in a cause as the legal representative of interests which may be injuriously affected by the decree made is, within the meaning of these laws, aggrieved, and therefore may appeal." In re *Stapleton's Will*, 75 N. Y. Supp. 657, 658, 71 App. Div. 1.

The term "aggrieved party," as used in a like statute, does not mean every one who is dissatisfied with a decree, but a "party aggrieved" is one whose pecuniary interest is directly affected by the decree, one whose right of property may be established or divested by the decree. An administrator de bonis non is a "party aggrieved," and may appeal from a decree allowing the account of his predecessor in the trust, since, as the balance in the hands of the former administrator is to be paid into the hands of the administrator de bonis non, and constitutes assets, such an administrator has a direct interest in increasing such balance. So, if the balance is in favor of the former administrator, and there is real estate liable to be sold on license by the administrator de bonis non to pay such balance, he has a direct interest, as trustee for the legatees, to diminish such balance; in other words, he becomes the sole representative of the estate, the trustee for all persons having an interest in it, and as such it is his province to see that the account is settled correctly. He is "aggrieved" in his property if there be any failure to account for all that is due to the estate. *Wiggin v. Swett*, 47 Mass. (6 Metc.) 194, 197, 39 Am. Dec. 716.

Within Code Civ. Proc. § 1296, giving the right of appeal to a party aggrieved by an order, except where the judgment or order was rendered or made upon his default, the words, "party aggrieved" embrace the representatives of a deceased party, so that an administratrix has a right of appeal from a judgment against the decedent. *Campbell v. Gallagher*, 9 N. Y. Supp. 432, 433, 18 Civ. Proc. R. 90.



**Adverse party synonymous.**

See "Adverse Party."

**Sureties.**

"Aggrieved," as used in a statute providing that parties "aggrieved" are entitled to appeal, etc., includes the sureties on an assignee's bond in an action on the bond, and hence they have the right to appeal for a finding as to the amount unaccounted for that came into the assignee's hands and which he was ordered to pay over. *Moulding v. Wilhartz*, 48 N. E. 189, 190, 169 Ill. 422.

Gen. St. c. 117, § 8, giving the right of appeal to "any person aggrieved" by an order, sentence, decree, or denial by the probate court or judge, includes a wider range of persons than those entitled to an appeal in other courts, in which it is provided that any "party" aggrieved may appeal, as in suits at law in the other courts there are well-defined parties whose names appear as litigants on the record, which is not so in cases in the probate court, and hence sureties on a guardian's bond may appeal from an order of the probate court charging the administratrix of the guardian who has died insolvent. *Farrar v. Parker*, 85 Mass. (3 Allen) 556, 557.

Under Rev. St. 1874, c. 3, § 123, relating to appeals, and providing that any person considering himself aggrieved by any judgment of the county court may appeal to the circuit court, and from the circuit court to the Supreme Court, it is not necessary that the person aggrieved should be a party of record to the litigation in which the judgment may be rendered. Where a guardian dies, having in his hands funds belonging to his ward, his surety on the guardian's bond, though not a party to the record, has a right to appeal from an order of the county court transferring a claim other than the ward's, allowed as of the seventh class, against the estate of the deceased, and ordering the administrator to pay it as of the sixth class. *Weer v. Gand*, 88 Ill. 490, 492.

**Appointment of receiver.**

The "party aggrieved," within the meaning of Rev. St. 1804, § 1245 (Rev. St. 1881, § 1231), giving such persons the right to appeal, is one whose legal right is infringed by the decree complained of, and whose legal interest may be changed by the result of the appeal. Where a complaint charges a defendant stockholder and officer of the defendant corporation with appropriating its money to his own use, and asks an accounting by him, such stockholder may not appeal from the appointment of a receiver for the corporation, as he is not a party within the statute. *McFarland v. Pierce*, 45 N. E. 706, 707, 151 Ind. 546.

**Decision of school committee.**

"Aggrieved," as used in a statute giving any "party aggrieved" the right to appeal from any decision or doings of any school committee, district meeting, or trustees, should be construed to include a property holder in the district whose convenience in sending to school and the value of his property therein may be seriously affected by the distance of the location of a schoolhouse from his dwelling. *Appeal of Cottrell*, 10 R. I. 615, 616.

**Decree or order in probate.**

The term "aggrieved," as used in the statute relating to appeals from probate by a party aggrieved, applies only to those who can show a direct pecuniary interest in the matter in controversy. *Appeal of Beard*, 30 Atl. 775, 64 Conn. 528. Only those who have rights which may be enforced at law and whose pecuniary interests might be established in whole or in part by the decree. *Moore v. Phillips*, 47 Atl. 913, 914, 84 Me. 421. One whose pecuniary interest is directly affected by the decree, or whose right of property may be established or divested by it. *Swackhamer v. Kline's Adm'r*, 25 N. J. Eq. (10 C. E. Green) 503, 505; *Dietz v. Dietz*, 38 N. J. Eq. (11 Stew.) 483, 485.

"Aggrieved person," as used in a like statute, is held not to mean a mere possibility of some unknown and future contingency by which one may be affected, but there must be some present interest, as where a legatee's legacy is directed to be paid and there is a surplus for distribution beyond what is necessary to meet it, and there is no reason to suppose there can be any contingent claims which will reduce the assets so as to affect his legacy, he may not interfere with the distribution by an appeal. *Labar v. Nichols*, 23 Mich. 310, 311.

A person entitled to a share in a fund, either under the testator's will or under the statute of distribution, can appeal from a decree allowing the final account of an administratrix. "It is settled that the right is not confined to those who would be legal parties to the suit under proceedings at common law or in equity, but extends to others whose pecuniary interests are affected." *Pierce v. Gould*, 9 N. E. 568, 569, 143 Mass. 234.

Where two wills were offered for probate, one by testator's brother, and the other by his widow, and both parties applied for the appointment of an administrator pendente lite, and the orphans' court thereupon appointed a person not interested in the estate or related to either party, and required the appointee to give a proper bond, the decedent's brother was not an aggrieved party and not entitled to an appeal. *Dietz v. Dietz*, 38 N. J. Eq. (11 Stew.) 483, 485.

"Person aggrieved," as used in the Vermont statute providing that any "person aggrieved" at or dissatisfied with any order, sentence, or decree of a court of probate appointing an administrator may within a certain time thereafter appeal therefrom to the next session of the Supreme Court, does not mean that any person who felt dissatisfied, without having any interest whatever in the estate, might subject an administrator to the expense and trouble of establishing his claim to the administration of that estate, or that the estate should be subject to that expense to gratify an individual in no way connected with the estate, the "person aggrieved" must be some one having an interest in the estate, or in some way connected with it. *Woodward v. Spear*, 10 Vt. 420, 423.

"Aggrieved," as used in Rev. St. c. 117, § 24, providing that any person aggrieved by a sale of lands by an administrator by order of the probate court is entitled to prosecute an appeal, includes any person who has acquired an interest in the land in controversy; and hence a person who claimed land, though a grantor who had purchased it at an administrator's sale, was aggrieved by an order vacating the administrator's sale, and entitled to prosecute an appeal. *Betts v. Shotton*, 27 Wis. 667, 670.

Within Gen. St. 1878, c. 49, § 14, providing that an appeal from an order appointing an administrator can only be taken by a party aggrieved, the term "party aggrieved" refers to one who, as heir, devisee, legatee, or creditor, has what may be called a legal interest in the assets of the estate and their due administration. A mere debtor of decedent's estate may have a personal preference as to who shall be appointed administrator, but in law that is a question in which he has no interest, and therefore its determination in one way or another cannot aggrieve him in any legal sense. In *re Hardy*, 28 N. W. 219, 35 Minn. 193.

The term "party," as used in Code, art. 5, § 58, authorizing an appeal from a judgment of the orphans' court by the party deeming himself aggrieved thereby, is not used in a technical sense, necessarily importing a litigant before the court, in the proceedings in which the decree or order passed, at the time of or antecedently to its passage, but may also mean one in whose interest the decree or order has a direct tendency to operate injuriously, and who, after its passage, may appear in the court and claim the privilege of appeal. *Stevenson v. Schriver* (Md.) 9 Gill & J. 324, 335. A legatee interested in sustaining the validity of a will may, under this section, appeal from a judgment revoking its probate, though he is not a party to the record. *Meyer v. Henderson*, 41 Atl. 1073, 1075, 88 Md. 585.

The right of an administrator with will annexed, and of an heir of a beneficiary under the decedent's will, to appeal from a decree granting a distribution of the estate, will not be determined on a motion to dismiss the appeals, based on the theory that they are not aggrieved by the decree, they being parties aggrieved within Code Civ. Proc. § 1721, granting the right of appeal to parties aggrieved. In *re Davis' Estate*, 70 Pac. 721, 722, 27 Mont. 235.

#### Discharge of prisoner.

A prisoner is not legally "aggrieved" by an order that he be discharged and go without day; he, therefore, cannot appeal therefrom. *Commonwealth v. Graves*, 112 Mass. 282, 283.

#### Equalization of taxable values.

As used in Mansf. Dig. § 568, creating a board for the equalization of taxable values in each county, and providing that any "party" aggrieved by any action of the board may appeal therefrom to the county court, does not mean a party, in its technical legal sense, to a suit, but in its popular signification of "person"; giving any person aggrieved by any action of the board a right to appeal. *Prairie County v. Matthews*, 46 Ark. 383, 386.

#### Establishment or change of highway.

"Aggrieved," as used in Gen. St. 1878, giving any person who shall feel himself aggrieved a right to appeal from an order of the town supervisors laying out, altering, or discontinuing a road, means any person who is in a position to be injuriously affected by the determination appealed from, and who would sustain a special injury, disadvantage, or inconvenience not common to himself with the other inhabitants or property owners similarly situated. *Schuster v. Town of Lemond*, 6 N. W. 802, 27 Minn. 253.

Code Civ. Proc. § 1294, giving any "aggrieved party" a right to appeal from any final judgment, does not include the city in proceedings in which a judgment is rendered refusing to confirm a report fixing the amount of damages awarded for a change in the street grade. In *re City of Yonkers*, 75 N. Y. Supp. 923, 71 App. Div. 534.

#### Grant of liquor license.

The term "aggrieved," as used in Pub. Acts 1893, c. 175, giving a right of appeal from the decision of the county commissioners granting a liquor license to any taxpayer who shall be "aggrieved," means any resident taxpayer who feels aggrieved at the granting of a license, and he need not have any grievance or interest in the matter peculiar to himself, either in his own motion for an appeal before the county commission-

ers, or by reasons of appeal in the superior court. Appeal of Beard, 30 Atl. 775, 64 Conn. 528.

"Aggrieved," as used in 9 Geo. IV, c. 61, § 27, authorizing an appeal by any person thinking himself aggrieved by any act of any justice in relation to the granting of licenses to innkeepers, means a person immediately aggrieved, as by refusal of a license to himself, and not one who is only consequently aggrieved; and therefore a licensee cannot appeal upon the act of the magistrate in granting a license to open a public house a short distance from the house of the licensee. *King v. Justices of Middlesex*, 3 Barn. & Adol. 938.

#### Improvement assessment.

"Aggrieved," as used in Improvement Act, 9 Geo. IV, c. 26, relating to assessments for certain improvements, and giving the right of appeal to any person aggrieved, is to be construed as meaning any person who had legal ground for saying he was aggrieved, and did not mean to confer the right on any person who merely fancied or said he was aggrieved. *Harrup v. Bayley*, 6 El. & Bl. 218, 223.

"Aggrieved," as used in Laws 1858, p. 574, c. 338, providing that the party aggrieved in proceedings relative to any assessment for local improvement in the city of New York may apply to vacate the same, should be construed to mean a mortgagee of the property who has foreclosed his mortgage and purchased the property for a sum less than the assessments and less than the mortgaged debt, for "a person aggrieved by an act or a motion is one injured thereby. Doubtless the injury sustained must not be a remote and consequential result, but a direct one. The owner of the land affected by the assessment is directly injured thereby, for his property is rendered so much the less valuable to him; it is worth so much the less in the market, so much as the assessment has taken from his other means to relieve his land from the assessment, or the land itself is sold or leased by virtue of the lien." In re *Walter*, 75 N. Y. 354, 357.

Prima facie, and in the absence of modifying facts, it is the owner of land who is aggrieved by the imposition of an unlawful assessment. Consequently one who purchased land after the confirmation thereon of an assessment for a local improvement, and who took, by the terms of his deed, "subject to any and all assessments," is a party aggrieved within the meaning of the act of 1858, entitling the "party aggrieved" to move to vacate the assessment. His ownership established, the illegality of the assessment imposed made out his case; if in fact he had been indemnified, or assumed and agreed to

pay the assessment, or deducted the amount from the purchase price, those are facts for the city to show, not for the courts to presume. In re *Gantz*, 85 N. Y. 536, 538.

#### Inquisition of lunacy.

A wife, the validity of whose marriage is affected by an inquisition in lunacy, is a "person aggrieved" within Act May 8, 1874, giving such person a right to traverse the finding. *Commonwealth v. Pitcairn*, 54 Atl. 328, 329, 204 Pa. 514.

#### Partition sale.

A party interested in a sale under partition is quite as much "aggrieved," within the rule granting a right of appeal to a "party aggrieved," when the sale is refused confirmation as when it is confirmed, and a purchaser in partition sale which has been confirmed in part and denied confirmation in part is an aggrieved party. *Dunn v. Dunn*, 69 Pac. 847, 849, 137 Cal. 51.

#### AGIST.

"Agist" is defined by Webster as meaning "to take, to graze or pasture at a certain sum." *Williams v. Miller*, 9 Pac. 166, 168, 68 Cal. 290.

#### AGISTER.

An "agister" "is one who takes any horses or other animals to pasture at certain rates." *Williams v. Miller* (Cal.) 6 Pac. 14.

An "agister" is one who takes the cattle of another into his own ground to be fed for a consideration by the owner; he is not an insurer of the cattle, is only liable for ordinary neglect, and not liable for the keeping of the animals, unless it is expressly so agreed. *Bass v. Pierce* (N. Y.) 16 Barb. 595, 596.

#### AGISTMENT.

"Agistment," as defined by Webster, is "the taking and feeding other men's cattle in the King's forest, or on one's own land, at a certain rate." *Williams v. Miller*, 9 Pac. 166, 168, 68 Cal. 290.

"Agistment" is where a person takes in or feeds or depastures horses, cattle, or similar animals upon the land for reward. The cattle must be delivered into his possession so exclusively that he may maintain a trespass or trover against a wrongdoer for any injury to their possession, and is responsible only for ordinary negligence. *Auld v. Travis*, 39 Pac. 357, 358, 5 Colo. App. 535.

#### AGITATOR.

See "Seditious Agitator."

**AGONY.**

"Agony" is defined as violent pain of body or distress of mind connected with or arising from the physical injury, so that evidence of condition of mind is admissible under an allegation that plaintiff suffered great pain and agony. *City of Chicago v. McLean*, 133 Ill. 148, 153, 24 N. E. 527, 528, 8 L. R. A. 765.

**AGREE.**

Mutually agree, see "Mutually"; "It is hereby Agreed."

"Agree," as used in Acts 1890, c. 538, § 152, providing that the board of supervisors should appoint two ballot clerks for each election district, each one of the supervisors having a vote upon the proposed selection or nomination of an election clerk, and if in any instance, in consequence of such vote, the board could not "agree" upon such appointment, the names of three persons who are eligible should be submitted for selection for election clerks by the supervisor or supervisors belonging to the leading political party entitled to be represented by such election clerk, means a concurrence or agreement of each supervisor, and does not mean that a mere majority should have the power to appoint without regard to the minority supervisor. *Sudler v. Lankford*, 33 Atl. 455, 456, 82 Md. 142.

**Assume synonymous.**

See "Assume."

**Consideration imported.**

Agree, as used in a writing signed by the person to be charged thereby, and stating that "I hereby agree to pay the rent of a certain house," construed not to show an agreement stating a consideration, as required in 2 Rev. St. p. 135, providing that every agreement to be performed in one year, or any special promise to answer for the debt, default, or miscarriage of another, shall be void unless the agreement, or some memorandum thereof, expressing a consideration, shall be in writing; and subscribed by the party to be charged therewith. *Newcomb v. Clark*, 1 Denio, 226, 228.

**Contract synonymous.**

"Agreed," as used in a bill averring that the defendant agreed that his daughter was to have certain slaves at her majority, has a technical meaning, and is synonymous with contracted, and hence evidence that the defendant gave the slaves to his daughter did not support the allegation. *McKisick v. McKisick*, 19 Tenn. (Meigs) 427, 433.

**Covenant synonymous.**

"Agreed" in a deed will make a covenant, and, though in the connection it is

applicable to both parties, it may refer to the party upon whom the doing or not doing the thing agreed upon devolves. If a lessee for years covenants to repair, etc., provided always, and it is "agreed" that the lessor shall find great timber, this is a covenant on the part of the lessor to find the timber, and not merely a qualification of the lessee's covenant. And where it is agreed that the time to perform a contract shall not be less than four years from a certain date, it is a covenant to complete the contract within less than four years, or, in other words, that the party shall be allowed four years for the completion of the contract. *Randel v. Chesapeake & D. Canal (Del.)* 1 Har. 151, 172.

**Fund synonymous.**

"Agree," when employed with reference to the verdict of a jury in a criminal case, means the same thing as "find." Both signify that the jury upon consideration of the evidence have determined that the accused is guilty or not guilty of the crime charged. The word "agree" is almost invariably used when the jury are addressed on the subject of their verdict. Mr. Chitty says "that when the jury have come to a unanimous decision with respect to their verdict, and return to the box to deliver it, the clerk then calls them over by their names, and asks them whether they have agreed on their verdict; and it certainly cannot be a bad answer if they reply that they have agreed, and state what that agreement is. *Benedict v. State*, 14 Wis. 423, 428.

**Grant synonymous.**

"Agree," as used in a deed providing that the "grantors agree that no building shall be erected on the lot next east of the granted premises, nearer than four feet from the west line," means the same as the word "grant," and therefore where such clause is inserted after the description, and before the habendum clause, an easement attached to the land conveyed. *Hogan v. Barry*, 10 N. E. 253, 254, 143 Mass. 533.

**Offer synonymous.**

"Agree," when employed unilaterally, is equivalent to the word "offer," so that the assent of the other party is necessary in order to make a contract. *Marshall v. Old*, 59 Pac. 217, 218, 14 Colo. App. 32 (citing *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240).

"Agree" is sometimes used to signify an offer merely, but, properly speaking, it imports concurrence or assent. As used in a memorandum whereby one agrees to sell certain land, and acknowledges the receipt of certain money on account of the sale, the contract is complete, and only remains to be carried into effect. *Thornton v. Kelly*, 11 R. I. 498, 499.

"Agree," as used in a letter stating that I hereby "agree" to purchase certain bonds, subject to approval by some lawyer, will be held to have been used in the sense of "offer," which might be withdrawn any time before acceptance, and not as constituting a contract to purchase absolutely. *Riner v. Husted's Estate*, 58 Pac. 793, 794, 13 Colo. App. 523.

"Agree to sell," as used in a written contract for the sale of property, which states that the other party agrees to purchase the property, and specifies the time for the payment of the price, construed to import an agreement for a present sale, and not an offer to sell in the future. *Martin v. Adams*, 104 Mass. 262, 263.

Where carriers wrote to defendants: "We hereby agree to receive in this port either from yard or vessel, and transport, \* \* \* not exceeding six thousand tons gross in and during the months of \* \* \*, upon the terms and for the price hereinafter specified," referring to railroad iron, and the plaintiff answered, "I assent to your agreement, and will be bound by its terms," it was manifest that the word "agree" in the letter was used as synonymous with the word "offer"; the letter being a mere proposition to transport for plaintiff any quantity of iron on the terms specified, not exceeding 6,000 tons. *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240, 242.

#### Mutuality imported.

"Agreed," as used in a contract, of itself imports mutuality. *Greene v. Creighton*, 7 R. I. 1, 8.

"Agreed" means the concurrence of both parties. *Wells v. New York Cent. R. Co.*, 24 N. Y. 181, 183; *Thornton v. Kelly*, 11 R. I. 498, 499.

"Agree," as used in a contract wherein one party agrees to pay the expenses of a specified improvement, is to be deemed the word of both, and implies an undertaking by the other party to make the improvement. *Baldwin v. Humphrey*, 44 N. Y. 609, 615.

"Agree," as used in a contract, means an agreement by both parties, and when used in a contract for services imports that the employer agreed to employ the servant in consideration that the servant would serve the master. *Payne v. New South Wales Coal & Intercolonial Steam Nav. Co.*, 10 Hurl. & G. 283, 291.

Where, in a written contract signed by two, it is said that it is agreed that one shall furnish the other with certain property at a specified price, it embraces a promise by the latter to accept and pay for it. "Agreed"

is to be deemed the words of both parties. *Barton v. McLean* (N. Y.) 5 Hill, 256, 258.

#### Promise synonymous

"Agreed," as used in a declaration formed under the common counts in assumpsit, is equivalent to the word "promised." *Corbett v. Packington*, 6 Barn. & C. 268, 273.

"Agreed," as used in a count alleging that defendant, in consideration of certain things done by plaintiff, agreed and undertook to effect an insurance on plaintiff's house, amounts to a promise. It is not necessary that the word "promise" should be used, the word "agreed" being equivalent to it. *Bodley v. Roop* (Ind.) 6 Blackf. 158, 159.

The word "agreed" in a declaration in assumpsit is equivalent to the word "promised." *Pierson v. Springfield Fire & Marine Ins. Co.* (Del.) 31 Atl. 966, 974, 7 Houst. 307.

"Agreed," as used in a complaint alleging that a party "agreed" to do a certain thing, must be taken as synonymous with "promised" or "undertook," signifying that he agreed in a valid and legal manner, so that if under the circumstances an oral promise could not constitute an enforceable agreement the effect of the allegation is to plead a written promise, since otherwise the defendant would not have "agreed" for the purpose of the complaint. *Jenkinson v. City of Vermillion*, 52 N. W. 1066, 3 S. D. 238.

One meaning of the word is to "promise," and the two words are given as synonymous by Cent. Dict.; and an affidavit stating that certain parties agreed that certain claims, on the happening of a contingency, should, at the option of the holder of them, become due and payable, does not characterize the language which follows as the legal conclusions of the affiant instead of the purport of the writing to which it refers, and its use does not show that the affiant was stating the legal conclusions drawn by him from the alleged contract. *Merchants' Nat. Bank v. Columbia Spinning Co.*, 47 N. Y. Supp. 442, 444, 21 App. Div. 383.

A declaration in an action of assumpsit for hogs sold averred that after making the contract it was "agreed" between the parties that the delivery should be extended to a certain day. Held, that the use of the word "agreed" in such count did not make the declaration one in "debt," since the count may show notwithstanding that the defendant "undertook and promised" to accept and pay for the hogs. *North v. Klizer*, 72 Ill. 172, 175.

The word "promise" means an acknowledgment without regard to an expressed consideration or corresponding duty of the other party, while the word "agreement" has been held to import a reciprocity of obligation. *Campbell v. Findley*, 22 Tenn. (3 Humph.) 330, 332.

**AGREE TO LET.**

"Agree to let," as used in a lease, means the same as the word "let," and operates as a present demise, unless there is something in the instrument showing that a present demise could not have been in the contemplation of the parties. *Phillip v. Benjamin*, 9 Adol. El. 644, 650; *Kabley v. Worcester Gaslight Co.*, 102 Mass. 392, 394.

The words "agreed to let" were effectual in creating a present demise, and the new term began from the date of the execution of the instrument, though the tenant's former term had not yet expired. *Chapman v. Bluck*, 4 Bing. N. C. 187, 192; *Western Boot & Shoe Co. v. Gannon*, 50 Mo. App. 642, 646.

"Agree to let," as used in an instrument which contained no mention of any length of term except that in the stipulation "to make a lease," where no agreement for entry before the lease is made, or that the proposed tenant shall commence his occupation before the landlord shall have made certain repairs, is an executory contract for a lease to be begun hereafter, and not as a present demise. *McGrath v. City of Boston*, 108 Mass. 369, 371.

**AGREE TO PAY.**

The words "agree to pay," in a deed of land subject to mortgage, which contains a covenant against incumbrances except mortgages, which mortgages the said second party accept and agree to pay, do not show an assumption of the mortgages by the grantee in the absence of other evidence explaining the language. *Hopper v. Calhoun*, 35 Pac. 816, 817, 52 Kan. 703, 39 Am. St. Rep. 303.

The words "agrees to pay," in a deed which recites that the grantee expressly agrees to pay a certain mortgage on the land, renders the grantee personally liable for the mortgage debt. *Bay v. Williams*, 112 Ill. 91, 93, 54 Am. Rep. 209; *Davis v. Hulett*, 4 Atl. 139, 58 Vt. 90; *Saunders v. McClintock*, 46 Mo. App. 216, 223; *Lappen v. Gill*, 12 Mass. 349, 350.

**AGREEABLY TO LAW.**

"Agreeably to law," as used in Act April 8, 1858, § 693, providing that a person, to be eligible to election or appointment to office in the military forces of the state, must be a resident of the proper military district, city or village, "agreeably to law," implies the existence of other legal provisions on the subject, and refers the question of eligibility entirely to such other provisions. *People v. Smith*, 23 N. Y. 53, 59.

**AGREEABLY TO THE USUAL MODE OF PROCESS.**

By the use of the phrase "agreeably to the usual mode of process," in the thirty-

third section of the judiciary act, providing that the procedure in respect to preliminary proceedings against persons accused of a violation of the criminal enactments of Congress shall be "agreeably to the usual mode" of process against offenders in the state in which the offenders may be arrested and the proceedings had, it has been said by Mr. Justice Curtis in *United States v. Rundlett* (U.S.) 27 Fed. Cas. 915, to have been the intention of Congress to assimilate all proceedings for holding accused persons to answer before a court of the United States to proceedings had for similar purposes by the laws of the state where the proceedings should take place, and as a necessary consequence that the commissioners have power to order a recognizance to be given to appear before them in those states where justices of the peace or other examining magistrates, acting under the laws of the state, have such power. *United States v. Horton* (U. S.) 26 Fed. Cas. 375, 370.

The term must be construed so as to include all the regulations and steps incident to the proceeding before the officer from its commencement to its termination, as prescribed by the state laws, so far as they may be applicable to the federal courts, so that the authority of a commissioner to take bail for the appearance of an accused person depends on the laws of the state. *United States v. Sauer* (U. S.) 73 Fed. 671, 674.

**AGREED CASE.**

"Agreed case," within the meaning of Rev. St. 1894, § 562, providing that parties may submit any matter of controversy between them to any court on an agreed statement of facts, to be made out and signed by the parties, accompanied by an affidavit that the controversy is real and the proceeding in good faith, does not apply to a case where the parties agree to the facts, reduce them to writing, and submit the case to the court. *Reddick v. Board of Com'rs of Pulaski County*, 41 N. E. 834, 14 Ind. App. 598.

**AGREED DISMISSAL.**

See "Dismissal Agreed."

**AGREED ORDER.**

The only difference between an "agreed order" and one which is made in the due course of the proceedings in an action is that in the one case it is agreed to, and in the other it is made as authorized by law. A receiver who acts under an agreed order is acting as an officer of the court, as much as he would be in acting under an order made without agreement in the due course of proceedings in the case, and his sureties on the official bond which he gives are as much bound in the one case as in the other, because he is acting under an order of the

court. *H. B. Claflin Co. v. Gibson (Ky.)* 51 S. W. 439, 440.

**AGREED STATEMENT.**

An agreement of counsel annexed to the case, filed in the office of the clerk of the Supreme Court, to the effect that the foregoing shall constitute the case for hearing on appeal before the Supreme Court, construed as an agreed statement of the case, as used in Code Civ. Proc. § 345, subd. 5, which provides that an "agreed statement" or case on appeal, prepared by counsel for the respective parties, shall dispense with the necessity of a return or any other paper from the circuit court. *McNair v. Craig*, 12 S. E. 367, 34 S. C. 9.

An "agreed statement of facts" may be the equivalent of a special verdict or a finding of facts upon which a reviewing court may declare the applicable law for such agreed statement, as of the ultimate facts. But if it is merely a recital of testimony or evidential fact it brings nothing before an appellate court for consideration. *United States Trust Co. v. New Mexico*, 22 Sup. Ct. 172, 174, 183 U. S. 535, 48 L. Ed. 815.

**AGREED TO.**

An indorsement on a judgment of "agreed to" is insufficient to show that it was rendered by consent, or that the words were intended to mean anything more than that the draft of the judgment prepared to be handed to the judge was agreed to, as properly expressing the judgment to be ordered by the court. *San Francisco Sav. Union v. Myers*, 18 Pac. 686, 76 Cal. 624.

A father and sons executed an agreement whereby the father "agreed to give" his sons his plantation to farm, etc., and in consideration the sons agreed to bind themselves to keep the father and his wife in everything they need for their comfort, etc., during their lives, and pay the father's debts. Held, that the phrase "agreed to give" did not indicate an intention that the agreement should operate as a present transfer of the land, but that it was merely a contract to allow the sons to farm the land and maintain the parents, being compensated by what they could make. *Shirley v. Shirley*, 59 Pa. (9 P. F. Smith) 267, 272, 273.

**AGREED UPON.**

"Agreed upon," as used in the preliminary articles of the treaty of Paris, providing that the peace between the United States and England shall take effect from the time the terms of peace are agreed upon between Great Britain and France, should be construed to mean, "when the ministers have come to an understanding as to the terms of the treaty and have reduced them to writing." *Hylton v. Brown (U. S.)* 12 Fed. Cas. 1129, 1132.

**AGREEING.**

"Agreeing to stay," as used in a declaration which alleged that, in consideration of plaintiff's "agreeing to stay" a certain action, defendant promised to pay a certain sum, was sufficient to admit proof that the consideration was a promise in consideration of the plaintiff's "having agreed" to stay the action. *Tanner v. Moore*, 9 Q. B. 1, 4.

**AGREEMENT.**

See "Collateral Agreement"; "Express Agreement"; "Implied Agreement"; "Positive Agreement"; "Reasonable Agreement."

Composition agreement, see "Composition."

An "agreement" concerning things personal is a mutual assent of the parties. *Rohr v. Baker*, 10 Pac. 627, 13 Or. 350 (citing *Plowd.* 5).

An agreement is the result of the mutual assent of two parties to certain terms. *Jones v. Williams*, 40 S. W. 353, 367, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436.

The term "agreement" signifies a mutual agreement on consideration between two or more parties. *Arnold v. Scharbauer (U. S.)* 116 Fed. 492, 497.

An agreement is the coming together in accord of two minds on a given proposition. *Leonard v. Marshall (U. S.)* 82 Fed. 396, 399.

"An agreement is an assent of two minds to the same thing." *Richardson v. Clements*, 89 Pa. 503, 505, 33 Am. Rep. 784.

An agreement means a completed contract. *Durham v. Taylor*, 29 Ga. 166, 176.

"An 'agreement,' as defined by Webster, is the union of two or more minds in a thing done or to be done; a coming or knitting together of minds. One of the definitions of the term given by Bouvier is a coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing. Another definition quoted by the last-named author is that it consists of two persons being of the same mind, intention, or meaning, concerning the matter." *Woodworth v. State*, 20 Tex. App. 375, 382.

"To constitute an agreement, the minds of both parties must meet. That means that one mind cannot make an agreement alone; that both must understand the agreement alike, and must assent to that agreement; or, to use the term the law uses in such case, the minds of the parties must meet upon the subject of the agreement." *Bingham v. Insurance Co. of North America*, 43 N. W. 494, 495, 74 Wis. 498.

"The word 'agreement' does not necessarily import any direct and express stipula-

tion, nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an agreement." *Holmes v. Jennison*, 39 U. S. (14 Pet.) 540, 571, 10 L. Ed. 579 (quoting *Vattel*, p. 192, §§ 152-154; *Id.* p. 218, §§ 206, 218).

"Agreement" embraces a mutual act of two parties, though in a popular sense it is frequently used as declaring the engagement of one only. A man may agree to pay money or to perform some other act, and the word is then used synonymously with "promised" or "engaged." *Packard v. Richardson*, 17 Mass. 122, 131, 9 Am. Dec. 123.

"Agreement," as used in the charter of a fire insurance company, authorizing the execution of such contracts, bargains, agreements, policies, or other instruments as might be necessary, but requiring them to be in writing and under the seal of a corporation, and signed by the president and attested by the secretary or other officer appointed for that purpose, held not to include a preliminary parol contract for insurance which is to be consummated by the execution of a written policy, and hence such oral contract is valid. *Franklin Ins. Co. v. Colt*, 87 U. S. (20 Wall.) 560, 566, 22 L. Ed. 423.

An "agreement" is an act done, and thereby differs from a simple declaration. It is provable in like manner as a payment of money or property would be. *Holcomb v. Campbell*, 27 N. Y. St. Rep. 848, 850 (citing *Smith v. Schanck*, 18 Barb. 344, 346).

"Agreement," as used in *Comp. Laws* 1879, p. 603, § 18, providing that an action upon any agreement, contract, or promise in writing must be brought within five years, does not include an action for the recovery of taxes illegally collected. *Richards v. Wyandotte County Com'rs*, 28 Kan. 326, 334.

#### Contract synonymous.

"Agreement," as used in the statute of frauds providing that no suit shall be brought on any contract or "agreement" whereby to charge the defendant on any special promise unless in writing, is synonymous with "contract." *Sage v. Wilcox*, 6 Conn. 81, 84.

An agreement of appraisal is a contract. An appraiser who makes his award under such an agreement is presumed to have acted in accordance with the law and the terms of the contract. *Barnard v. Lancashire Ins. Co.* (U. S.) 101 Fed. 36, 37, 41 C. C. A. 170.

"Agreement," as used in *Act Feb. 26, 1885*, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290], making it unlawful to prepay the transportation of an alien when he is known to be under contract or agreement to perform labor or service in the United States, means a contract or agreement which lacks none of

the elements of a valid agreement, and is an enforceable contract, either express or implied. *United States v. Edgar* (U. S.) 45 Fed. 44, 46.

#### Deed or will.

The term "agreement" includes deeds and wills as well as contracts between parties. *Daw v. Niles*, 37 Pac. 876, 877, 104 Cal. 106.

Within a statute providing that the terms of an agreement which have been reduced to writing are considered as containing the whole contract, and that no evidence can be introduced to change its terms except in certain cases, the term "agreement" includes deeds and wills as well as contracts between the parties. *Bogk v. Gassert*, 13 Sup. Ct. 738, 740, 149 U. S. 17, 37 L. Ed. 631.

Under *Code Civ. Proc.* § 3136, the term "agreement" includes deeds and wills as well as contracts between parties relating to the introduction of parol evidence to various terms of any written agreement. *Riddell v. Peck-Williamson Heating & Ventilating Co.*, 69 Pac. 241, 242, 27 Mont. 44.

"Agreement," as used in *Civ. Code*, § 696, providing that parol evidence of the circumstances under which an "agreement" was made is admissible to explain any ambiguity or to establish illegality or fraud, includes deeds and wills as well as contracts between the parties. *Hicklin v. Le Clear*, 22 Pac. 1057, 1060, 18 Or. 126.

The term "agreement," as used in the provision that an agreement reduced to writing is deemed the whole, includes deeds and wills as well as contracts between parties. *Code Civ. Proc. Cal.* 1903, § 1856.

#### Judgment.

"Agreement," as used in the statute of limitations defining the time in which an action on a specialty, or any agreement, contract, or promise in writing, must be brought, construed not to include a judgment. *Kimball v. Whitney*, 15 Ind. 280, 282.

#### Receipt.

A receipt, such as is usually given by express companies for goods delivered to them to be carried by express, is not an agreement within the meaning of the stamp act requiring a stamp of five cents. *De Barre v. Livingston* (N. Y.) 48 Barb. 511, 521.

#### Understanding synonymous.

"Agreement" and "understanding" are synonymous terms, at least to such an extent that where a special query was propounded to a jury as to the existence of an understanding, and they answer that there was no such agreement, the answer was responsive. *Barkow v. Sanger*, 3 N. W. 16, 21, 47 Wis. 500.



The term "agreement" is often defined as synonymous with "understanding," and either word, when used in a question relating to an understanding or agreement, cannot be said to call for a conclusion of the witness. *Garrett v. Western Union Tel. Co.*, 58 N. W. 1064, 1065, 92 Iowa, 449.

**Warrant or promise synonymous.**

The term "agreement," in its usual popular signification, is synonymous only with "promise," and means no more than the union of two or more minds or a concurrence of views and intention. This concord or union of minds may be lawful or unlawful; with consideration or without; creating an obligation. Still, by the universal understanding, it is an "agreement," and it is not the less so because it is opposed to law, or even good morals. In short, everything done or committed by the compact of two minds is universally and familiarly called an "agreement" by every one who understands the use and meaning of language. Of this every person has intuitive evidence, and frequently employs the term in question to manifest that operation of minds denominated "mutual assent." Whether a consideration exists is a distinct idea, and enters not into the popular meaning of the term. The word "agreement" is used more frequently to denote a mutual assent of minds without legal consideration than it is to denote one's promise or undertaking. Like many other words, it is sometimes restricted or limited by the subject of its application. If the inquiry be made whether there exists an agreement which the law will enforce, the subject-matter limits the signification of the term "agreement," and gives it a new and peculiar meaning. The question does not regard the broad and comprehensive intendment of the term, nor its usual and popular meaning, but the object of inquiry is an agreement of a special nature, distinguished by a legal consideration, and enforceable in the court of justice. The mind, influenced by the popular and most familiar use of the term "agreement," considers the law as pointing to promises only; but if, from any source, it appear that the consideration was meant to be embraced, the peculiar and technical sense of the legal and sufficient contract is intended. The word "agreement," if there be nothing to limit its meaning, regards promises only, and not their consideration, and hence, to make an agreement valid within the statute of frauds, the consideration need not be expressed in writing. *Sage v. Wilcox*, 6 Conn. 81, 84.

"Agreement," as used in the statute of frauds, providing that no suit, in law or equity, shall be maintained upon any agreement to answer for the debt, default, or miscarriage of another, unless the agreement or a memorandum thereof shall be made in

writing and signed by the person to be charged therewith, should be construed not to be used in its technical sense, as being synonymous with "contract" or "mutual obligation," but only to require a written promise which need not necessarily state the consideration therefor. It is equivalent to promise. *Smith v. Ide*, 3 Vt. 290, 299.

A party as a witness was asked if certain services performed by him as set out in his declaration were under any agreement, warrant, or promise with defendant or any one, and he answered that he did not make an agreement with any one. Held, that the word "agreement," as used in the answer, was intended to cover the three synonyms of "agreement," "warrant," or "promise," as used in the question. *Stratford v. Ames*, 90 Mass. (8 Allen) 577, 579.

"Agreement," as used in Gen. St. p. 86, providing that no action shall be brought on any agreement not to be performed within one year unless the promise, contract, or agreement on which such action shall be brought is in writing, is synonymous with special promise or undertaking. *Sheehy v. Adarene*, 41 Vt. 541, 543, 98 Am. Dec. 623.

**AGREEMENT BETWEEN STATES.**

"Agreement," as used in the federal Constitution prohibiting a state from making any compact or agreement with another state or foreign power, means any compact or agreement tending to the formation of a combination increasing the political power in the states which may encroach upon or interfere with the supremacy of the United States. *Stearns v. Minnesota*, 21 Sup. Ct. 73, 82, 179 U. S. 223, 45 L. Ed. 162. Agreements or compacts in their nature political, or such as may in any wise conflict with the powers which the states, by the adoption of the federal Constitution, delegated to the federal government. *Union Branch R. Co. v. East Tennessee & G. R. Co.*, 14 Ga. 327, 339. All connection and communication between states and foreign powers. *Holmes v. Jennison*, 39 U. S. (14 Pet.) 540, 571, 10 L. Ed. 579 (citing *Vattel*, p. 192, §§ 152, 153, 154; *Id.*, p. 218, § 206).

**AGREEMENT FOR COMMON-LAW COMPOSITION.**

An agreement by creditors, for the purpose of reopening a bank, to accept in payment of the amounts due from the bank certificates of deposit of the bank or its successor, payable in annual installments, is what is usually termed an "agreement for a common-law composition," and applies to all creditors; not a part, or even a majority, of them. *Abel v. Allemania Bank*, 82 N. W. 680, 681, 79 Minn. 419.

# **AGREEMENT FOR HIRE OF LABORER.**

"Agreement for the hire of any laborer," as used in St. 55 Geo. III, c. 184, Schedule, pt. 1, tit. "Agreement," exempting any "agreement for the hire of any laborer" from stamp duty, construed to include an agreement of employment for the purpose of discharging the duty and doing the work of fireman and stokers on board a ship under the direction of engineers. *Wilson v. De Zubueta*, 14 Q. B. 405, 414.

# **AGREEMENT IN CONSIDERATION OF MARRIAGE.**

The term "agreement made upon consideration of marriage" in the statute of frauds, requiring such agreements to be in writing, does not include a promise to marry made in consideration of a similar promise by the other party. *Clark v. Pendleton*, 20 Conn. 495, 508.

"Agreement," as used in statute of frauds providing that no action shall be brought to charge any person on an agreement made in consideration of marriage, or upon any agreement not to be performed within one year, unless such promise or agreement be in writing, means promises in consideration of marriage, agreements for other things made in consideration of marriage, and does not apply to the mutual promises constituting the contract to marry. *Derby v. Phelps*, 2 N. H. 515, 516.

"Agreement," as used in the statute of frauds, requiring agreement made in consideration of marriage to be in writing, is to be construed not to include an antenuptial agreement, by which the prospective husband and wife agree that if either dies the other will make no claim on the property of the one dying. *Rainbolt v. East*, 56 Ind. 538, 540, 26 Am. Rep. 40.

The phrase "agreement made in consideration of marriage," as used in the statute of frauds, does not embrace a case where an unmarried woman, being the owner of lands, agrees with a man that in consideration that he will marry her and make improvements on the land she will convey the same to him, inasmuch as the additional consideration of making improvements on the land does not change the character of the agreement. *Henry v. Henry*, 27 Ohio St. 121, 128.

# **AGREEMENT TO ANSWER FOR DEBT OF ANOTHER.**

As used in the statute of frauds, providing that no person shall be charged upon any promise to pay the debt of another unless the agreement is in writing, construed as requiring an agreement expressing a consideration as well as a promise. *Wain v. Warlters*, 5 East, 10, 16; *Sears v. Brink*, 8 Johns. 210, 215, 3 Am. Dec. 475.

As used in St. 1788, c. 16, providing that no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or misdoings of another person unless the "agreement" is in writing and signed by the person to be charged therewith, is to be construed in its popular meaning, as synonymous with "promise" or "engage," and not in a technical legal meaning, as synonymous with "contract," and hence the writing is not required to recite a consideration. *Packard v. Richardson*, 17 Mass. 122, 132, 9 Am. Dec. 123.

# **AGREEMENT TO BE PERFORMED WITHIN A YEAR.**

See "Perform."

# **AGREEMENT TO BUY.**

An "agreement to buy" is a contract by which one engages to accept from another, and pay a price for the title to a certain thing. Civ. Code Cal. 1903, § 1728. An agreement to buy is a contract by which one engages to accept from another and pay a price for the title to a certain thing. Rev. Codes N. D. 1899, § 3952; Civ. Code S. D. 1903, § 1303. An "agreement to buy" is a contract by which one engages to accept from another, and pay a price for the title to a certain thing. Civ. Code Mont. 1895, § 2322.

# **AGREEMENT TO SELL AND BUY.**

An "agreement to sell and buy" is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay the price therefor. Civ. Code Mont. 1895, § 2323; Civ. Code Cal. 1903, § 1729; Rev. Codes N. D. 1899, § 3953; Civ. Code S. D. 1903, § 1304.

# **AGREEMENT TO SELL OR CONVEY.**

Sale distinguished, see "Sale."

An "agreement to sell" is a contract by which one engages for a price to transfer to another the title to a certain thing. Civ. Code Mont. 1895, § 2321; Rev. Codes N. D. 1899, § 3951; Civ. Code S. D. 1903, § 1302; Civ. Code Cal. 1903, § 1727.

There being a controversy concerning certain land, the plaintiff and P. entered into a written contract, reciting that he had given P. a power of attorney to prosecute the action to judgment, and had agreed to grant, bargain, and sell, and did thereby grant, bargain, and sell the land in controversy to P. and his heirs, but which provided that P. should prosecute the suit "by virtue of the power of attorney" from the plaintiff, and that if he should be successful he should pay the plaintiff a certain sum, and the plaintiff should convey the land to him in fee; other-

wise P. was not to pay such sum or any part thereof. Held, that the instrument constituted an agreement to convey rather than a conveyance. *Maus' Lessee v. Montgomery*, 11 Serg. & R. 329, 331.

An "agreement to convey to R., his heirs or assigns," etc., is of an executory character, only binding the grantor to convey the interest described at a future day, and does not vest in the grantee immediately any right or title, nor put him in the constructive possession of the land, though the lands may not at the time have been in the actual possession and occupation of the grantor. *Seltzinger v. Ridgway* (Pa.) 4 Watts & S. 472, 487.

"There is a broad distinction between a license and a contract or agreement for the sale of land. A license is but an authority to do an act or series of acts on the lands of the licensor. It needs no consideration to support it, and transfers no interest in the land, and is from its nature revocable at the will of the licensor. A contract, on the other hand, requires a consideration to support it, and confers rights which may be enforced at law." *Baltimore & H. R. Co. v. Algire*, 63 Md. 319, 322.

A contract reciting that S. "hath agreed to sell and has sold to P.," and that P. "hath agreed to purchase and has purchased," the lease of certain property, and providing that the consideration for such lease was certain property for which P. was "to give good and sufficient deeds" on or before the 1st day of May next, at which time or before conveyance was "to be made by both parties of the property hereby agreed to be conveyed," was an agreement to convey, and not a conveyance. *Jackson v. Moncrief* (N. Y.) 5 Wend. 26, 29.

An agreement to sell land "is a contract to be performed in the future, which if fulfilled results in a sale of land. It is preliminary to the sale, and is not the sale. Purchase, rescission, or release may occur by which the contemplated sale never takes place. *Ide v. Leiser*, 24 Pac. 695, 10 Mont. 5, 24 Am. St. Rep. 17.

There is a difference between a sale of personal property and an "agreement to sell." Under an agreement to sell no title passes, but whenever parties have agreed upon the time of sale and the property sold is identified, and nothing remains but to deliver it, and if it appears from the evidence that the parties understood and intended the title to pass without actual delivery at the time of the sale then the title would pass without such delivery. *Baker v. Guinn*, 23 S. W. 604, 605, 4 Tex. Civ. App. 539.

A call as used in stock exchange is an "agreement to sell," whether it is referred to as an offer or an option or a call, and comes within the stamp act, requiring certain

stamps to be fixed on all sales or agreements to sell. *Treat v. White*, 21 Sup. Ct. 611, 612, 181 U. S. 284, 45 L. Ed. 853.

Inasmuch as a sale is a contract or agreement, it is frequently spoken of as a "contract of sale" or an "agreement of sale"—two phrases which in the law mean no more and no less than the word sale. No amount of offering to sell will make a contract of sale, unless some one accepts the offer by agreeing to buy; so that a call or memorandum or writing executed for a valuable consideration, giving the bearer a right to call upon the subscriber for a certain share of stock therein, within a stated time and at a given price, is not a contract or agreement to sell. *White v. Treat* (U. S.) 100 Fed. 290, 291.

"Agreement" necessarily embraces two parties in a contract of sale—one to sell and one to buy—and when R. agrees to sell his farm to E. for a certain sum, and E. signs the agreement, there is a promise to purchase and pay for the farm the consideration expressed, as clearly implied as though it was expressed in words. It was not merely a promise by one party to the other, but it was an agreement made by both, and binds both by every principle of law and morality. *Richards v. Edick* (N. Y.) 17 Barb. 260, 263.

## AGRI LIMITATI.

"Agri limitati" are lands whose boundaries are strictly limited by the lines of government surveys, so that when they border on streams or other waters they are not entitled to accretion or alluvion or to islands in the stream. *Hardin v. Jordan*, 11 Sup. Ct. 808, 818, 140 U. S. 371, 35 L. Ed. 428.

## AGRICULTURE.

As business, see "Business."  
Engaged in agriculture, see "Engage."

"Agriculture" is defined to be the art or science of cultivating the ground, especially in fields or large quantities, including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and managing of live stock. The variety of products of the earth, of agricultural implements, and of domestic animals invited and put on exhibition at agricultural fairs attests the comprehensiveness of the term "agriculture." It refers to the field or farm, with all its wants, appointments, and products, as horticulture refers to the garden, with its less important, though varied, product. *Dillard v. Webb*, 55 Ala. 468, 474.

"Agriculture," as defined by Webster, "is the art or science of cultivating the ground,

including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and management of live stock." *Binzel v. Grogan*, 29 N. W. 895, 897, 87 Wis. 147.

"Agriculture," as used in Acts 1870-71, c. 71, § 3 (Thomp. & St. Code, § 2109a), exempting five head of sheep in the hands of the head of a family "engaged in agriculture," means "in its original sense, the cultivation of the ground for the purpose of procuring vegetables and fruits for the use of man and beast, or the act of preparing the soil, sowing and planting seeds, dressing the plants, and removing the crops. In this sense the word includes gardening or horticulture, and also the raising and feeding of cattle or stock; but in a more common and appropriate sense is used to signify that specie of cultivation which is intended to raise grain and other field crops for man and beast. It is equivalent to husbandry, and 'husbandry' Webster defines to be the business of a farmer, comprehending agriculture or tillage of the ground, the raising, managing, and fattening of cattle and other domestic animals, the management of the dairy, and whatever the land produces; but the word 'agriculture,' as used in these exemption laws, has its peculiar legal sense, and relates to the vocation." While "it is true that two or more vocations may be combined, we are not accustomed to think of an artist, merchant, or a banker, who, living within a great town or city, and following his vocation, chooses in addition to cultivate a little patch of earth in vegetables for his table, as an agriculturist, even in its most general sense. If he produce them on any extensive scale for market, or for man and beast, in the sense of husbandry, then he might be regarded as an agriculturist in the sense of the law. A butcher who bought five head of sheep, not to stock a farm, but to butcher on the next day for market, is not engaged in agriculture, in the sense of the exemption laws." *Simons v. Lovell*, 54 Tenn. (7 Helsk.) 510, 514.

"Agriculture," as used in Act Assem. April 22, 1846, § 8, exempting property "owned by any person actually engaged in the science of agriculture," means any person who "derives the support of himself and family, in whole or in part, from the tillage and cultivation of fields. He must cultivate something more than a garden, though it may be much less than a farm. If the area of cultivation can be called a field, it is agriculture as well in contemplation of law as in the etymology of the word; and if this condition be fulfilled, the uniting of any other business not inconsistent with the pursuit of agriculture does not take away the protection of the act. The keeping tavern and boarding house, and the working at his trade as a tailor in the intervals of the seasons for farming, did not divest "one of the benefits which the statute was intended to secure to

him." One is engaged in agriculture during the winter, when he is obliged to suspend his labors in the field, as effectually as in the summer, while actually engaged in rearing or harvesting crops. *Springer v. Lewis*, 22 Pa. (10 Harris) 191, 193.

#### AGRICULTURAL ADVANCES.

"Agricultural advances," as used in a mortgage to secure agricultural advances, construed to include both money and supplies advanced. *Smith v. Smith*, 11 S. E. 761, 763, 33 S. C. 210.

#### AGRICULTURAL CROPS.

"Agricultural crops," as used in Pol. Code, § 3495, authorizing the entry of lands suitable for raising ordinary "agricultural crops," construed to include fruits, and hence that the statute authorizes the entry of lands only useful for the cultivation of fruits. *Reeves v. Hyde*, 19 Pac. 685, 686, 77 Cal. 397.

#### AGRICULTURAL LABORER.

"Agricultural laborer," as used in a statute giving agricultural laborers a lien on crops made by them, and as used in homestead acts exempting the products of such laborers from levy and sale, does not include an overseer. *Barkman v. Duncan*, 10 Ark. (5 Eng.) 465, 466; *Isbell v. Dunlap*, 17 S. C. 581, 583.

#### AGRICULTURAL LIEN.

In order to create a valid "agricultural lien" under Battle's Revisal, c. 65, § 19, relating to agricultural liens, it must appear (1) that the advances were in money or supplies; (2) they were made to the person engaged or about to engage in the cultivation of the soil; (3) they were made after the agreement is perfect; (4) they were made to be expended in the cultivation of the crop during that year; (5) the lien must be on the crop of that year made by reason of the advances so made. *Clark v. Farrar*, 74 N. C. 686, 690.

#### AGRICULTURAL PRODUCT.

##### Beef cattle.

In ordinary usage, the term "agricultural products" is confined to the yield of the soil, as corn, wheat, rye, hay, etc., in its primary form. Thus Code, § 1605, providing that a municipal corporation shall not levy or assess a tax on any "agricultural products," does not exempt beef cattle. *Davis v. City of Macon*, 64 Ga. 128, 134, 37 Am. Rep. 60.

##### Dairy and poultry yard products.

"The common parlance of the country and the common practice of the country have been to consider all those things as farming products or agricultural products which have

the situs of their production upon the farm, or which are brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, in contradistinction from manufacturing or other pursuits. The product of the dairy and the product of the poultry yard, while it does not come directly out of the soil, is necessarily connected with the soil and those who are engaged in the culture of the soil." *District of Columbia v. Oyster*, 15 D. C. 285, 286, 54 Am. Rep. 275.

#### Flour.

The product of agriculture is that which is the direct result of husbandry and culture of the soil. It embraces the product in its natural unmanufactured condition, as cotton is a product of agriculture; yet cotton cloth or other fabrics made from cotton could hardly be termed "agricultural products." Flour, being the product of manufacture, is not strictly an "agricultural product," as used in the charter of corporation reciting that its purpose was for the conversion and disposal of "agricultural products" by means of mills, elevators, stores, or otherwise, though in one sense it may be said that flour is a product of agriculture. *Getty v. C. R. Barnes Milling Co.*, 19 Pac. 617, 618, 40 Kan. 281.

#### AGRICULTURAL PROPERTY.

"Agricultural property," within the meaning of Pen. Code, art. 683, providing a penalty for the willful and malicious injury or destruction of any growing fruit, corn, grain, or other agricultural product or property, does not include a buggy and harness, even though the buggy and harness, necessary for the use of the family, is exempt under the general exemption laws. *Terry v. State*, 8 S. W. 934, 25 Tex. Cr. App. 714.

#### AGRICULTURAL PURPOSE.

"Agricultural purposes," as used in Rev. St. § 2983, authorizing the selection of a homestead not exceeding forty acres used for "agricultural purposes," means the using of the soil for planting seeds and raising and harvesting the crops, the rearing, feeding, and management of live stock; and hence, where defendant kept and fed his horse on land claimed as a homestead, he used it for at least one agricultural purpose. *Binzel v. Grogan*, 67 Wis. 147, 150, 29 N. W. 895.

#### AGRICULTURAL PURSUITS.

The business of a vegetable dealer in the markets is not such an agricultural pursuit as exempts the dealer from a license, under Const. art. 206, exempting agricultural pursuits from license acts. *State v. Cendo*, 38 La. Ann. 828, 829.

#### AGRICULTURAL SOCIETY.

An agricultural society "is one seeking to bring together people engaged in agricul-

tural pursuits, and in the manufacture of articles adapted to the use and cultivation of the soil, and to exhibit to those in attendance the crops resulting from the various methods of farming, and give to the people of the state engaged in agricultural pursuits an opportunity of discussing various methods of farming, farm implements used, different breeds of stock raised, and to educate the people in this way in the pursuits of agriculture, that the condition of the agriculturist may be improved by knowledge of the best methods of farming, best machinery, and best breeds of stock." *Downing v. Indiana State Board of Agriculture*, 28 N. E. 123, 126, 129 Ind. 443, 12 L. R. A. 664.

An agricultural society is not a quasi but an aggregate corporation, created by the union of certain individuals, their successors and assigns, and is continued by a succession of members united in one society, and, being the mere creature of the law, possesses only those qualities conferred by charter, either expressly or as incidental to its existence, and best calculated to effect the object of its creation. *Brown v. South Kennebec Agricultural Soc.*, 47 Me. 275, 283, 74 Am. Dec. 484.

Under the Ohio statute, county agricultural societies are corporations for public purposes, with definite and limited powers. In the absence of statutory authority, they have no power to mortgage fair grounds to secure debts. *Stewart v. Hardin County Agricultural Soc. Com'rs*, 7 Am. Law Rec. 668.

"Agricultural societies' are not corporations, in the ordinary sense of the term, but rather agencies of the state, created for the purpose of assisting in promoting the interests of agriculture." *State v. Robinson*, 53 N. W. 213, 214, 35 Neb. 401, 17 L. R. A. 383.

Though its objects are public, an agricultural society is essentially a private corporation. The fact that it was organized for pecuniary profit does not change its character. *Thompson v. Lambert*, 44 Iowa, 239.

An agricultural society is in no sense a corporation for pecuniary profit. It is an agency for the state. It exists for the sole purpose of promoting the public interest in the business of agriculture, and therefore is not liable for the illegal action of its agents, as in case of wrongful arrest and assault. *Jordan v. Iowa State Agricultural Soc.*, 53 N. W. 1092, 1093, 91 Iowa, 97, 24 L. R. A. 655.

"Agricultural societies" organized under Act Feb. 28, 1846, are the result of voluntary association by the persons composing them, for purposes of their own. It is true their purpose may be public in the sense that their establishment may conduce to the public welfare, by promoting the agricultural and household manufacturing interests of the county; but, in the sense that they are designed for the accomplishment of some public good, all private corporations are for a

public purpose, for the public benefit is both the consideration and the justification for the special privileges and franchises conferred. These agricultural societies are not only of the free choice of their constituent members, but they are also by their active procurement; for it is only when they organize themselves into a society, adopt the necessary constitution, and elect the proper officers that they become a body corporate. The state neither compels their incorporation nor controls their conduct afterwards. They may act under the organization, or at any time dissolve or abandon it. *Dunn v. Brown County Agricultural Soc.*, 46 Ohio St. 93, 18 N. E. 496, 1 L. R. A. 754, 15 Am. St. Rep. 556.

### AGRICULTURAL SUPPLIES.

See "Supplies."

### AGRICULTURIST.

An agriculturist is a student of the science of agriculture. *Downing v. Indiana State Board of Agriculture*, 28 N. E. 123, 126, 129 Ind. 443, 12 L. R. A. 664.

### AID.

See "Mutual Aid."

Consent distinguished, see "Consent."

The mere standing by and witnessing the commission of a crime is not the doing of an act "in aid thereof" which will authorize a conviction for the crime. *People v. Woodward*, 45 Cal. 293, 13 Am. Rep. 176.

An allegation in a claim against a decedent's estate for services in the care of, and "aiding and supporting," decedent's sister and minor children, includes aid and support by the contribution of money. *Grimm v. Taylor's Estate*, 55 N. W. 447, 448, 96 Mich. 5.

"Aid and relief," within a resolution proposing to extend the same to a family or dependents of a soldier in service, implied want, need, or necessity on the part of the applicant. *Russell v. City of Providence*, 7 R. I. 566, 574.

#### Aid absconding debtor.

"Aid, within the meaning of a statute punishing any person who shall aid in moving a debtor out of the county with an intent to defraud creditors, does not mean advice. Most people are willing to give advice. Some do it officiously, but if called on to give aid or assistance the subject is looked at from a different point of view. Advice costs nothing. Aid or assistance is doing of some act whereby the party is enabled, or it is made easier for him, to do the principal act or effect some primary purpose. If a debtor's object be to remove out of the county, and I let him have my horse or carry him or his

family or his property some distance of the way to the county line in my wagon, it is giving him aid and assistance. But mere words of advice, no matter with what intent they are used, are not giving aid and assistance in removing out of the county." *Wiley v. McRee*, 47 N. C. 349, 351.

"Aiding" in removing a debtor outside of the county, with intent to defraud his creditors, includes helping him by carrying him or his property a part of the way, and this although the person who helped him did not convey the debtor or his goods entirely out of the one county into the other. *Godsey v. Bason*, 30 N. C. 260, 264.

"Aiding" an absconding debtor is the doing of some act whereby he is enabled, or it is made easier for him, to do the particular act. The going with the debtor to the depot and bringing back his horse, thereby making it easier for him to abscond and leave the country secretly, so as not to attract the attention of his creditors by giving to the movement the appearance of an ordinary act of a gentleman going to market to sell his cotton, is "aiding" within the meaning of the law. *Moss v. People*, 51 N. C. 140, 142.

A person "aids" in removing a debtor out of the county if he waits until the debtor crosses over the county line and then carries his property to him, or where the debtor, being out of the county, is aided by a supply of money to leave the country, and induced not to return to the county of his residence by a promise to forward his property to him, which is accordingly done. *Moore v. Rogers*, 48 N. C. 90, 94.

#### Aid in completion of railroad.

The words "aid in the completion of," as used in a statute authorizing counties to subscribe to the stock of a railroad when necessary to aid in its completion, must be taken in their ordinary colloquial sense. In its narrow significations the word "completion" means to carry out something already begun, to fill out something already outlined, and, as used in the statute, the term means to come to the assistance of a railroad begun and contemplated and aid in accomplishing its end; that is, to complete it to its terminus. *Coler v. Stanley County Com'rs* (U. S.) 89 Fed. 237.

#### Aid in construction of bridges.

In Act 1871, entitled an act to provide aid to counties for constructing highway bridges across the Platte river, and authorizing all organized counties through which the Platte river runs, or which are bounded thereby on the north and south, to aid under the act, the word "aid" means that the county may contribute toward the cost of the improvement, by issuing its bonds, a portion of the fund necessary to make the improvement to be contributed in some other manner, as by grant from the state, donations, by two counties

bordering on the river uniting in the enterprise, etc., but does not necessarily repel the conclusion that the county may construct the desired improvement for the benefit of the public. *Union Pac. R. R. v. Colfax County Com'rs*, 4 Neb. 450, 456.

#### **Aid in construction of railroad.**

"Aid," as used in Comp. St. c. 45, § 1, authorizing any county or city to issue bonds to "aid" in the construction of any railroad or any other work of internal improvement, may include the donation of a bond. *State v. Babcock*, 27 N. W. 98, 101, 19 Neb. 230.

Rev. St. 1874, p. 797, being an act entitled an act to limit and determine the time for which counties, cities, townships, towns and precincts in the state shall be liable and holden to issue "aid" for the building of any railroad in pursuance of any vote taken in conformity to the laws of the state, should be construed to cover and embrace subscriptions to capital stock of a railroad company in "aid" of it, for subscription to stock is one form of "aid," and hence the act may determine the time within which such municipality shall be liable and holden to make subscriptions to capital stock of a railroad company in pursuance of a vote, though no mention is made of subscriptions in the title of the act. *People v. Town of Granville*, 104 Ill. 285, 291.

#### **Aid of corporation.**

The constitutional provision providing that the General Assembly shall never authorize any city, etc., to aid any joint stock company, corporation, or association whatever, cannot be construed to preclude the Legislature from authorizing a city to build a steam railroad. *Salker v. City of Cincinnati*, 21 Ohio St. 14, 54.

#### **Aid of individual.**

Under Const. art. 4, § 55, declaring that the General Assembly shall have no power to authorize any county, city, town, or other subdivision of the state to lend its credit or to grant public money or anything of value in "aid of any individual" association or corporation whatever, it is held that an act authorizing certain counties to erect a bridge which might be either a free foot and wagon bridge for the traveling public, or a railroad bridge, or both combined, was an act in aid of an individual, association, or corporation within the meaning of the constitutional prohibition. *Garland v. Montgomery County*, 6 South. 402, 87 Ala. 223.

Under Const. art. 4, § 47, providing that the General Assembly shall have no power to authorize any city or other political subdivision of the state to grant money in "aid of any individual," etc., it is held that an act requiring a city to pension policemen who were injured in the service, or the family of

policemen killed in the service, or of patrolmen who have served in the force for 20 years or more, etc., was a grant of money in aid of an individual, within the meaning of that phrase as used in the Constitution, and hence was void. *State v. Ziegenhein*, 45 S. W. 1099, 1100, 144 Mo. 283, 66 Am. St. Rep. 420.

#### **Aid of judge.**

In Rev. St. § 596 [U. S. Comp. St. 1901, p. 482], providing that it shall be the duty of every circuit judge, whenever in his judgment the public interest requires, to designate and appoint the district judge of any judicial district within his circuit to hold a district or circuit court in the place of or "in aid of" any other district judge within the same circuit, "in aid of" naturally implies some existing judge to be aided, so that such circuit judge has no power to make such an appointment when the office is vacant. *McDowell v. United States* (U. S.) 74 Fed. 403, 405, 20 C. C. A. 476.

#### **Aid in maintenance of nuisance.**

Rev. St. c. 17, § 4, punishing the offense of aiding in the maintenance of a nuisance in keeping a house of ill fame, includes a person charged with aiding in the maintenance of such a house by knowingly permitting a tenement to be used for such purposes. *State v. Frazier*, 8 Atl. 847, 79 Me. 95.

#### **Aid offender.**

The word "aid," in its broader significance, might include assistance like the failure to disclose a felony by one having knowledge of its commission, or assisting the offender in obtaining witnesses to testify in his behalf, or giving untruthful testimony in his behalf at the trial. But as used in a statute providing that every person who shall be convicted of having concealed any offender after the commission of any felony, or of having given such offender any other aid, etc., shall be deemed an accessory after the fact, such acts were not contemplated, and where a wife advised a daughter who had given birth to an illegitimate child, of which the woman's husband was the father, to tell the county attorney a falsehood with respect to the paternity, such advice does not constitute such aid. *State v. Doty*, 48 Pac. 145, 146, 57 Kan. 835.

"Aid other," as used in the By-Laws of 1885, c. 31, § 288, providing that every person who shall conceal any offender after the commission of any felony, or give him any other aid, may be convicted as an accessory, requires more than merely giving the offender information of his danger by trying to secure from him security on certain obligations on which the defendant was liable, but the aid must be of a substantial character, such as furnishing the offender personal help, or some means of transportation, or a key, or

some place of concealment. *State v. Fry*, 19 Pac. 742, 746, 40 Kan. 311.

#### **Aid prisoner to escape.**

Rescue is the forcibly and knowingly freeing another from arrest or imprisonment. Code § 4478. A rescue takes place where there is no effort on the part of the prisoner to escape, but his delivery is effected by the interference of others without his co-operation, whereas the offense of aiding a prisoner to escape consists in inciting, supporting, and re-enforcing his exertions in his own behalf, tending to the accomplishment of the object. *Robinson v. State*, 9 S. E. 528, 529, 82 Ga. 535.

#### **Aid of public officer.**

A statute provided that actions against a public officer, or against a person who, by his command or "in his aid," shall do anything touching the duties of such officer, shall be tried in the county where the cause of action or some part thereof arose. An action against the sureties on an indemnity bond given to the sheriff to induce him to levy on certain property, which it was claimed had been fraudulently conveyed by the debtor, is not within the terms of such statute. The words "in his aid" were meant to extend immunity to all who assisted and took part in the act with his assent, though not by his direct order; but the sureties in such bond did not do anything touching the duties of such officer, nor did the giving of such bond aid him in the performance of the duties of his office. *Harvey v. Brevard*, 3 S. E. 911, 912, 98 N. C. 93.

#### **Aid of school.**

Under Const. art. 6, § 8, providing that no sectarian instruction shall be allowed in any school aided or supported by the state, it is held that the term "aided" applies to all appropriations to sectarian schools, whether made as a donation, or in payment for services rendered the state by such schools. *Synod of Dakota v. State*, 50 N. W. 632, 635, 2 S. D. 366, 14 L. R. A. 418.

The phrase "aid of common schools," in a constitutional provision providing that the school fund, etc., may be appropriated in aid of common schools, but for no other purpose, "has not in itself a certain and definite meaning, and, being capable of covering more or less ground according to the intention of the framers of the Constitution, we are to adopt that sense which, without departing from the import of the words, best harmonizes with the scope, object, and design of the provision." The term in such connection is limited to mean that such fund shall be used exclusively in aid of common schools in the same manner in which the school fund has been previously appropriated, and therefore an act directing the purchase of Collins' His-

torical Sketches of Kentucky for each school district is unconstitutional in so far as it provides for the appropriation of any part of the school fund for that purpose. *Collins v. Henderson*, 74 Ky. (11 Bush) 74, 82.

#### **Aid slave to run away.**

The term "aid," in Clay's Dig. 419, § 15, making it criminal for any person to knowingly aid any negro or other slave to run away or depart from his master's service, comprehends all those appliances which may be resorted to as means to induce or assist a slave in running away. An affidavit charging that defendant was about to persuade and trying to persuade affiant's negroes to leave his premises is sufficient to state the offense created by the statute.—*Crosby v. Hawthorn*, 25 Ala. 221, 223.

#### **AID AND ABET.**

A person may "aid" in the commission of an offense by doing innocently some act essential to its accomplishment, and hence the word "aid" does not imply guilty knowledge or felonious intent. So that an instruction that "if the defendant aided, abetted, or assisted any other person to commit the crime, then you will find him guilty," is erroneous, in that it authorizes a conviction for aiding in the commission of the offense without criminal intent. *People v. Dole*, 55 Pac. 581, 584, 122 Cal. 486, 68 Am. St. Rep. 50.

In *True v. Commonwealth*, 90 Ky. 651, 14 S. W. 684, the words "encourage, aid or abet, counsel, advise, or assist," were said to be words in appropriate use to describe the offense of a person who, not actually doing the felonious act, by his will contributes to or procures it to be done, and thereby becomes a principal or accessory. *Omer v. Commonwealth*, 25 S. W. 594, 596, 95 Ky. 353.

By technical legal construction a person may assist or aid in the commission of a crime and still be possessed of no criminal intent, and therefore in no sense an accessory to the crime; but to the ordinary mind one who aids or assists in the commission of the crime of forgery is guilty, and this is true because to such a mind criminality is included as an element in the act of the party aiding or assisting. To the ordinary understanding it would seem that a person could not commit the crime of forgery without knowing that it was a crime, neither could he aid or assist in its commission without being aware of the criminality of his acts, and the use of such terms in an instruction would not tend to mislead the jury. *People v. Dole* (Cal.) 51 Pac. 945, 946.

The statement and definition in regard to the use of the words "aid and abet," in *People v. Dole*, 122 Cal. 486, 55 Pac. 581, quoted and approved, holding that it was erro-



aeous to instruct that a person is an accomplice who aids and abets or assists in the commission of a crime, and that aid does not imply guilty knowledge or felonious intent, and hence should not have been used disjunctively. *State v. Corcoran*, 61 Pac. 1084, 1042, 7 Idaho, 220.

It is said in *Raiford v. State*, 59 Ala. 106, that the words "aid and abet" are pretty much the synonyms of each other"; and this has doubtless come to be true in the law, though originally a different meaning attached to each. The legal definition of "aid" is not different from its meaning in common parlance. It means to "assist"; "to supplement the efforts of another." *Rap. & L. Law Dict.* p. 43. Chief Justice Stone defined the two terms as follows: "The words 'aid' and 'abet,' in legal phrase, are pretty much the synonyms of each other. They comprehend all assistance rendered by acts or words of encouragement or support, or presence, actual or constructive, to render assistance should it become necessary. No particular acts are necessary. If encouragement be given to commit the felony, or if, giving due weight to all the testimony, the jury are convinced beyond a reasonable doubt that the defendant was present with a view to render aid, should it become necessary, then that ingredient of the offense is made out." This definition was sufficient for the case then in hand, and it is in the form not infrequently found in the books. But it is incomplete. Mere presence, for the purpose of rendering aid, obviously is not aid; in the substantive sense of assistance by an act supplementary to the act of the principal; nor is it aid in the original sense of abetting, nor abetting in any sense, unless presence with the purpose of giving aid, if necessary, was preconcerted, or in accordance with the general plan, conceived by the principal and the person charged as an aider or abettor, or, at the very least, unless the principal knew of the presence, with intent to aid, of such person. It is essential to the guilt of a person charged with aiding or abetting the commission of a felony that such person's acts should have contributed to the effectuation of the design to kill. It is not essential that the assistance given contributed to the criminal result, but it is sufficient if it facilitated a result that would have transpired without it, or if the aid merely rendered it easier to accomplish the end intended, though in all human probability the end would have been attained without it. *State v. Tally*, 15 South. 722, 737, 102 Ala. 25.

The words "aid and abet," as used in the statute abolishing the distinction between an accessory before the fact and a principal, whether they directly commit the act constituting the offense, or aid and abet in its commission though not present, manifestly have reference to some work or act

or encouragement or assistance in the commission of the offense, and not to something done after the crime is complete. In other words, an accessory after the fact is not an aider and abettor under this statute. *State v. Jones*, 88 N. W. 196, 197, 115 Iowa, 118.

"Aid and abet," as used in Act Cong. April 20, 1818, c. 375, § 3, making it criminal to aid or abet the importation of slaves, are not "used as technical phrases belonging to the common law, because the offense is not made a felony, and therefore the words require no such interpretation. The statute punishes them as substantial offenses, and not as accessorial, and the words are therefore to be understood as in the common parlance, and import assistance, co-operation, and encouragement. *United States v. Gooding*, 25 U. S. (12 Wheat.) 460, 475.

As used in Act 1855, § 19, providing that those who "aid and abet, though not present," the commission of a misdemeanor, shall be punished as principals, etc., are used in an enlarged sense, including all which go to constitute an accessory before the fact at common law. *Shannon v. People*, 5 Mich. 71, 84.

To aid and abet, as used in criminal law, consists in being present at the time and place of the crime and doing some act which renders aid to the perpetrator, but does not include the mere mental approval by a bystander of a crime committed in his presence. *State v. Cox*, 65 Mo. 29, 33.

There is a plain distinction between consenting to a crime and aiding and abetting in its perpetration. Aiding and abetting are affirmative in their character; consenting may be a mere negative acquiescence, not in any way made known to the principal malefactor. Such consenting, though involving moral turpitude, does not come up to the meaning of the words "aid and abet." *White v. People*, 81 Ill. 333, 337 (quoted in *State v. Douglass*, 26 Pac. 476, 479, 44 Kan. 618; *Drury v. Territory*, 60 Pac. 101, 107, 9 Okl. 398).

The fact that a person is present at the commission of an assault and battery, or within a reasonable distance, so that he knows what is going on, without disapproving or opposing it, is evidence on which, in connection with other circumstances, it is competent for the jury to infer that he "aided and abetted" the same. *Kuney v. Dutcher*, 22 N. W. 866, 868, 56 Mich. 308.

Code Cr. Proc. § 115, providing that any person who counsels, aids, or abets in the commission of any offense may be punished as a principal, held not to include a case where a detective employed by a railroad company to watch defendant laid a tie upon the tracks, defend-

ant being present at the time and mentally consenting to the act, whether the act was a crime, or whether it was innocent in itself but was looked on by defendant as a crime, since such acts did not constitute aiding, abetting, or assisting as required by the statute, defendant merely having stood by, and not having done any act of assistance. The court says: "We have no statute that makes the consenting to a thing which is innocent in itself an offense, although the person consenting thereto may have believed the thing to be an offense; nor have we any statutes making the consenting to even the commission of a crime an offense, unless the consent amounts to the counseling, aiding, or abetting in its commission (citing *Allen v. State*, 40 Ala. 334, 91 Am. Dec. 477; *Spelden v. State*, 3 Tex. App. 156; *Reg. v. Johnson*, 1 Carr. & M. 218, 41 E. C. L. 123; *State v. Jansen*, 22 Kan. 498). \* \* \* In the case of *White v. People*, 81 Ill. 337, the Supreme Court of Illinois used the following language: "The jury were instructed that one who stands by when a crime is committed in his presence by another, and consents to the perpetration of the crime, is a principal in the offense, and must be punished as such. The law is that one who 'stands by and aids, abets, or assists the perpetration of the crime' is an accessory, and shall be considered as a principal." Rev. St. 1874, p. 393, § 274. There is a plain distinction between consenting to a crime and 'aiding, abetting, and assisting' in its perpetration. Aiding, abetting, or assisting are affirmative in their character, while consent may amount to a mere negative acquiescence; such consenting, though involving moral turpitude, does not amount to aiding, abetting, or assisting." *State v. Douglass*, 26 Pac. 476, 479, 44 Kan. 618.

"Aiding and abetting," as used in reference to a crime, involves some participation. "Mere presence without participation will not suffice if no act whatever is done in concert, and no confidence intentionally imparted by such presence to the perpetrators." *Connaughty v. State*, 1 Wis. 159, 166, 60 Am. Dec. 370.

A person who, with knowledge that a crime is being committed, watches for his companions in order to prevent surprise, or remains at a convenient distance in order to favor their escape, or is in such a situation as to be able readily to come to their assistance, knowledge of these things being calculated to give additional confidence to his companions, is "aiding and abetting" in the commission of the crime. *State v. Walker*, 9 S. W. 646, 652, 98 Mo. 95.

A person who is present at the commission of an assault and battery, and encourages and incites by words, gestures, looks, or signs, or by any other means, is "aiding and abetting" the same, and is lia-

ble as a principal. *Kuney v. Dutcher*, 22 N. W. 866, 868, 56 Mich. 308.

### AID AND COMFORT.

The words "aid and comfort," as used in Act March 12, 1863, 12 Stat. 820, providing that the owner of property captured or abandoned in the War of the Rebellion may bring suit for the proceeds thereof, on proof of his ownership and right for such proceeds, and that he had never given "aid or comfort" to the Rebellion, are used in the same sense as they are in the clause of the Constitution defining treason; that is, in their hostile sense. The acts of aid and comfort which will defeat a suit must be of the same general character as those necessary to convict of treason, where the offense consists in giving "aid and comfort" to the enemies of the United States. But there may be "aid and comfort" without treason, for "treason is a breach of allegiance, and can be committed only by him who owes allegiance, either perpetual or temporary." The benefits of the statute are withheld, not for treason only, but for giving "aid and comfort" as well. The claimant, to be included, need not have been guilty of treason. It is sufficient if he has done that which would have made him a traitor if he had owed allegiance to the United States. A nonresident alien was not a traitor, but by entering into and confirming a contract of copartnership with the state of North Carolina in 1863 to provide the country with its chief requirements from abroad, of warlike supplies, and to assist in running out through the blockade a quantity of cotton for the state, to enable it to obtain the benefit of the high price in Great Britain, and supplying the government of the Confederacy with all kinds of munitions of war, and acting as agent of North Carolina for the sale in England of its obligations for the delivery of cotton, was guilty of acts which would have made him guilty of treason had he been a citizen of the United States, and therefore gave "aid and comfort" to the Rebellion. *Young v. United States*, 97 U. S. 39, 62.

### AIDER AND ABETTOR.

An "aider and abettor" is one who advises, counsels, procures, or encourages another to commit a crime, though not personally present at the time and place of the commission of the offense. *Pearce v. Territory*, 68 Pac. 504, 506, 11 Okl. 438.

Any person who is present at the commission of an assault by one upon another, encouraging or inciting the same by words, gestures, looks, or signs, or who in any manner or by any means countenances or approves the same, is in law deemed an "aider and abettor." *Hilmes v. Stroebel*, 59 Wis. 74, 17 N. W. 539; *Rhinehart v. Whitehead*, 24

N. W. 401, 402, 64 Wis. 42; *Brown v. Perkins*, 83 Mass. (1 Allen) 89, 98.

The mere presence of a person at the place where a crime is being committed is not of itself sufficient to constitute such person an "aider or abettor" in the commission of the crime. *People v. Woodward*, 45 Cal. 293, 13 Am. Rep. 176.

Aiders and abettors were formerly defined to be accessories at the fact, and the rule was that they could not be tried until the principal had been convicted or outlawed; but it has been long settled that all those who are present aiding or abetting when a felony is committed either in the first or second degree, and, if in the second degree, that they may be arraigned and tried before the principal in the first degree, and that they may be convicted even though the party charged as principal in the first degree is acquitted. *United States v. Hartwell* (U. S.) 26 Fed. Cas. 196, 199.

#### AIDING DISTANCE.

An instruction that, in order to be an aider or abettor, the person so aiding and abetting should be present "within aiding distance" to aid by counsel, by watching or by assisting the person doing the unlawful act, is the same thing as saying that persons not sufficiently near to render assistance are not principals. From the language used, the jury could not fail to understand that, to constitute one who did not himself do the act a principal by reason of the fact that he was aiding and abetting in the performance of such act, he must either be actually present or near enough to render assistance while the act was being done. *State v. Prater*, 2 S. E. 108, 111, 26 S. C. 198, 613.

#### AIDOIO MANIA.

Aidoio mania is a form of insanity in which the sufferer longs for every woman he sees. *Ekin's Heirs v. McCracken* (Pa.) 11 Phila. 534, 539.

#### AILMENT.

"Ailment" is defined in the Century Dictionary as "disease; indisposition; morbid affection of the body—not ordinarily applied to acute diseases"; in Webster's Unabridged Dictionary as "indisposition; serious affection of the body—not ordinarily applied to acute diseases"; and by Worcester as "pain; disease; illness"; and it is so used in questions submitted to an applicant for a life insurance policy as to whether he had been treated for personal ailments within a certain time. *McDermott v. Modern Woodmen of America*, 71 S. W. 833, 838, 97 Mo. App. 636.

#### AIR.

The word "air," as used in an agreement to maintain a private alley, by which the parties to the agreement may mutually have light and "air," is meant the atmosphere at its outdoor temperature; air as pleasant and refreshing as the weather permits; not air raised to a supernormal temperature by artificial heat, and radiated into the neighboring buildings in hot currents, which, instead of cooling and purifying the confined atmosphere of a room, renders it less comfortable, and even intolerable. *St. Louis Safe Deposit & Savings Bank v. Kennett's Estate*, 74 S. W. 474, 480, 101 Mo. App. 370.

#### AIR CELL.

"The term 'air cell,' used in connection with the manufacture of fireproof material, is descriptive merely, and hence not the subject of a valid trade-mark." *New York Asbestos Mfg. Co. v. New York Fireproof Covering Co.*, 62 N. Y. Supp. 339.

#### AIR GUN.

As gun or weapon, see "Gun"; "Weapon."

#### AIRTIGHT.

The term "airtight," as applied to the floor of an ice reservoir, means substantially "watertight," or such a construction as prevents water running down upon the articles stored below or air escaping to the ice above. A patent for such a floor is infringed by constructing a leaky floor. *Chicago Fruithouse Co. v. Busch* (U. S.) 5 Fed. Cas. 603, 605.

#### AISLE.

The word "aisle," as used in the charter of a city providing a punishment for the obstruction of aisles in theaters, is such a passage for ingress and egress as has been actually constructed and now in use according to the plans filed with the building department, and is not a theoretical aisle of the minimum width permissible under the building code of the city. *Sturgis v. Coleman*, 77 N. Y. Supp. 886, 887, 38 Misc. Rep. 302.

#### ALABAMA MONEY.

Current money of Alabama, see "Current Money."

A promise to pay in "Alabama money" is in legal effect an undertaking to pay in gold or silver. *Carlisle v. Davis*, 7 Ala. 42, 45.

#### ALARM.

Act April 11, 1873, § 2, providing that, if any two or more persons shall confederate

for the purpose of "intimidating, alarming or disturbing" any person or persons, they shall on conviction be fined, implied the use of physical force and menace, and involved a breach of the peace; and hence an allegation of a threat to prosecute for selling whisky without a license was not an intimidation, alarming, or disturbing within the statute. *Embry v. Commonwealth*, 79 Ky. 439, 441.

## ALASKA.

See "District of Alaska."

As Indian country, see "Indian Country."

## ALBACEA.

A term used in the Spanish law. Esriche defines "albacea" thus: "He who is charged with fulfilling and executing that which is directed by the testator in his testament or other last disposition." *Emeric v. Alvarado*, 2 Pac. 418, 433, 64 Cal. 529.

## ALCALDE.

An alcalde is an officer appointed by the government of Mexico to exercise limited judicial functions. *United States v. Castillero*, 67 U. S. (2 Black) 17, 194, 17 L. Ed. 380.

In all cases where the word "alcalde" is used, it shall be taken and construed to mean and intend justice of the peace. Comp. Laws N. M. 1897, § 3803.

## ALCOHOL

See "Wood Alcohol."

The essential element in all spirituous liquors is a limpid colorless liquid. To the taste it is hot and pungent, and it has a slight and not disagreeable scent. It has but one source, the fermentation of sugar and saccharine matter. It comes through fermentation of substances that contain sugar proper, or that contain starch that may be turned into sugar. It is a mistake to suppose that it is really produced by distillation. It is produced by fermentation, and the process of distillation simply serves to separate the spirit from the mixture in which it exists. *State v. Giersch*, 4 S. E. 193, 194, 98 N. C. 720.

"Alcohol is a volatile organic body, constantly formed during the fermentation of the vegetable juices, containing sugar in solution. In popular language, it is the intoxicating principle of fermented liquor. It is exclusively produced by the process of fermentation." *Eureka Vinegar Co. v. Gazette Printing Co.* (U. S.) 35 Fed. 570, 571; *United States v. Cohn*, 52 S. W. 38, 44, 2 Ind. T. 474.

It is a matter of common knowledge that alcohol is the intoxicating element in intoxi-

cating liquor, that pure alcohol is not used as a beverage, and that all intoxicating liquors that are so used contain alcohol mingled with other things, particularly with water. Whisky is alcohol mixed with water and other elements, of which the alcohol alone is intoxicating. *Commonwealth v. Morgan*, 21 N. E. 369, 149 Mass. 314.

"Alcohol is the intoxicating principle—the basis—of all intoxicating drinks. Whatever contains alcohol will, if a sufficient quantity be taken, produce intoxication." *Intoxicating Liquor Cases*, 25 Kan. 751, 762, 37 Am. Rep. 284.

As ardent spirits.

See "Ardent Spirits."

As intoxicating liquor.

Where an indictment charges the sale of "alcohol," it does not charge the sale of intoxicating liquor. "Alcohol" is extensively used in the arts, it is employed in medicine as a solvent, in the preparations of tinctures, and by painters in the making of varnishes. The court does not judicially know that it is an intoxicating beverage like whisky, nor that it is in common use for purposes of dissipation, nor even that it is capable of being applied to such a use. A bare charge of selling "alcohol" discloses no criminal offense. *State v. Witt*, 39 Ark. 216, 218.

Alcohol is an intoxicating liquor, so that a sale of "alcohol" comes within Pen. Code, art. 376, forbidding selling intoxicating liquors to a minor without the written consent of his parents. *Rucker v. State* (Tex.) 24 S. W. 902, 903. See, also, *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Rep. 337; *Emerson v. State*, 43 Ark. 372, 375.

The courts will take judicial notice that alcohol is intoxicating. *Snider v. State*, 7 S. E. 631, 81 Ga. 753, 12 Am. St. Rep. 350.

As liquor.

See "Liquor."

As a spirituous liquor.

Pure alcohol is not in common parlance a spirituous liquor, although it is a basis of all spirituous liquors. But we are not prepared to say that "selling pure alcohol" is not selling spirituous liquors. *Bennett v. People*, 30 Ill. (20 Peck) 889, 395. See, also, *State v. Haymond*, 20 W. Va. 18, 20, 43 Am. Rep. 787; *Lemly v. State*, 12 South. 22, 70 Miss. 241, 20 L. R. A. 645.

As vinous liquor.

See "Vinous Liquor."

## ALCOHOLIC COMPOUND.

"Alcoholic compound," as used in Tariff Act Oct. 1, 1890, par. 8, § 1, includes a preparation of cherry juice, made by subjecting

the natural juice to heat in a vacuum, to eliminate the watery parts, and adding 17 per cent. of alcohol, such preparation being thicker, darker, heavier, and stronger than the natural juice. *Smith v. Rheinstrom* (U. S.) 65 Fed. 984, 986, 13 C. C. A. 261.

"Alcoholic compounds," as used in *Tariff Ind. New*, par. 103, relating to the duties on "alcoholic compounds," include a compound composed principally of raisins and prunes crushed in water and fermented, to which mixture alcohol was added after fermentation, to preserve the compound from souring and spoiling, the alcohol at the time of importation varying between 14.6 and 16.28 per cent. by weight. *Mackie v. Erhardt* (U. S.) 59 Fed. 771, 772.

### ALCOHOLIC LIQUOR.

The term "alcoholic or vinous liquor," in a statute prohibiting the sale of such liquor, includes wine made from grapes and from blackberries, though there is evidence that it is not intoxicating. *Reyfelt v. State*, 18 South. 925, 73 Miss. 415.

### ALDERMAN.

See "Board of Aldermen."  
See, also, "Councilmen."

Originally "ealderman" or "alderman" was the title of a judicial office of the English county courts, as well as of the borough and city courts, under the Anglo-Saxon dynasty. *People v. City of New York* (N. Y.) 25 Wend. 9, 36.

"The term 'alderman' does not embrace legislative more than judicial power. The term is equivalent to 'comes,' 'aldorman,' and 'earl' in the Latin-Saxon and Danish-Saxon languages. In England this officer sat with the bishop at the trial of cases, and, while the latter expounded the ecclesiastical, it was the duty of the former to declare the common law. Aldermen sat as judges of assize, and exercised such powers of government as were conferred by the charters of the cities or towns where they resided, and in that character took cognizance of civil as well as criminal matters, at one time administering the laws which emitted from the British Parliament, and at another acting under the code of the corporation law. *Purdy v. People* (N. Y.) 4 Hill, 384, 409 (citing 1 Hume's Hist. Eng. p. 69; *Jacob's Law Dict.* tit. "Alderman").

The term was formerly used to designate an officer having judicial as well as civil power in England, for a period which extended back even before the Norman Conquest; nor were they deprived of judicial powers by the loss of Normandy, when they were extended into England for a similar class of elective, judicial, and municipal offi-

cers. They acted in the states of France under the name of 'echevins' or 'aldermen,' from the remotest period of the French history, and their election by the citizens to discharge such duties was recognized in the capitularies or statutes of Charlemagne. Aldermen elected in New York also, for a long period, and probably until Act May 14, 1840 (*Sess. Laws* 1840, p. 257), excluding aldermen of the city of New York of the right to sit as judges of the Court of General Sessions, exercised judicial power in addition to their duties as members of the legislative department of the city. *Purdy v. People* (N. Y.) 4 Hill, 384, 387.

An alderman is one of a board of municipal officers next in order to the mayor. *Crovatt v. Mason*, 28 S. E. 891, 894, 101 Ga. 246.

### Councilman synonymous.

In Act Sept. 26, 1883, relating to the town of Reynolds, the phrase "mayor and aldermen" is generally used as synonymous of the corporate use and style, "mayor and council of the town of Reynolds." *Gostin v. Brooks*, 15 S. E. 361, 89 Ga. 244.

The word "aldermen," as used in *McClell. Dig.* p. 246, § 4, authorizing the election of aldermen by a town, who shall be known as the "city council," will be construed as equivalent with the word "councilmen," as used in an ordinance of the town directing an election of "councilmen" under such act. *State v. Anderson*, 8 South. 1, 4, 26 Fla. 240.

### Mayor.

Commonly and colloquially, when we speak of a councilman or alderman, we do not refer to a mayor. Hence, under a statute providing that the councilmen and aldermen of towns and cities shall be ineligible during their term of office to any other municipal office in said towns and cities, a mayor is not therefore rendered ineligible. *Akerman v. Ford*, 42 S. E. 777, 116 Ga. 473.

### ALE.

See "American Hop Ale."

"Ale" is a liquor made from an infusion of malt by fermentation. *Nevin v. Ladue* (N. Y.) 3 Denio, 43, 44; *Walker v. Prescott*, 44 N. H. 511, 512.

The court will take judicial notice that "ale" is a malt liquor. *Wiles v. State*, 33 Ind. 206.

Ale is a liquor made from an infusion of malt by fermentation, differing from beer in having a smaller proportion of hops. *State v. Oliver*, 26 W. Va. 422, 426, 53 Am. Rep. 79; *Nevin v. Ladue* (N. Y.) 3 Denio, 43, 44.

**As an intoxicating liquor.**

"Ale," as used in Act March 8, 1870 (Laws 1870, p. 437), providing that it shall be unlawful for any person to sell "ale" except at a regular licensed inn and tavern, means a certain liquor made from malt, containing a certain percentage of alcohol sufficient to render it intoxicating. *Murphy v. Inhabitants of Montclair Tp.*, 39 N. J. Law (10 Vroom) 673, 675.

Ale is an intoxicating liquor within the meaning of statutes prohibiting the sale of intoxicating liquors, and there is no necessity, in a prosecution for the sale of ale, to introduce evidence that it is intoxicating, but the jury are at liberty to act upon the knowledge they possess upon the subject in common with all the rest of mankind. *State v. Barron*, 37 Vt. 57, 60.

Ale, by the express provisions of St. 1875, c. 99, § 18, is an intoxicating liquor. *Commonwealth v. Curran*, 119 Mass. 206, 208.

Act Feb. 12, 1853, prohibiting the manufacture of "intoxicating beverages," did not mean merely spirituous liquors or those which are distilled, but included all drinks of an intoxicating nature, and embraces beer and ale. *People v. Hawley*, 3 Mich. 330, 340.

**As a spirituous liquor.**

"Ale" is a strong or spirituous liquor within the meaning of 1 Rev. St. p. 680, § 15, providing for a forfeiture by any person who shall sell any strong or spirituous liquors in any quantity of less than five gallons at a time without having a license therefor. It is an intoxicating liquor. *Nevin v. Ladue* (N. Y.) 3 Denio, 43, 44.

Being a liquor produced by fermentation and not by distillation, ale is not a spirituous liquor within the meaning of Pamph. Laws, c. 846, referring to sales of wines or spirituous liquors, mixed or unmixed. *Walker v. Prescott*, 44 N. H. 511, 512.

A statute authorizing the granting of licenses to persons to be innholders, with liberty to sell "ale," wine, beer, and other fermented liquors, cannot be construed to authorize such holders to sell brandy, rum, or other spirituous liquors. *Commonwealth v. Jordan*, 35 Mass. (18 Pick.) 228.

**As wine.**

See "Wine."

**ALEATORY CONTRACT.**

An "aleatory contract," in civil law, is one in which the advantages and losses, whether to all the parties or some of them, depend on an uncertain event. Civ. Code, art. 2951. It is of the essence of such contracts that there should be risk on one side or on both, and that all risks appertaining

to the contract and not inspected are assumed by the parties. Aleatory contracts are in the main, and in the general sense, contracts generally known as "gambling contracts." *Moore v. Johnston*, 8 La. Ann. 488, 489.

A contract is aleatory or hazardous when the performance of that which is one of its objects depends on an uncertain event; hence a contract for the purchase of crops of fruit to be grown in subsequent years is a certain contract. *Losecco v. Gregory*, 32 South. 985, 986, 108 La. 648.

A contract in which the interest of one or both of the parties depends on an element of chance as a contract for the racing of horses, etc. The performance of such contracts cannot be excused by the intervention of accidental or overpowering force. *Henderson v. Stone* (La.) 1 Mart. (N. S.) 639, 641.

A contract is aleatory or hazardous when the performance of that which is one of its objects depends on an uncertain event. Civ. Code La. 1900, art. 1776.

**ALEWIFE.**

For the purpose of the chapter relating to fish and fisheries, the term "alewife" means the small species of mackerel fish commonly called "alewife," but known also by the local name of "herring" and "gaspereau," and also includes the similar species found in tidal waters and known as "bluebacks." Rev. St. Me. 1883, p. 375, c. 40, § 32.

**ALFALFA.**

Alfalfa is not a grass indigenous to the land of California. It is a perennial plant, which, when properly cared for, like fruit trees, produces yearly crops of hay or pasturage for an indefinite number of years. As a crop it is unlike wheat or barley sown for hay, which produces but a single annual crop and no more. It adds value to the land, in different degree it may be, but in a similar manner, as do fruit or nut-bearing trees. It is therefore not exempt from taxation as a growing crop under Cal. Pol. Code, § 3607, exempting growing crops from taxation. *Miller v. Kern County*, 70 Pac. 549, 553, 137 Cal. 516.

**ALIAS.**

The word "alias" is simply an abbreviated form of the words "alias dictus," meaning "otherwise called," and, where a person is known by two different names, it seems a proper way to designate him in legal proceedings in order to avoid the danger of misnomer or of variance; so that the title of an action as naming the defendant as N. H. Anderson, "alias" Hans Anderson, sufficient-

ly discloses who the real defendant is. *O. L. Packard Mach. Co. v. Laev*, 76 N. W. 596, 597, 100 Wis. 644.

The word "alias," as used in an indictment which was entitled, "The State against Ferguson, 'alias' Ferguson," is the equivalent of "alias dictus," or "otherwise called," and indicates not that the person referred to bears both names laid under the alias, but that he is called by one or the other of those names. *Ferguson v. State*, 32 South. 760, 761, 134 Ala. 63, 92 Am. St. Rep. 17.

The word "alias" is commonly used in indictments in naming the accused by two or more names by which he is known to the grand jury. "If the person on his arraignment does not plead in abatement, he admits himself rightly designated by the name stated." *Turns v. Commonwealth*, 47 Mass. (6 Metc.) 224, 235.

"Alias" was formerly employed in pleading in connection with "dictus," and a charge of the killing of H., "alias" T., would import a killing of H., otherwise called T. The use of the single word "alias" to express the whole meaning has so long obtained that it is not uncertain what its true meaning is. The term has become familiar as equivalent to "otherwise called," or "otherwise known as," and may properly be treated as having in use in pleadings in English acquired that import, without its former Latin companion. *Kennedy v. People*, 1 Cow. Cr. R. 119, 121.

#### ALIAS WRIT.

An "alias" execution is another or different execution actually issued at a different time, and does not include an execution which was renewed at the expiration of the return day by erasing the former date and inserting a subsequent one. *Roberts v. Church*, 17 Conn. 142, 145.

An alias writ is one which is issued when a former writ has not produced its effect. The writ is so called from the words "as we have formerly commanded you" being inserted after the usual commencement, "we command you." *Farris v. Walter*, 31 Pac. 231, 232, 2 Colo. App. 450 (quoting *Rap. & L. Law Dict.*).

#### ALIBI.

The defense known in law as an "alibi" is that, at the time of the commission of the crime charged in the indictment, the defendant was at a different place, so that he could not have committed it. *State v. McGarry*, 83 N. W. 718, 719, 111 Iowa, 709; *State v. McGinnis*, 59 S. W. 83, 88, 158 Mo. 105; *State v. Hale*, 56 S. W. 881, 882, 156 Mo. 102; *State v. Taylor*, 24 S. W. 449, 451, 118 Mo. 153; *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 319, 52 Am. Dec. 711; *Savage v. State*, 18 Fla. 970, 974; *People v.*

*Levine*, 24 Pac. 631, 632, 85 Cal. 39; *Wisdom v. People*, 11 Colo. 170, 174, 17 Pac. 519, 522; *Dunn v. State*, 94 N. W. 646, 648, 118 Wis. 82.

An alibi is evidence of the fact that the defendant, at the time the crime is charged to have been committed, was at another place, and therefore could not have committed the crime; hence it involves the impossibility of the person's presence at the scene of the offense at the time of its commission. *State v. Caymo*, 32 South. 351, 352, 108 La. 218; *Ware v. State*, 67 Ga. 349, 351; *Brice-land v. Commonwealth*, 74 Pa. (24 P. F. Smith) 463, 469.

"An 'alibi' in law simply means that the defendant was not there; or, to state it more definitely, a defendant who sets up an alibi shows such a state of facts surrounding his whereabouts at that particular time as would make it practically improbable or impossible for him to have committed the offense charged." *State v. Child*, 20 Pac. 275, 276, 40 Kan. 482.

An "alibi" is a defense which is established by showing that the person charged with the crime was at some place other than where the crime was committed at such a time that he could not have been at the place of the crime at the time of its commission. *State v. Powers*, 47 Atl. 830, 833, 72 Vt. 168.

It is not an extrinsic defense, but a traverse of a material averment of an indictment that the defendant did then and there the particular act charged. *State v. Taylor*, 24 S. W. 449, 451, 118 Mo. 153.

An "alibi" is not a defense of confession and avoidance, but, if established, merely negatives the guilt of the defendant. In order to make the defense of an alibi successful and worthy of serious consideration by the jury, it is essential that the evidence to establish this defense should cover and account for the whole of the transaction in question, or, at least, so much of it as to render it impossible that the defendant could have committed the offense for which he is indicted. *Albritton v. State*, 10 South. 426, 427, 94 Ala. 76.

An "alibi" in criminal law is defined in *Black's Law Dictionary* as follows: "Elsewhere; in another place. A term used to express that manner of defense to a criminal prosecution where the party accused, in order to prove that he could not have committed the crime with which he is charged, offers evidence to show that he was in another place at the time, which is termed 'setting up an alibi.'" So that an instruction, on a defense of alibi, that defendants must have been at such distant and different place that they could not have participated in the commission of a crime, is erroneous as to the element of distance. That parties

charged with acts constituting a crime were at a place other than that of the alleged acts embraces necessarily, as elemental of its existence as a fact, that they were also at some distance from the alleged place of the commitment of the crime; but that the distance disclosed by the evidence be long or short is not always an absolutely controlling fact. *Peyton v. State*, 74 N. W. 597, 698, 54 Neb. 188.

## ALIEN—ALIENAGE.

See "Nonresident Alien"; "Resident Alien."

Lord Coke says: "Alien, *alienigena*, is derived from the Latin word '*alienus*,' and, according to the etymology of the word, it signifies one born in a strange country, under the obedience of a strange prince or country, or, as Littleton says, 'out of the liegeance of the King.'" Coke's Littleton, 128, B. "When I say," says Blackstone, "that an alien is one born out of the king's dominion or allegiance, this also must be understood with some restrictions. The common law, indeed, stood absolutely so, with only a very few exceptions, so that a particular act of parliament became necessary, after the Restoration, for the naturalization of children of his majesty's English subjects born in foreign countries during the late troubles. And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two allegiances or serve two masters at once." *Ex parte Dawson* (N. Y.) 3 Bradf. Sur. 180, 186.

An "alien" is defined by Lord Coke as "a person out of the legiance of the King. It is not *extra regnum* nor *extra legem*, but *extra ligeantiam*." To make a subject born, the parents must be under the actual obedience of the King, and the place of birth be within the King's obedience as well as within his dominion. *McKay v. Campbell* (U. S.) 16 Fed. Cas. 161, 164 (citing *Calvin's Case*, 7 Coke, 18a).

Every writer of the common law stated two circumstances which must concur in order to make a man an alien in England: (1) He must not be born within the allegiance of the Crown. (2) He must be born of parents who are not entitled to the privileges of natural-born subjects. *Martin v. Brown*, 7 Hal. 305, 335 (citing 1 Bac. Abr. 175).

An "alien" is defined to be one born out of the United States who has not since been naturalized under the Constitution. An "alien," it is said, means nothing more than a citizen or subject of a foreign state. *Milne v. Huber* (U. S.) 17 Fed. Cas. 403, 406. Such is its meaning as used in Bill of Rights, § 17, declaring that no distinction shall ever be made between citizens and aliens with reference to the purchase, descent, or enjoyment

of property. *Buffington v. Grosvenor*, 27 Pac. 137, 138, 46 Kan. 730, 13 L. R. A. 282. Such also is its meaning in Civ. Code, § 672, providing that if a nonresident alien takes by succession he must claim the property in five years from the time of succession or be barred. *State v. Lyons*, 7 Pac. 763, 764, 67 Cal. 380; *State v. Smith*, 12 Pac. 121, 123, 70 Cal. 153. So, also, as used in 2 Rev. St. c. 69, § 31, providing that an alien residing out of this state shall be incompetent to serve as executor. *McGregor v. McGregor* (N. Y.) 33 How. Prac. 456, 458; *McGregor v. McGregor* (N. Y.) 3 Abb. Dec. 92, 93; *Id.*, \*40 N. Y. (1 Keyes) 133, 134.

"Aliens" are the subjects of foreign governments, not naturalized under the laws of the United States. Civ. Code Ga. 1895, § 1814.

Civ. Code, § 71, providing that any person, whether citizen or "alien," may take, hold, and dispose of property, does not mean by the word "alien" a person who was born in another country and has come to this country and is here residing, either permanently or temporarily, in the one case being a resident alien and in the other a nonresident alien, but, according to Webster, the word "alien" means "a foreigner, one born in or belonging to another country, in American law one born out of the jurisdiction of the United States and not naturalized," and the word "foreigner," "a person belonging to a foreign country, or without the country or jurisdiction under consideration." *Lyons v. State*, 7 Pac. 763, 764, 67 Cal. 380.

The word "aliens," as used in section 25 of the Bill of Rights, that no distinction shall ever be made by law between resident "citizens and aliens" in relation to the possession, enjoyment, or descent of property, relates to the political status of persons as respects their relation to the United States. *Glynn v. Glynn*, 87 N. W. 1052, 62 Neb. 872.

"Alien," within 2 Rev. St. 69, § 31, excluding certain aliens from being executors, means a person born out of the jurisdiction of the United States, and, according to the notion commonly received as law, an "alien" is one born in a strange country and in a foreign society, to which he is presumed to have a natural and a necessary allegiance. Aliens in the United States are of two kinds—aliens by birth and by election. Aliens by birth are all persons born out of the dominion of the United States since July 4, 1776, with the exception of children of citizens born abroad and of persons naturalized by acts of Congress; and aliens by election are those made by voluntary expatriation (1 Tucker's Blackstone, pt. 2, app. 101). Dane says: "An alien owes a local allegiance while in the country, and is there protected, and is one born under a foreign allegiance." *Lynch v. Clarke* (N. Y.) 1 Sandf. Ch. 583, 668 (citing 4 Dane's Abr. 695).



The word "aliens," as used in 25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 508], relating to the jurisdiction of federal courts, embraces subjects or citizens of foreign countries, and not merely persons resident in this country who owe allegiance to another. *Hennessey v. Richardson Drug Co.*, 23 Sup. Ct. 532, 533, 189 U. S. 25, 47 L. Ed. 697.

A person born in England before the Declaration of Independence, and who also resides there, and never was in the United States, is an alien, and hence could not, in the year 1793, inherit lands in Maryland. *Dawson v. Godfrey*, 8 U. S. (4 Cranch) 321, 322, 2 L. Ed. 634.

Rev. St. 1881, § 1793, making alienage a cause of challenge of a juror, requires only that the juror be a citizen of the state, and not that he shall be a citizen of the United States; and one may be a citizen of a state and yet not a citizen of the United States. *McDonel v. State*, 90 Ind. 320, 323.

#### As citizen.

See "Citizen."

#### Citizens of colonies.

An "alien" is one who is born without the allegiance of the commonwealth, but does not include a person born in the territory of the late province of Massachusetts Bay before the Declaration of Independence, since the abdication of the former sovereign did not dissolve the social compact, nor annul the existing laws, nor extinguish the rights of the people, nor reduce them to a state of nature, without governmental laws or political rights, until a new social compact was established, but the previous rights and interests existing under the former government remained in force after the Declaration of Independence, without the passage of any act confirming or establishing such previous laws and rights. *Ainslie v. Martin*, 9 Mass. 453, 456.

One born in Ireland who emigrated to the United States after the Declaration of American Independence and did not become a citizen by naturalization must be regarded as an "alien," and was therefore a British subject in 1794, and, having purchased lands previously to that period, he comes within the ninth article of the treaty between the United States and Great Britain, concluded in 1794, by which it was agreed that British subjects holding lands in the territories of the United States should continue to hold them according to the nature and tenure of their respective estates and titles therein, and neither they nor their heirs or assigns, so far as may respect the said lands and the legal remedies incident thereto, shall be regarded as aliens. *Jackson v. Wright* (N. Y.) 4 Johns. 75, 78.

Where defendant was born in the colony of New York in 1760 of Irish parents, and

in 1771 went to Ireland, and was educated and served his apprenticeship there, and remained in the British dominions until 1795, and then returned to America, he was not a citizen of the United States. *Hollingsworth v. Duane* (U. S.) 12 Fed. Cas. 356, 358.

A native of Ireland removed to New York in 1760, where he continued to reside until his death, in 1798. He left a wife in Ireland at the time he removed from that country. His wife was a native of Ireland, and never left the country, but continued a subject of the King of Great Britain. Held, that the wife, being an alien, could recover dower of those lands only of which her husband was seised before the American Revolution, or before July 4, 1776, and not of those he acquired after that period. *Kelly v. Harrison* (N. Y.) 2 Johns. Cas. 28, 31, 1 Am. Dec. 154.

The conditions of a person born as a subject of a foreign state or power, and a plea of "alienage" filed in an action for dower, would not be sufficient unless it contained a direct averment that the person of the husband, through whom plaintiff claims, is an alien, and that he was born out of the allegiance of the state, and within the allegiance of a foreign state. Alienage will not be inferred simply from the fact that a person on the 3d day of July, 1776, was a subject of Great Britain, and in 1777 withdrew from the state of New Jersey and took refuge with the British army, and died in England, and never took upon himself the oath of allegiance to the state or to the United States, but elected to become a subject of the King of Great Britain. *Coxe v. Gulick*, 10 N. J. Law (5 Halst.) 328, 330.

A citizen of the colony of Connecticut, in 1759, removed to Nova Scotia, carrying with him his infant son. In 1797 the son removed from Nova Scotia to Manchester, Mass., where he purchased real estate, which he occupied for more than 10 years, paying all the taxes assessed upon him. Held, that the son was an alien, and acquired no settlement in Manchester. Inhabitants of Manchester v. Inhabitants of Boston, 16 Mass. 230, 235.

Persons born in a foreign country of parents also born in a foreign country are not citizens of Virginia, and consequently cannot inherit land there, although their grandmother was a native of Virginia, who moved to England before the Rebellion, married there, resided there until after peace, when she returned to Virginia and resided there until her death. *Barzizas v. Hopkins* (Va.) 2 Rand. 276, 286.

#### Citizen of Texas before annexation.

Where a person who owned land in Texas while it was a part of Mexico removed into Mexico prior to the declaration of independence by Texas, and continued to reside in Mexico until her death, her daughter, who

was also a citizen of Mexico, could not, as heir, recover the land in Texas. The Constitution of Texas considered as aliens all those who did not reside there at the time of the declaration of independence, unless they were afterwards naturalized, and also decreed that no alien should hold land in Texas except by titles emanating directly from the government of that republic, and also provided that an alien could not inherit from an alien. *McKinney v. Saviego*, 59 U. S. (18 How.) 235, 237, 15 L. Ed. 365.

A person was born at Goliad in the state of Coahuila and Texas, being a part of the republic of Mexico, which place was also the domicile of her father and mother until their deaths. At the age of four years, before the declaration of Texan independence, she was removed to Matamoras in Mexico. Held, that she was an alien, and could sue in the courts of the United States. *Jones v. McMasters*, 61 U. S. (20 How.) 8, 20, 15 L. Ed. 805.

#### **Citizenship distinguished.**

See "Citizenship."

#### **Native-born child of alien parent.**

An alien is a person born in fealty to a foreign government or ruler who has not renounced his allegiance thereto, and does not embrace one born in the United States of alien parents. *Town of New Hartford v. Town of Canaan*, 54 Conn. 39, 40, 45, 5 Atl. 360, 363.

Rawle declares that every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen, within the sense of the Constitution, and entitled to all the rights and privileges appertaining to that capacity (*Rawle's View of the Constitution*, 86); and hence a person born in the state of New York of alien parents during their temporary sojourn in that state, and who returned within a year with her parents to their native country, where she subsequently resided, was a citizen of the United States. *Lynch v. Clarke* (N. Y.) 1 Sandf. Ch. 583, 668, 669.

#### **Foreign corporation.**

A corporation created under the laws of the republic of France is an alien person, as a citizen of the republic of France, within the meaning of the law conferring jurisdiction on the federal courts of actions brought by an alien. *Barrowcliffe v. La Caisse Generale* (N. Y.) 58 How. Prac. 131, 132.

#### **Foreign power.**

The word "alien," as used in Act March 3, 1891, c. 517, § 6, 26 Stat. 826, 828 [U. S. Comp. St. 1901, p. 549], relating to appeals to the Supreme Court from the decree of the Circuit Court of Appeals in a controversy between a foreign state and citizens, was not

intended to exclude foreign powers that chose to sue here from the right of appeal. The word "aliens" could be given that effect only by straining it beyond its natural meaning and away from the indications of the context. *Columbia v. Cauca Co.*, 23 Sup. Ct. 704, 705, 190 U. S. 524, 47 L. Ed. 1159.

#### **Naturalized citizen.**

Laws 1845, c. 115, § 4, enabling a "resident alien" to take and hold real estate, and enabling the heirs of a deceased "alien resident" to take, cannot be construed to include or designate a naturalized citizen. *Luhrs v. Elmer*, 80 N. Y. 171, 177.

#### **Nonresident of state.**

Under 2 Rev. St. 69, § 8, providing that an "alien" residing out of the state is incompetent to act as an executor, a native of the state, though not an inhabitant thereof, is not an "alien." *McGregor v. McGregor*, \*40 N. Y. (1 Keyes) 133, 134; *McGregor v. McGregor*, 3 Abb. Dec. 92, 93; *Id.*, 33 How. Prac. 456, 458.

Under Bill of Rights, § 17, requiring that no distinction shall ever be made between citizens and "aliens" in reference to the purchase, enjoyment, or descent of property, a wife of a citizen of Kansas who resided in another state cannot be regarded as an alien. *Buffington v. Grosvenor*, 27 Pac. 137, 138, 46 Kan. 730, 13 L. R. A. 282.

#### **ALIEN ENEMY.**

An "alien enemy," within the meaning of the naturalization act providing that any free white person not an alien enemy might lawfully be naturalized, is one who owes allegiance to an adverse belligerent nation. *Dorsey v. Brigham*, 52 N. E. 303, 304, 177 Ill. 250, 42 L. R. A. 809, 69 Am. St. Rep. 228.

"By the modern phrase, a man who resides under the allegiance and protection of a hostile state for commercial purposes is to be considered to all civil purposes as much an 'alien enemy' as if he were born there." *Hutchinson v. Brock*, 11 Mass. 119, 122.

An alien is the subject of some hostile power. "A man who resides in the allegiance and protection of an hostile state for commercial purposes is as much an alien enemy as if he was born there." *McConnell v. Hector*, 3 Bos. & P. 113, 114.

The expression "alien enemy," as used in a plea in an action setting up that the plaintiff is an "alien enemy" commorant in Ireland, "being an alien born within the allegiance of the King of Great Britain, with whom we are at war," means that plaintiff's disability is but temporary, merely barring him in his character of an "alien enemy" commorant abroad, his right of action being only suspended by the war, and reviving on

the return of peace. *Bell v. Chapman* (N. Y.) 10 Johns. 183, 184.

### ALIEN IMMIGRANT.

One who is a resident of the United States, though of foreign birth and not naturalized, and who is returning from a visit to the country of his birth, is not an alien immigrant within the meaning of the laws regulating immigration. In *re Panzara* (U. S.) 51 Fed. 275, 276; In *re Martorelli* (U. S.) 68 Fed. 437.

The term "alien immigrants" does not include an unmarried man who has immigrated to the United States in 1892 with the intention of making his home there, has remained about two years, working at his trade, and then, being taken ill, has returned to his native country, remained about ten months, doing no work, and then in 1895 returning to the United States. In *re Maiola* (U. S.) 67 Fed. 114, 115.

### ALIEN—ALIENATE—ALIENATION.

See "Suspension of Power of Alienation." Other alienation, see "Other."

To "alienate" is to divest one's self of property or title, or transfer property from one's self to another. *Harty v. Doyle*, 3 N. Y. Supp. 574, 576.

The term "alienation" embraces every mode of passing real estate by the act of the party, as distinguished from passing it by the operation of law. *Jenckes v. Court of Probate of Smithfield*, 2 R. I. 255, 257.

"Blackstone describes four modes of alienation or transfer of the title to real estate, which he calls 'common assurance': The first of which is by matter in pais or deed; the second, by matter of record, or an assurance transacted only in the King's public courts of record; the third, by special custom; and the fourth, by devise in a last will or testament." *United States v. Schurz*, 102 U. S. 378, 397, 26 L. Ed. 167 (quoting Blackstone's Comm., book 2, c. 20); *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. (3 Fairf.) 44, 48, 28 Am. Dec. 150.

"Alienation" is the voluntary and complete transfer from one person to another, and, applied to the transfer of property, involves the complete and absolute exclusion from him who alienates of any remaining interest in the thing transferred, and involves the complete transfer of the property, possession of land, tenements, or other things to another. *Stark v. Duvall*, 54 Pac. 453, 454, 7 Okl. 213.

"The word 'alien' or 'alienate' extends not only to alienations of land in deed, but also to alienations in law. A transfer of title by devise, descent, or by levy would be as technically an alienation as a transfer

by deed." *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. (3 Fairf.) 44, 48, 28 Am. Dec. 150.

As understood at common law, to "alienate" real estate is voluntarily to part with the ownership of it, either by bargain and sale, or by some conveyance, or by gift or will. *Burbank v. Rockingham Mut. Fire Ins. Co.*, 24 N. H. (4 Post.) 550, 558, 57 Am. Dec. 300; *Harty v. Doyle*, 3 N. Y. Supp. 574, 575, 49 Hun, 410.

"As generally used, 'alienation' means the passing of a thing from another, or the separation of two things, and not the conjoining or uniting of things. The passing of an estate or title from a person is an alienation, but the passing of an estate or title to a person is not an alienation. It is only when they are separated from each other in some manner, when they are discontinued, or when they become foreign to each other, that they are alienated. The passing of an estate to a person must be given some other name, as a 'reception,' or a 'union,' or an 'association.'" *Vining v. Willis*, 20 Pac. 232, 233, 40 Kan. 609.

"Alienation," as used in the articles of incorporation of an insurance company providing that, when any property insured with this corporation shall be aliened by sale or otherwise, the policy shall be void, means a transfer of the title, and "alienated" has been defined to be the act by which the title to an estate is voluntarily resigned by one person and accepted by another in the form prescribed by law. *Masters v. Madison County Mut. Ins. Co.* (N. Y.) 11 Barb. 624, 629.

"Alienate," as used in articles of incorporation prohibiting the trustees of the corporation from alienating any shares of stocks, bonds, cash, or other property which might come into their possession or under their control, except on approval of the board of trustees, means to convey or transfer to another the title of property. *Gould v. Head* (U. S.) 41 Fed. 240, 245.

"Alienated," as used in Const. art. 15, § 9, providing that a homestead shall not be alienated without the joint consent of husband and wife, when that relation exists, "only means a voluntary parting or surrendering of some interest in the homestead." *Vining v. Willis*, 20 Pac. 232, 233, 40 Kan. 609.

Since the case of *Frost v. Raymond*, 2 Caines, 188, it has been regarded as settled in this state that no one of the words "grant, bargain, sell, alien, or confirm," when used in a conveyance of real estate, imports a warranty. *Burwell v. Jackson*, 9 N. Y. (5 Seld.) 535, 541.

Where the word "alien" is employed in a deed, it is not used to designate the quan-

tity of estate intended to be conveyed, but merely for the purpose of passing title to an estate described by other words introduced for that purpose. *Krider v. Lafferty* (Pa.) 1 Whart. 303, 314-316.

The words "alien or grant" in a deed will make a good deed of bargain and sale, if made for a pecuniary consideration or one of pecuniary value, and though ever so small, even a barley corn. *Krider v. Lafferty* (Pa.) 1 Whart. 303, 314, 315 (citing *Shepherd's Touchstone*, 222).

In St. 1862, p. 519, providing that no "alienation, sale, conveyance, mortgage or other lien" of or on the homestead property shall be valid or effectual for any purpose unless the same be executed by the owner thereof and be executed and acknowledged by the wife, such terms are comprehensive enough to include most, if not all, of the modes in which parties may by their own act convey, create a lien on, or otherwise affect real estate, and seem to have been inserted to confirm and conserve the right of voluntarily alienating or incumbering the homestead, but requiring the lien, etc., to be made in writing, and, in order to protect the wife of the owner, if the owner be a married man, and his wife a resident of the state, to be signed and acknowledged by her. *Peterson v. Hornblower*, 33 Cal. 266, 274.

The elementary writers say that "to alienate" is to pass property from one person to another. Under the constitutional clause giving a married woman an absolute power of alienation as to her separate estate, where such married woman assigns a mortgage and note held by her to creditors of her son, who are threatening to sue him, and the assignment is under seal and absolute in its terms, it is an actual and valid transfer of the property. *Langston v. Smyley*, 16 S. E. 771, 773, 38 S. C. 121, 125.

#### Contract to convey.

Within an act incorporating an insurance company, providing that when any property insured with this corporation shall be "aliened," by sale or otherwise, the policy shall thereby be void, the word "aliened" means alienated in the ordinary sense which belongs to it, namely, a transfer of the title, since the term "alienate" is the act by which the title to an estate is voluntarily resigned by one person and accepted by another in the forms prescribed by law. An "alienation" has been defined as a mode of obtaining an estate by purchase, by which it is yielded up by one person and accepted by another; and hence any transfer of real estate, short of the conveyance of title, is not an alienation of the estate, no matter in what form the sale may be made, and the term "alienate" does not include a contract to sell and convey the property. *Masters*

*v. Madison County Mut. Ins. Co. (N. Y.)* 11 Barb. 624, 630.

Under an insurance policy providing that, if the insured property should be "alienated" by sale or otherwise, the policy should be void, it was held that a contract for the sale of the property under which no deed was made, and only a part of the purchase money paid, was not an alienation within the meaning of the policy. *Hill v. Cumberland Valley Mut. Protection Co.*, 59 Pa. (9 P. F. Smith) 474, 478.

"Alienation," as used in an insurance policy providing that when the property insured shall be alienated, by sale or otherwise, the policy shall be void, means a technical alienation, and does not include any transfer short of a conveyance of the title, and, no matter in what form the sale may be made, the estate is not alienated unless the title is conveyed by the purchaser; and hence a contract to convey the insured property is not a conveyance within the meaning of the policy. *Pollard v. Somerset Mut. Fire Ins. Co.*, 42 Me. 221, 225.

Under Rev. St. §§ 2290, 2291 [U. S. Comp. St. 1901, pp. 1389, 1390], providing that no patent shall issue without an affidavit that no part of the land has been alienated, a contract to convey, made during the transition period, having for its purpose the execution of a regular conveyance of the title when acquired, is an alienation within the spirit and purpose of the statute, and is illegal and void. *Anderson v. Carkins*, 10 Sup. Ct. 905, 907, 135 U. S. 483, 34 L. Ed. 272. And the undoubted preponderance of the adjudications of the state courts is to the same purpose. *Horseman v. Horseman*, 72 Pac. 698, 701, 43 Or. 83.

#### Deed of trust or mortgage.

A mortgage on property does not constitute an alienation within the meaning of a phrase in an insurance policy rendering the policy void whenever any property insured shall be "alienated" by sale or otherwise. *Conover v. Mutual Ins. Co.*, 1 N. Y. (1 Comst.) 290, 294; *Shepherd v. Union Mut. Fire Ins. Co.*, 38 N. H. 232, 240; *Rollins v. Columbian Mut. Fire Ins. Co.*, 25 N. H. (5 Fost.) 200, 202; *Smith v. Monmouth Mut. Fire Ins. Co.*, 50 Me. 96, 97; *Judge v. New York Bowery Fire Ins. Co.*, 132 Mass. 521, 523; *Bryan v. Traders' Ins. Co. (Mass.)* 14 N. E. 454, 457; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 40 Mass. (23 Pick.) 418, 34 Am. Dec. 69.

"Alienation," as used in the by-laws of a fire insurance company providing that an "alienation" of insured property will avoid any insurance thereon, construed to include a mortgage of the insured property. *Edmonds v. Mutual Safety Fire Ins. Co.*, 83 Mass. (1 Allen) 311, 79 Am. Dec. 746; *Pol-*

lard v. Somerset Mut. Fire Ins. Co., 42 Me. 221, 225.

"Alienate," as used in a fire insurance policy providing that the policy shall be void if the property be sold or transferred, means such a sale, transfer, or alienation of the property as passes the title and carries with it the right of possession, and does not include the execution of a chattel mortgage without change of possession. Union Ins. Co. of California v. Barwick, 54 N. W. 519, 521, 36 Neb. 223.

"Alienation or transfer," as used in a fire policy a clause of which provided that, in case of any sale, alienation, transfer, or change of title in the insured property, the policy should be void, meant which absolutely divested the title of the insured in the property, and hence the giving of a chattel mortgage without parting with possession did not avoid the policy. Van Deusen v. Charter Oak Fire & Marine Ins. Co., 1 Abb. Prac. (N. S.) 349, 358, 24 N. Y. Super. Ct. (1 Rob.) 55, 62.

Code, § 2807, which provides that an insurance policy shall be void if, during the life of the policy, there be any "alienation" of the property, does not include the execution of a deed of trust by the insured, since the word "alienate," as there used, imports an absolute divestiture of title. Virginia Fire & Marine Ins. Co. v. Feagin, 62 Ga. 515, 519.

"Alienation," as used in statutory provisions concerning homesteads, and in the Constitution, includes any agreement or contract by which the title would inure to the benefit of another, and hence includes a mortgage. Brewster v. Madden, 15 Kan. 249, 251.

The constitutional provision, that real estate constituting a homestead shall not be "alienable" without the joint consent of a husband and wife, construed as "simply a restriction upon an admitted power otherwise to sell or incumber." A mortgage is an alienation within the meaning of the provision. Hart v. Sanderson's Adm'rs, 18 Fla. 103, 115.

Gen. St. c. 41, § 7, providing that no land "alienated" shall be sold for taxes if the person taxed have other sufficient property, means land the title to which has been transferred, and implies a conveyance more than a mortgage. People's Sav. Bank v. Tripp, 13 R. I. 621, 622.

In the Wills Act, § 20, declaring that where judgment is obtained against an heir, on account of the death of his ancestor, by reason of any lands descending to him, an execution shall be taken out against the heir to the value of the lands, but that those which were bona fide "allened" before the action brought shall not be liable to such execution, the word "allened" is not used in

any peculiar sense not applied to its use in other connections, and includes a bona fide mortgage. McMahon v. Schoonmaker, 25 Atl. 946, 947, 51 N. J. Eq. 95; Hetfield v. Jaques, 10 N. J. Law (5 Halst.) 259, 264.

The word "alienate," as used in a statute providing against the alienation of land held by a widow during a subsequent marriage, means "to convey," and includes mortgages. United States Saving Fund & Investment Co. v. Harris (Ind.) 40 N. E. 1072, 1075 (citing Vinnedge v. Shaffer, 85 Ind. 841).

Giving a lien on real estate by a mortgage is neither a bequest, a devise, nor an alienation. Warren v. Raymond, 17 S. C. 190, 198. A mortgage of a married woman's separate estate to secure a debt of her husband in no way connected with her separate estate is not an alienation within the meaning of Const. S. C. art. 14, § 8, allowing married women to alienate their separate estate as fully as if they were single women. Aultman & Taylor Co. v. Rush, 28 S. C. 517, 533, 2 S. E. 402, 404.

"Alienated," as used in Act 1822, making property alienated between the signing of a judgment on appeal and the signing of the judgment in the trial court pursuant to the judgment on appeal subject to such judgment, construed to include a mortgage on the property. Phillips v. Behn, 19 Ga. 298-302.

The entryman, under section 2291 of the Revised Statutes of the United States, who swears that "no part of the land" which he seeks to have conveyed to him from the United States "had been alienated," may mortgage his claim before final certificate, in order to procure money with which to improve his land, or for any other purpose, provided he seeks in good faith to acquire the land as a homestead; and such mortgage will not be alienation under the statute. Stark v. Duvall, 54 Pac. 453, 454, 7 Okl. 213.

The phrase "alien, transfer and dispose," as used in a charter granting to a corporation the right to acquire, alien, transfer, and dispose of property of every kind, embraces the power to mortgage. McAllister v. Plant, 54 Miss. 106, 119.

#### Descent or devise.

The word "alien" or "alienate" extends not only to alienations of land in deed, but also to alienations in law. A transfer of title by devise, descent, or levy would be as technically an alienation as a transfer by deed. Lane v. Maine Mut. Fire Ins. Co., 12 Me. (3 Fairf.) 44, 48, 28 Am. Dec. 150.

"As understood at common law, to 'alienate' real estate is voluntarily to part with the ownership of it, either by bargain and sale, or by some conveyance, or by gift or will. The right to alienate was a right which the owner had over the real estate to

divert it from the heir. 'Alienation' differs from 'descent' in that it is effected by the voluntary act of the owner of the property, while 'descent' is the legal consequence of the decease of the owner, and is not changed by any previous act or volition of the owner. A 'sale and a conveyance' is an alienation which takes effect from the time of the transfer, while a 'devise' is an alienation that takes effect on the decease of the testator, according to the terms of the will." *Burbank v. Rockingham Mut. Fire Ins. Co.*, 24 N. H. 550, 558, 57 Am. Dec. 300.

A charge imposed upon a testator's homestead by a will is not an "alienation" in the lifetime of the testator, which prevents the operation of the statute passing the homestead to the testator's wife and children on his decease without alienation, for the testamentary provision does not come into existence and take effect until the death of the testator. *Macrae v. Macrae* (Tenn.) 57 S. W. 423, 425.

In *Hendrix v. Seaborn*, 25 S. C. 481, it was held that while, in the broadest sense, "alienation" covered "devise," yet that a devise was not an alienation within the statute providing that no right of homestead shall exist in any property aliened by any person as against the title of the alienee. *Bostick v. Chovin* (S. C.) 83 S. E. 508, 509.

"Alienation," as used in *Laws 1857*, p. 119, amending *Laws 1851*, p. 25, requiring the signature and acknowledgment of the wife to "alienations" of the homestead by the husband, does not include transfer by descent. "It must mean a transfer by conveyance; such a one as the signature and acknowledgment of a party are proper to effect, as the law requires these acts as conditioned to the alienation of the homestead. If the homestead exemption applies to the acts of the descent of property, then it may be released in the mode required by the statute, as an act contemplates that it may be released; but it would be preposterous to suppose that the Legislature should intend such thing as the signature and acknowledgment of the wife should apply to the acts of the operation of the law of descent." *Turner v. Bennett*, 70 Ill. 263, 267.

The word "alienate," as used in *Const. art. 5, § 9*, providing that a homestead shall not be alienated without the joint consent of the husband and wife, means a voluntary parting with or surrendering of some interest in the homestead; and, as a person never parts with or surrenders anything by virtue of a will, but only by reason of his or her subsequent death, and as it never can be supposed without proof that any person will voluntarily bring about his own death, it necessarily follows that the constitutional provision has no application to wills. We know that text-writers have sometimes broadened the word "alienation" so as to make it in-

clude the transfer of property by will, death, and the state, and perhaps this use of the word is not inaccurate; but, as before stated, the efficient cause of the alienation in such case, indeed the sole cause, is death, and the will and the statute merely say where the title and estate shall go. *Vining v. Willis*, 40 Kan. 609, 613, 20 Pac. 232.

The word "alienable" may be broad enough to include dispositions by will, when not otherwise restrained by the context. But where that word was used in the first section with respect to the joint consent of husband and wife, and following this section was another providing for the continuance of the exemption in the heirs of the head of the family from and after his death, it cannot be said that the word "alienable" was intended to embrace testamentary dispositions. The word "alienable" was not used in the sense of "devisable." *Caro v. Caro* (Fla.) 34 South. 309, 313.

#### Entry or foreclosure by mortgagee.

"Alienate," as used in *Pub. St. c. 12, § 25*, providing that a reassessment, where an assessment has been made to the wrong person, shall constitute a lien on the real estate for two years, unless the estate has been "alienated" between the first and second assessments, means to transfer or convey the title, and hence does not include an entry on land by a mortgagee for the purpose of foreclosing his mortgage, since such entry cannot in any just sense be called an "alienation," though it constitutes one step in a proceeding which may result in an alienation by operation of law. *Market Nat. Bank v. Inhabitants of Belmont*, 37 Mass. 407, 409.

A fire policy conditioned that the same should be void if the premises were alienated without the consent of the insured, and that a judgment in foreclosure proceedings should be deemed an "alienation" of the property, meant a judgment of strict foreclosure, and did not embrace a decree for sale in the foreclosure suit without any further proceedings. *Kane v. Hibernia Mut. Fire Ins. Co.*, 38 N. J. Law (9 Vroom) 411, 456, 20 Am. Rep. 409.

"Alienation," as used in an insurance policy prohibiting the alienation of property, does not include a void sale of the property by a trustee under a deed of trust which is executed before the issuance of the policy. *Worthington v. Bearse*, 94 Mass. (12 Allen) 382, 90 Am. Dec. 152; *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. (3 Fairf.) 44, 28 Am. Dec. 150; *Power v. Ocean Ins. Co.*, 19 La. 28, 36 Am. Dec. 665; *Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 424; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. (4 Wright) 289, 80 Am. Dec. 573; *Commercial Union Assur. Co. v. Scammon* (Ill.) 12 N. E. 324, 329.

"Alienation," like "sale," imports an actual transfer of title. Yet, where it is used in an insurance policy in a provision that

the same shall become void on alienation of the insured premises, it is used in a narrower sense, and hence where, at the time of the fire, a decree in chancery for the sale of the property on foreclosure had been entered and the property bid in by the mortgagee, but no deed had been delivered, and because of the fire the mortgagee refused to receive a sheriff's deed, the policy did not become void by alienation. *Marts v. Cumberland Mut. Fire Ins. Co.*, 44 N. J. Law (15 Vroom) 478, 481.

#### **Execution and sale.**

To "alienate" means to transfer property to another; to make a thing another man's. In common law, to alienate realty is to voluntarily part with ownership in it by bargain and sale, conveyance, gift, or will; but within the statute providing that, when a widow shall be entitled to dower out of any lands which shall have been "aliened" by her husband in his lifetime, and such lands have been enhanced in value after the alienation, such lands shall be estimated in setting out the widow's dower according to their value at the time they were so aliened, the word "alienation" includes sale of the property of the husband on execution against him alone. *Butler v. Fitzgerald*, 61 N. W. 640, 641. 43 Neb. 192, 27 L. R. A. 252, 47 Am. St. Rep. 741.

An insurance policy provided for an immediate termination of the risk if the property be sold or transferred, or any alienation or change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance. It was held that the words "sold, transferred, alienated," do not ordinarily include a sale upon execution, and the words "change in the title of possession" do not extend the meaning; and this would be the meaning were it not for the words "by legal process or judicial decree." But since under a sale on execution the owner of the land has full right of possession and occupancy for 15 months after the sale, and for 12 months of that time he has an absolute right to redeem, so that neither possession nor title passes before the end of 15 months, such a sale does not violate the provisions of the policy. *Hammel v. Queen's Insurance Co.*, 11 N. W. 349, 355, 54 Wis. 72, 41 Am. Rep. 1.

"Alienated," as used in a fire policy providing that the policy shall be void if the insured property is alienated, construed not to include the seizure of the insured goods on execution without removing them, since the general property and the goods remain in the debtor until they are sold. *Rice v. Tower*, 67 Mass. (1 Gray) 426-429.

#### **Lease.**

Comp. Laws Kan. 1879, and Const. art. 15, § 9, providing that a homestead occupied

as a residence shall not be alienated without the joint consent of the husband and wife, when that relation exists, prohibits the husband from executing a lease of the homestead for a term of five years, and giving possession thereof to a tenant, without the consent of his wife. *Coughlin v. Coughlin*, 26 Kan. 116, 118.

#### **As sale in course of business.**

"Alienated," as used in a fire policy on a stock of goods kept for sale, which provides that if the property be alienated by sale or otherwise it shall avoid the policy, construed to mean a sale of the whole or a material part of the stock out of the regular course of business, and not a sale of various items of the stock in the ordinary course of business. *Lane v. Mutual Fire Ins. Co.*, 12 Me. (3 Fairf.) 44-48.

#### **Sale of partner's interest.**

A fire policy, providing that it shall be void by "alienation" of the property by sale or otherwise, is to be construed as including a transfer by one partner, having an interest in the property, of his interest to another party. *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179, 183, 85 Am. Dec. 452.

#### **Settlement of boundary.**

"Alienation" means, in law, the transfer of title by conveyance, so that the statute forbidding the "alienation" of property by a corporation except by a three-fifths vote of its stockholders relates to alienation of real estate, and will not include the mere settlement of a boundary dispute. *Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co.*, 76 N. W. 395, 403, 118 Mich. 109.

#### **Transfer without consideration.**

"Alienate," as used in a quitclaim deed reserving to the grantor the power to "alienate" or mortgage, means "to divest one's self of property or title, to transfer property from one's self to another," which is not done by the execution of quitclaim deeds by the grantor without consideration. *Harty v. Doyle*, 3 N. Y. Supp. 574, 575, 49 Hun, 410.

Though the word "sale," as used in the Alabama statutes empowering a married woman to dispose of her separate property by sale, was used in its legal sense as a transfer of property for a valuable consideration, yet the word "alienation," as used in a subsequent statute giving a married woman power to alienate her separate property the same as a feme sole, authorizes a married woman to convey her land without consideration. *Stacey v. Walter* (Ala.) 28 South. 89, 90, 82 Am. St. Rep. 235.

#### **ALIENATION IN MORTMAIN.**

See "Mortmain."

## ALIENIST.

An "alienist" is a person who has made mental diseases, those affecting the mind involuntarily, and the moral or spiritual faculties, his special study. *State v. Reidell* (Del.) 14 Atl. 550, 552.

## ALIGNMENT.

In a contract for the construction of a village waterworks system, providing that the city engineer could make such changes in the form, dimensions, and "alignment" of the work as might be necessary for its proper fulfillment, the word "alignment" cannot be construed to mean simply an adjusting of a line, so that a change in alignment cannot be construed to cover a change of line, but signifies not only the act of adjusting to a line, but the state of being so adjusted, and in terms of engineering is used to denote the ground plan of a road or other work, as distinguished from its profile. *Village of Chester v. Leonard*, 37 Atl. 397, 400, 68 Conn. 495 (citing *Webst. Dict.*).

## ALIKE.

The word "alike," as used in a will, is the same as the word "equally." *Loveacres v. Blight*, 1 Cowp. 352, 354.

## ALIMONY.

See, also, "Suit Money"; "Permanent Alimony."

"Alimony" is defined to be an allowance which a husband or a former husband may be forced to pay to his wife or former wife, living legally separate from him, for her maintenance. *Stivers v. Wise*, 46 N. Y. Supp. 9, 18 App. Div. 316; *Rogers v. Vines*, 28 N. C. 293, 297; *Sanchez v. Sanchez*, 21 Fla. 346, 350; *Odom v. Odom*, 36 Ga. 286, 319 (citing 1 Bl. Comm. 441); *De Roche v. De Roche* (N. D.) 94 N. W. 767, 769; *Chase v. Chase*, 55 Me. 21, 23; *Keerl v. Keerl*, 34 Md. 21, 25; *Newman v. Newman*, 69 Ill. 167, 168.

"Alimony" is that allowance which is made to a woman on a decree of divorce, for her support out of the estate of her husband. It is equivalent to the obligation, implied in every marriage contract, that the husband shall furnish his wife a suitable support and maintenance. *Adams v. Storey*, 26 N. E. 582, 584, 135 Ill. 448, 11 L. R. A. 790, 25 Am. St. Rep. 392; *Taylor v. Taylor*, 93 N. C. 418, 420, 53 Am. Rep. 460; *Westerfield v. Westerfield*, 36 N. J. Eq. (6 Stew.) 195, 197; *In re Le Claire* (U. S.) 124 Fed. 654, 657 (citing *Martin v. Martin*, 21 N. W. 595, 65 Iowa, 255); *Sheafe v. Sheafe*, 24 N. H. (4 Fost.) 564, 567.

"Alimony," in its origin, was the method by which the spiritual courts of England en-

forced the duty of support owed by the husband to the wife during such time as they were legally separated pending the marriage relation. The courts of law could not adequately enforce this duty, but made a clumsy and circuitous attempt to do so under some circumstances by employing the fiction that a wife living apart from her husband by reason of his fault was his agent for the purpose of binding him to pay third parties for necessities furnished to her. *Manby v. Scott*, 2 Sm. Lead. Cas. 502; *Snover v. Blair*, 25 N. J. Law (1 Dutch.) 94; *Vusler v. Cox*, 22 Atl. 347, 53 N. J. Law (24 Vroom) 516. At common law, a divorce from the bonds of matrimony was granted by the ecclesiastical courts only for such causes as rendered the marriage void ab initio. Naturally, alimony was not allowed as an incident to such a divorce, for, there being no marriage, the duty of maintenance had not been undertaken. Divorces a mensa et thoro, however, amounting merely to a legal separation, were granted for causes which rendered it improper or impossible for the parties to live together, and in such case the ecclesiastical court ordered a periodical allowance to be paid by the husband to the wife for her support, the amount thereof being settled at the discretion of the judge, in view of all the circumstances of the case. The spiritual courts reserved and exercised the power of varying the amount of the alimony from time to time as required by change of circumstances. In this state, the subject-matter of divorce having been by statute committed to the court of chancery, and causes for absolute divorce having been allowed other than such as rendered the marriage void ab initio, there followed as a logical consequence the allowance of permanent alimony, in cases of absolute divorce, as a means of enforcing the continuing duty of support which the husband owed to the wife, and of which he was not permitted to absolve himself by his own misconduct, although that misconduct resulted in a dissolution of the marriage. *Lynde v. Lynde* (N. J.) 52 Atl. 694, 699.

"Alimony" is the allowance which a husband, by order of the court, pays to his wife, being separate from him, for her maintenance. *Bish. Mar. & Div.* This definition is substantially the same as that given by other American and English authorities, and may be said to be only applicable to divorces a mensa et thoro, because it presumes the relation of husband and wife still to exist, although the parties are separated by virtue of the decree of a competent court, and is peculiarly applicable to divorces granted by the courts in England prior to the year 1858, for in England, previous to that year, no judicial divorces dissolving the bonds of matrimony originally valid were allowed. *Bowman v. Worthington*, 24 Ark. 522, 523.

"Alimony" is an allowance for the support of the wife during divorce proceedings,



or after a separation a mensa et thoro. The right to alimony of any kind is founded on the duty of the husband to support his wife, but this duty does not extend to affording her a separate maintenance, except in those cases where the law judges that she may live apart from him, for her protection, in consequence of his wrongdoing. *Collins v. Collins*, 80 N. Y. 1, 12.

"Alimony" is that allowance made to a woman on a decree of divorce for her support out of the estate of her husband. At common law it was usually settled at the discretion of the ecclesiastical judge on consideration of the circumstances of the case. The principle on which alimony is given to a divorced wife is that it is the equivalent of that obligation, implied in every marriage contract, that the husband shall furnish his wife a suitable support. *Stillman v. Stillman*, 99 Ill. 196, 201, 39 Am. Rep. 21.

The term "alimony," in its broad sense, means support to which the wife and children are entitled on account of the misconduct or negligence of the husband or father. *Bucknam v. Bucknam* (Mass.) 57 N. E. 343, 344, 49 L. R. A. 735.

"Alimony" means subsistence or support, and it is apparent that such allowance is given for the support to which the wife was entitled by the marriage, and which she has been compelled to forego, and has been deprived of, through the husband's default in failing to perform the marriage contract and covenant. *Stearns v. Stearns*, 28 Atl. 875, 68 Vt. 187, 44 Am. St. Rep. 836.

"Alimony" is the support which the court decrees in favor of the wife as a substitute for the common-law right of marital support. *Livingston v. Livingston*, 66 N. E. 123, 127, 173 N. Y. 377, 61 L. R. A. 800, 93 Am. St. Rep. 600.

"Alimony" is a maintenance secured by judicial authority during coverture or until reconciliation. *Lockridge v. Lockridge*, 33 Ky. (3 Dana) 28, 29, 28 Am. Dec. 52.

"In its strict technical sense 'alimony' proceeds only from husband to wife, and, where the relation is not that of husband and wife, strictly speaking there can be no alimony. Alimony grows out of the obligation of support which arises from the relation of husband and wife, and the moment the decree of divorce is granted the relation of husband and wife has ceased. There is no husband nor wife, hence there can be no alimony." *In re Spencer*, 23 Pac. 395, 396, 83 Cal. 460, 17 Am. St. Rep. 266.

"Alimony" may be defined to be such sum as is ordered by the court to be paid to the wife by the husband for her support during the time she lives separate from him, or to be paid by her late husband for her maintenance after divorce from the marriage

tie. The latter is a creation of modern law, and is known as "permanent alimony." *Green v. Green*, 68 N. W. 947, 948, 49 Neb. 546, 34 L. R. A. 110, 59 Am. St. Rep. 560; *Pape v. Pape*, 35 S. W. 479, 480, 13 Tex. Civ. App. 99.

"Alimony" is an allowance which by order of the court the husband is compelled to pay the wife, from the date he has been legally separated or divorced, for her support and maintenance. This is to be distinguished in a general sense from "alimony pendente lite," and proceeds from the husband's common-law liability to support the wife. *Henderson v. Henderson* (Or.) 60 Pac. 597, 598, 48 L. R. A. 766, 82 Am. St. Rep. 741.

Alimony is an allowance out of the husband's estate, made for the support of the wife when living separate from him. It is either temporary or permanent. Civ. Code Ga. 1895, § 2456.

"Alimony" imports a provision for the support of the wife out of the profits of the estate of her husband, the allowance to be regulated according to the value of the estate. If the wife was entitled to her dower and distributable portion of the estate as in cases of intestacy, it could scarcely be believed that the Legislature would have made the provision for her recovery of alimony by a proceeding against the husband as in other cases. If the estate was in the husband, then there was propriety in the provision; but if an interest in the wife is great or greater than she would be entitled to recover, then there was no necessity or propriety in the provision. *Wooldridge v. Lucas*, 46 Ky. (7 B. Mon.) 49, 51.

The word "alimony," as commonly used, is equally applicable to all allowances, whether annual or gross, made to a wife on a decree of divorce. *De Roche v. De Roche* (N. D.) 94 N. W. 767, 769 (citing *Burrows v. Purple*, 107 Mass. 432).

By "alimony" we understand what is necessary for the nourishment, lodging, and support of the person who claims it. It includes the education when the person to whom alimony is due is a minor. Civ. Code La. 1900, art. 230.

Alimony decreed upon the dissolution of a marriage, if payable in installments, is, unless otherwise specially provided, an allowance for the support of the beneficiary during the life of herself and her divorced husband. The duty of support ends with the death of the beneficiary. *Craig v. Craig*, 45 N. E. 153, 155, 163 Ill. 176.

#### Continuous or gross payments.

Alimony is not a sum of money nor a specific proportion of the husband's estate given absolutely to the wife, but is a continuous allotment of sums payable at regular intervals from year to year, continuing only

during the joint lives of the parties, or, when there is a divorce from the bonds of matrimony, until the wife remarries. *Brown v. Brown*, 38 Ark. 324, 328.

"Alimony and maintenance," as used in *Nix*, Dig. 247 (Rev. St. p. 317, § 19), declaring that when a divorce shall be decreed it shall be lawful for the court of chancery to make such order touching the alimony and maintenance of the wife and care and maintenance of the children as shall be fit, reasonable, and just, means money payments of the character of an annuity, and does not authorize the giving of a gross sum nor a portion of the real estate of the husband, since the terms "alimony" and "maintenance" were practically synonymous, and imported the giving of special specific sums necessary for the maintenance and support of the wife and child as needed. *Calame v. Calame*, 25 N. J. Eq. (10 C. E. Green) 548, 551.

Alimony includes all allowances made to a wife on the decree of a divorce, whether payable in periodical installments or in a gross sum. *Robinson v. Robinson*, 21 Pac. 1095, 1096, 79 Cal. 511.

"Alimony," as used in St. 1785, c. 69, § 5, St. 1805, c. 57, St. 1810, c. 119, Rev. St. c. 76, § 31, and Gen. St. c. 107, §§ 43, 44, providing that upon granting a wife a decree of divorce she may be allowed reasonable alimony out of her husband's estate, includes gross allowances as well as the payments of sums at stated intervals. *Burrows v. Purple*, 107 Mass. 428, 432

#### As a debt.

See "Debt": "Debt Founded on Contract."

#### Dependent on means of parties.

"While 'alimony' is commonly defined a proportion of the husband's estate, yet the duty of the husband to maintain his wife does not depend alone on his having visible tangible property. While the parties are living together they are bound to contribute by their personal exertions to a common fund, which in law is the husband's, but from which the wife may claim support. If she is compelled to seek a divorce on account of his misconduct, she loses none of her rights in this respect, only she is to draw her maintenance in a different way; that is, under a decree for alimony, based, if he has no property, on his earnings or ability to earn money." *Bailey v. Bailey* (Va.) 21 Grat. 43, 57.

Alimony is a support for the wife allowed out of the husband's estate during proceedings for a divorce, or after a divorce a mensa et thoro. It depends on no principle of indebtedness, nor on his merit or demerit, but on the amount of his means and those of the party in whose favor it is decreed. *Chase v. Ingalls*, 97 Mass. 524, 527.

Alimony is an equitable allowance made to a wife out of her husband's estate on dissolution of the marriage relation, and should be based on the value of the estate, taking into consideration the debts of the husband. *Daniels v. Lindley*, 44 Iowa, 567, 569.

"As applied to the marital relation, 'alimony' is that maintenance or support which the husband on separation is bound to provide for the wife, and is measured by the wants of the person entitled to it, and the circumstances or ability of him who is bound to furnish it." *Wheeler v. Wheeler*, 18 Ill. (8 Peck) 39, 40.

Alimony is an allowance for support and maintenance, having no other purpose and provided for no other object. It is solely intended to furnish a provision for food, clothing, and habitation for the wife who has been driven to seek a divorce on account of the husband's wrongful breach of the marriage contract. The amount necessary for this purpose depends more or less on the condition, habits of life, and social position of the parties. *Turner v. Turner* (U. S.) 108 Fed. 785-787.

Alimony is the maintenance or support which a husband is bound to give his wife upon a separation from her, or the support which either father or mother is bound to give to his or her child, though this is more generally called "maintenance." It is accorded in proportion to the wants of the person requiring it, and the circumstances of those who are to pay it. *Burr v. Burr* (N. Y.) 7 Hill, 207, 218.

"Alimony payable from time to time" may well be regarded as a portion of the husband's current income or earnings, and is ordinarily based and measured in its allowance upon such income or earnings. In *re Lachemeyer* (U. S.) 14 Fed. Cas. 914, 915.

Alimony is an allowance for support and maintenance, having no other purpose and provided for no other object. Like the alimentum of the civil law, from which the word was evidently derived, it respects a provision for food, clothing, and a habitation, for the necessary support of the wife after the marriage bond has been severed; and since what is thus necessary has more or less relation to the condition, habit of life, and social position of the individual, it is graded in the judgment of the court of equity somewhat by regard for these circumstances, but never loses its distinctive character. *Romaine v. Chauncey*, 29 N. E. 826, 827, 129 N. Y. 566, 14 L. R. A. 712, 26 Am. St. Rep. 544.

#### Division of property distinguished.

Alimony is an allowance which by order of the court the husband or former husband is compelled to pay to his wife or former wife, from whom he has been legally separat-

ed or divorced, for her support and maintenance. The foundation of its allowance is the duty of the husband to provide for the wife's support. A division of the property of the parties is essentially a different thing. *Johnson v. Johnson*, 46 Pac. 700, 701, 57 Kan. 343.

#### **As part of divorce proceedings.**

The demand for alimony is not an essential part of the cause of action for a divorce. It is described by Bishop as a mere appendage of the action, or, where it enters into the final decree, it is a mere accident of the judgment. *Hecht v. Hecht*, 36 N. Y. Supp. 271, 272, 14 Misc. Rep. 597 (citing *Forrest v. Forrest*, 25 N. Y. 501).

#### **As an estate or property right.**

Alimony is not itself an estate in a technical legal sense of the word, and therefore not the separate property of the wife. *Guenther v. Jacobs*, 44 Wis. 354, 355; *Miller v. Miller*, 75 N. C. 70, 72.

Alimony allowed to a wife by the final decree granting her a divorce is not her property or separate estate, and cannot be reached by creditors whose claims and judgments antedate such decree. *Romaine v. Chauncey*, 15 N. Y. Supp. 198, 60 Hun, 477.

A wife's claim for an allowance of alimony is a purely personal right, and not in any sense a property right. It is in its nature not susceptible of assignment by the wife to another, nor capable of enjoyment by her in anticipation. *Lynde v. Lynde*, 52 Atl. 694, 699, 64 N. J. Eq. 736, 58 L. R. A. 471 (citing *Miller v. Miller*, 1 N. J. Eq. [Saxt.] 386; *In re Robinson*, 27 Ch. Div. 160).

Alimony is that portion of the husband's estate which is allowed to the wife for her sustenance and livelihood. It is unlike property held for her sole and separate use, and on her death the arrears, if any, belong to the husband, subject only to the payment of her debts. *Holbrook v. Comstock*, 82 Mass. (16 Gray) 109, 110.

#### **Estate of husband distinguished.**

Alimony is a temporary provision allowed by the court to a wife, to continue during the separation of herself and husband, and hence, "does not include the allowance of a portion of the husband's estate in fee." *Calame v. Calame*, 25 N. J. Eq. (10 C. E. Green) 548, 550.

In the statute providing that in a decree of divorce the court may adjudge to the wife such part of the personal estate of the husband and alimony out of his estate as may be just, having regard to his ability, the estate intended must be understood as the estate applicable to the payment of alimony. The words "estate" and "alimony" in the section are not only associated within the rule

of *noscitur a sociis*, to be understood in the kindred sense; they are correlatives, dependent one on the other for effect, and should be understood in a corresponding sense. *Campbell v. Campbell*, 37 Wis. 206, 218. The words "alimony" and "estate," as used in Wis. Rev. St. § 2364, which, after declaring that "alimony may" be allowed, provides that the court may finally divide and distribute the estate, are not to be associated within the rule of *noscitur a sociis*, to be understood in a kindred sense; they are correlatives, depending one on the other for effect, and should be understood in a corresponding sense. *Blake v. Blake*, 43 N. W. 144, 145, 75 Wis. 339. In the former case it is further said: "We are not considering division of the estate, but alimony proper. The correlative estate must be intended as an estate available to the payment of the correlative alimony. This seems to disregard actual estate not yielding income, and implies income, however accruing, whether from estate proper, or employment, or both. This view is strongly upheld by the concurrent direction to have regard to the ability of the husband. The court shall have regard, not to his estate only, but to his ability; that is, his ability to pay by way of annuity or income. The word 'ability' here plainly bears the sense of the ecclesiastical term 'faculties.' For ability to pay by way of annuity does not rest on estate in the sense of investment, but on estate in the sense of income; ability to pay income to another depends on the income of the person to pay it. We have therefore no difficulty in holding, on authority, that 'alimony' may be always based on the husband's income at the time of divorce and afterwards." *Campbell v. Campbell*, 37 Wis. 206, 218.

Alimony is a maintenance offered to the wife where the husband refuses to give it, or where from his improper conduct she is compelled to live separate from him. It is not a portion of his real estate to be assigned to her in fee simple, subject to her control, or to be sold at her price, but a provision for her support, to continue during their joint lives or so long as they live separate. Upon the death of either, or upon their mutual consent to live together, it ceases. *Wallingsford v. Wallingsford* (Md.) 6 Har. & J. 485, 488 (quoted in *Field v. Field* [N. Y.] 15 Abb. N. C. 434, 438).

"Alimony" is not an estate, and not a portion of the husband's estate to be assigned to the wife as her own, and, though it is payable out of the husband's real as well as his personal property, the word never covers the estate itself. *Bacon v. Bacon*, 43 Wis. 197, 203.

#### **Income implied.**

Alimony implies an income, and does not mean the corpus or capital yielding it, and

It is paid by the husband as a part of and out of the income of his estate. It is not necessarily a charge upon the husband's estate; it may be derived from personal labor, wages, or salary, as well as from land or personal property. *Miller v. Miller*, 75 N. C. 70, 71.

#### Maintenance of children.

In its proper signification, "alimony" is not maintenance to the children, but to the wife, so that obligation of a man, or of his estate after his death (Pub. St. c. 189, § 17), to support his child, is not discharged by the procuring of a divorce by the mother, with alimony and custody of the child. *Dolloff v. Dolloff*, 38 Atl. 19, 20, 67 N. H. 512.

"Alimony" in its proper sense is not maintenance to the children, but to the wife. *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 459, 15 N. E. 471, 4 Am. St. Rep. 542. Thus an order made by the common pleas, in granting a motion to modify the original decree in a divorce case as to the custody and maintenance of minor children, which requires the father to pay to the mother a monthly stipend for the support of the children, of whom she is given the custody, is not an order for the payment of alimony, and no appeal can be taken from such judgment to the circuit court. *Rogers v. Rogers*, 36 N. E. 310, 312, 51 Ohio St. 1.

Where, in a decree of divorce, the custody of minor children is awarded to the wife, and the husband is required to pay her a monthly sum for their support, such allowance is not alimony. *Pape v. Pape*, 35 S. W. 479, 480, 13 Tex. Civ. App. 99.

#### For present and future.

The word "alimony," as used in Indiana statutes in speaking of a judgment for support and maintenance of a wife, uses it in its primary sense of nourishment, sustenance, means of living, and hence applies only to nourishment and means of sustenance for the present and future. *Carr v. Carr*, 33 N. E. 805, 807, 6 Ind. App. 377.

#### ALIMONY PENDENTE LITE.

See, also, "Temporary Alimony."

"Alimony pendente lite," in a strict sense, is an allowance which the husband may be compelled to pay to the wife to enable her to prosecute a suit for divorce, or to defend an action where the proceedings are instituted by him. It is held that "alimony pendente lite" includes not only a reasonable allowance for the support and maintenance of the wife during the pendency of the action, but also court costs, reasonable attorney's fees, and necessary expenditures to enable her to prepare and conduct her case in an efficient manner. *Gundry v. Gundry* (Okla.) 63 Pac. 509, 510.

In its nature, "alimony pendente lite" is a fund for the current support of the wife. It is not in any sense a debt due from the husband to the wife, but is simply a provision made by law, in appropriate cases, to enable the wife to support herself and defend her rights in a suit for divorce against her husband, or a suit by him against her. Where a husband is paying excessive alimony and has the amount reduced, he cannot apply the amount overpaid on the current demand for accruing alimony. *Johnson v. Johnson* (Tenn.) 49 S. W. 305, 307.

"Alimony pendente lite" is that allowance which a husband may be forced to pay to the wife during the pendency of an action for divorce, separation, or annulment of marriage. Such definition recognizes the husband as the source of payment, so that alimony pendente lite cannot be awarded against the parent of an infant son who institutes an action to annul his marriage. *Stivers v. Wise*, 46 N. Y. Supp. 9, 18 App. Div. 316.

Wag. St. p. 535, § 12, providing that in a suit for a divorce the court may decree alimony pending suit in all cases where the same would be just, whether the wife be plaintiff or defendant, is properly construed to authorize the allowance of a reasonable sum for defending the suit where the husband is complainant. *Waters v. Waters*, 49 Mo. 385, 388.

An application for alimony pendente lite rests solely on the ground of necessity. Originally such allowances were made in divorce suits almost as a matter of course. This was but the natural result of the fact that at common law, by the marriage contract, the husband acquired complete control over all property owned by the wife at the time of the marriage, or which she might acquire during coverture. In such a state of affairs, unless the court required the husband to support his wife and to furnish her with the means of prosecuting her suit or defending his, she would be left during the litigation both destitute and defenseless, but since the modern innovations with respect to the proper rights of married women no such reason exists, and alimony pendente lite will only be allowed in cases where it is made to appear that such allowance is necessary. The facts that a wife is destitute of means to carry on her suit and to support herself during its pendency are as essential as any other fact to authorize the court to award temporary alimony. *Westerfield v. Westerfield*, 36 N. J. Eq. (9 Stew.) 195, 197.

**ALIQUT.** See page 312, post.

#### ALIVE.

See "Born Alive."

The term "alive," when used in an indictment charging the defendant with the

larceny of animals, "the same being alive," may be rejected as surplusage, inasmuch as it is to be presumed animals are alive unless they are stated to be dead. *Kollenberger v. People*, 11 Pac. 101, 102, 9 Colo. 233.

The word "alive," as used in a will providing that, if any of the testator's children should die without issue "alive," the share of such child should be divided among the surviving children, refers to the devisee's death as the antecedent, and describes the state or condition of the issue at that precise time, and the natural and grammatical meaning is "if he die without issue alive when he dies." It cannot mean if he die without issue a century hence alive, and "dying without issue alive" means the same as "dying without issue," and both import an indefinite failure of issue. *Van Middlesworth v. Schenck*, 8 N. J. Law (3 Halst.) 29, 41.

## ALIZARIN.

Alizarin is a natural dyestuff, found in the root of the madder plant, and has long been known as such in the art of coloring. It is formed and held in the fiber of the root, and reached by distintegrating the substances which it is among, separating it from them, and securing it, by long and well-known process. It is essentially an extract from among other natural products, and not in any sense an artificial compound. Its structure was carefully studied by chemists, and its formation ascertained to be composed of 14 atoms of carbon, 8 of hydrogen, and 4 of oxygen, represented by the formula  $C_{14}H_8O_4$ . *Badische Anilin & Soda Fabrik v. Cochrane* (U. S.) 2 Fed. Cas. 339, 340.

Alizarin is a peculiar red coloring matter ( $C_{14}H_8O_4$ ), formerly obtained from madder and incidentally used as a dyestuff, but now artificially prepared from anthracene ( $C_{14}H_{10}$ ), a product of the distillation of coal tar. *Farbenfabriken of Elberfeld & Co. v. United States* (U. S.) 102 Fed. 603, 42 O. C. A. 525.

A lake pigment, composed of 42.20 per cent. of alizarin, and 56.80 aluminum oxide, which is classed by the government chemists as alizarin color, comes within Tariff Act 1894, providing for the free entry of alizarin colors. *Keppelmann v. United States* (U. S.) 116 Fed. 777.

## ALKALOID SALT.

"Alkaloid salt," as used in Tariff Act Oct. 1, 1890, par. 76, includes hydrochlorate or murlate of cocaine, which consists of hydrochloric acid in combination with cocaine, which is, chemically speaking, an alkaloid. This chemical compound is also a medicinal preparation, which is prepared for use by treating crude cocaine with hydrochloric acid to form the salt, and by washing it with

alcohol to remove certain impurities found in crude cocaine. In re *Mallinckrodt Chemical Works* (U. S.) 66 Fed. 748.

## ALIKUOT.

The word "aliquot" is generally used in judicial opinions to signify a particular fraction of the whole. *Skehill v. Abbott*, 68 N. E. 37, 184 Mass. 145.

## ALL

"All" means "every one, or the whole number of particulars; the whole number." *State v. Maine Cent. R. Co.*, 66 Me. 488, 510.

A more comprehensive word cannot be found in the English language, and, when used in the condition of a policy of insurance providing that "all" fraud shall be a cause of forfeiture of any claim under the policy, it has the comprehensive meaning to be gathered from the literal terms in which it is expressed. *Moore v. Virginia Fire & Marine Ins. Co. (Va.)* 28 Grat. 508, 516, 26 Am. Rep. 873.

"All," within a statute requiring the inspectors of wheat to determine the weight of "all wheat" that shall be inspected by them, does not require that every bushel shall be weighed, and the weighing 1 bushel in every 60, according to long-established usage, is the weighing of all wheat within the meaning of the act. *Frazier v. Warfield*, 13 Md. 279, 290, 291.

"All," as used in a statute imposing taxes, refers to such things as are within the jurisdiction of the taxing power. Thus a statute taxing "all" horses would not be held to tax those in another state. *Commonwealth v. Standard Oil Co.*, 101 Pa. 119, 146.

### As all other.

The last section of St. 1834, authorizing a license for sale of liquor, and declaring that the act shall take effect from the first Monday of September following its enactment, and that "all acts and parts of acts" relating to the subject-matter were repealed from and after the time aforesaid, must be construed as intending "all other acts," since it would be absurd to hold the act repealed at the very moment when it was in express terms to take effect, and that the omission of the word "other" was therefore immaterial. *State v. Stinson*, 17 Me. (5 Shep.) 154, 158.

A marine insurance policy providing that the insurance was to be "against all risks" must be construed as creating a special insurance and extending to other risks than are usually contemplated, and covers all losses except such as arise from the fraud of the insured. *Golz v. Knox*, 1 Johns. Cas. 337, 340.

A policy of fire insurance, providing that in case of loss the insured shall furnish a statement of all other insurance and copies of "all policies" on the property, means copies of all other policies on the property exclusive of the policy in question, and therefore does not require the insured to furnish a copy of that policy. *Miller v. Hartford Fire Ins. Co.*, 29 N. W. 411, 412, 70 Iowa, 704.

#### As any or each.

"All," as used in a will devising certain property share and share alike to certain persons, but providing that on the decease of "all" of said persons the property should go to their heirs, is to be construed as meaning "each or every one of." *Sherburne v. Sischo*, 9 N. E. 797, 798, 143 Mass. 439.

"All," as used in a devise to a mother and two daughters of an income during her life, and to each of the daughters a certain income so long as both they and their said mother shall "all" live, is not to be construed to mean "each," but is only satisfied by the death of the three. *Towle v. Delano*, 10 N. E. 769, 773, 144 Mass. 96.

In Rev. St. § 829 [U. S. Comp. St. 1901, p. 636], providing that "in all cases" where mileage is allowed the marshal may elect to receive the same or his actual traveling expenses, "in all cases" is not equivalent to "upon any process, warrant, attachment or writ," so that the marshal, having several writs in his hand at the same time, served on different persons at the same place, cannot at his election charge actual expenses on one and full mileage on the other. *Saunders v. United States* (U. S.) 73 Fed. 782, 790.

In a fee bill giving to a constable traveling expenses "in all cases," for each mile circular, six cents, the words "in all cases" are used in the sense of each case. *McGee v. Dillon*, 108 Pa. 433, 435.

#### As both.

In a return of an execution certifying that the creditor having appointed an appraiser and the debtor refusing to appoint one, the sheriff appointed two certain appraisers, "all indifferent freeholders," "all" signifies that the three appraisers were indifferent freeholders, and could not be limited to the two named, as such construction would virtually require the substitution of the word "both," which describes only two persons, for the word "all," which naturally includes more than two. *Donahue v. Coleman*, 49 Conn. 464, 465.

"All," is a term of number, and as used in St. 1893, p. 499, § 204, providing that certain supervisors shall receive a certain per diem and mileage, and that "all" of which compensation shall not exceed a certain sum,

includes both the items making up the basis of the compensation. *Chapin v. Wilcox*, 46 Pac. 457, 458, 114 Cal. 498.

#### As description of locality.

The use of the word "all" in a devise of "all" of a certain tract of real estate is, by the authority of *Ballis v. Gale*, 2 Ves. Jr. 48, and *Right v. Sidebotham* (Eng.) Doug. 759, to be taken as descriptive of locality, and not of interest. *Jackson v. Harris*, 8 Johns. 141, 146.

#### As ejusdem generis.

The use of the word "all," in a will giving testator lands and the money arising from the sale of his stock and "all" of his loose property to his nephew, indicates that the word "property" in the latter clause is not to be limited to the kind or character of property described in the preceding clause, and therefore the ejusdem generis rule of construction does not apply. *Fry v. Shipley*, 29 S. W. 6, 8, 94 Tenn. 252.

In a deed of trust conveying "all personal effects" of every name, nature, and description, according to the general rule "all personal effects" embraces only things of the same kind as those which had been mentioned before, which might not have been supposed to pass under the words there used. *Bellamy v. Bellamy's Adm'r*, 6 Fla. 62, 107.

"All my personal goods and chattels," as used in a will in which testator bequeathed all his household furniture and all his personal goods and chattels on certain premises, should be construed as meaning only chattels ejusdem generis with the household furniture specifically enumerated, so as to mean only other articles of the same kind belonging to the house, and not as including, in its broad sense, all property other than realty. *Peaslee v. Fletcher's Estate*, 14 Atl. 1, 5, 60 Vt. 188, 6 Am. St. Rep. 108.

#### As word of emphasis.

Under a statute providing that malice is to be implied when no considerable provocation appears, or when "all" the circumstances of the killing show an abandoned and malignant heart, the word "all" is a word of emphasis only, and it is not essential to the completeness of a charge based thereon. *People v. McDonald*, 2 Idaho (Hasb.) 10, 14, 1 Pac. 345.

In a case involving a devise of a slave and "all her increase," the court, after saying that it had become the established doctrine of the state, in view of a certain decision, that a devise of increase be construed to include after-born children only, said that "it is supposed that the term 'all her increase' may make a difference. But supposing 'increase' to have the established meaning of after-born children, 'all' is merely an expletive, and includes all her after-born

children." *Donald v. Dendy*, 2 McM. 123, 130.

#### **As every.**

In a deed reciting that it was made expressly subject to a mortgage of a certain sum, together with interest and taxes from a certain date, "all" of which are assumed by the party of the second part, "all" means every one of which, and must include every one of the incumbrances previously set out, being the mortgage, interest, and taxes, and cannot be restricted to the last two incumbrances. *Field v. Thistle*, 43 Atl. 1072, 1073, 58 N. J. Eq. 339.

The word "all" is sometimes construed to mean "every," and will be so understood in an ordinance providing that "all" ordinances shall be read three times before being passed, etc. *Swindell v. State*, 42 N. E. 528, 534, 143 Ind. 153, 35 L. R. A. 50.

In Cincinnati Municipal Code, § 98, providing that "all" by-laws and resolutions of a permanent nature shall be read on three different days, etc., "all" should be construed as meaning "every." *Campbell v. City of Cincinnati*, 31 N. E. 606, 608, 49 Ohio St. 463.

"All," as used in Mun. Code, p. 166, c. 660, § 98, providing that "all" by-laws, resolutions, and ordinances of a general or permanent nature shall be fully and distinctly read on three different days, unless the rule is dispensed with, means "every," making the law read, "Every by-law, resolution, or ordinance must be read on three different days, unless the rule is dispensed with." The rule must therefore be dispensed with as to each particular ordinance. *Bloom v. City of Xenia*, 32 Ohio St. 461, 462.

In Rev. St. § 2513, giving "all" judgment creditors of a debtor who have obtained judgment for the execution sale of the land of the debtor, except where the judgment is obtained by fraud, the right to redeem from such execution sale, "all" is to be construed in its popular meaning as meaning every judgment creditor, except those expressly excepted. *Posey v. Pressley*, 60 Ala. 243, 246.

#### **As the whole.**

"All appropriations, general and special," should be construed to be of no more comprehensive meaning than the phrase "all appropriations," as the word "all" necessarily includes the whole. *State v. Babcock*, 33 N. W. 709, 711, 22 Neb. 33.

Where a will directed a sale of land for the purpose of paying "all" testator's debts, this provision indicated an intention on the testator's part that no part of the personal property should be used to pay debts, provided the proceeds of the real estate were sufficient for that purpose, and as the word

"all" was thus used it meant the whole, and not the remainder after application of the personal property. *Sweeney v. Warren*, 23 N. E. 413, 127 N. Y. 426, 24 Am. St. Rep. 468.

*Nix*, Dig. p. 218 (Rev. Laws, p. 209, § 8), declares that a landlord may "seize all or any wheat, rye, etc., or any produce whatever growing or being on the premises," as distress for rent. It was contended that the expression "all grain" in the connection in which it was used meant the grain of the tenant only, and did not include the crops on the property grown by others; but the court declined so to limit the statute, and declared that the term "all grain" was used in its popular sense, and extended the power of distress to all grain grown on the premises, by whomsoever it might be owned. *Guest v. Opdyke*, 31 N. J. Law (2 Vroom) 552, 555.

#### **All accounts.**

A submission to arbitrators of "all accounts, disputes, controversies, and reckonings," of whatsoever nature, now existing between the parties, should be construed to include the accounts of a partnership composed of the parties to the submission and a partner deceased. *Wooden v. Little* (S. C.) 3 McCord, 487, 489.

#### **All actions or causes of action.**

"All actions," as used in an agreement of attorneys under which a rule of court was made providing for the confession of judgment at certain periods, unless the clients would swear that they had a just defense, does not extend to torts, nor to matters in which plaintiff has no certain demand, or to executors or administrators, or to infants. *Read v. Bush* (Pa.) 5 Bin. 455, 457.

Prac. Act, § 124 (Revision, p. 868) providing that in all actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense, governs actions for slander of title. "Remedies of this kind are plainly within the language of the act, for it applies in terms to all actions of slander, and these are of that sort; nor is there any substantial difference between an action for a slander of a title to property and an action for slander of a person, for in the latter instance the words are actionable only on the ground of the special damage which has resulted. But whether or not such close similarity exists, the statute must be taken to apply in this and in similar cases, because they are not only within the words of the act, but they are also within the mischief to be remedied, for the same technicality in pleading prevailed according to the old mode in suits for defamation of title as in suits for defamation of character, there being the

same difficulty in making the inuendoes congruous with the colloquium." *Andrew v. Deshler*, 43 N. J. Law (14 Vroom) 16, 19.

A release given to the acceptor of a bill of exchange, on a compromise with creditors, reciting that it released all "actions and causes of action," will not include a cause of action for money afterwards paid as indorser, when the bill had been negotiated before due, and at the date of the release was held bona fide by a third party. *Crawford v. Swearingen*, 15 Ohio, 264, 280.

#### All advances.

Where a bond is conditioned to pay "all the advances" which may be made under an agreement at the times, in the manner, and with the interest stipulated in such agreement, such bond is a continuing security for all advances finally unpaid to the amount of the penalty of the bond. *Shores v. Doherty*, 26 N. W. 577, 578, 65 Wis. 153.

#### All banks.

"All banks," as used in Const. art. 12, § 3, providing that all property, effects, or dues of every description of "all banks" shall be taxed, means only those banks which exercise the functions of issuing paper money, and does not include private bankers and exchange brokers who conduct their business without any special statutory authority, and includes only those banks, created by authority of law, which, in addition to the ordinary business of banking, have the power to issue their paper to circulate as money. *Exchange Bank v. Hines*, 3 Ohio St. 1, 31.

#### All bills or notes.

"All bills or notes," as used in the charter of a bank authorizing it to deal with "bills and notes," is very comprehensive, and includes bills of exchange. *Battertons v. Porter*, 12 Ky. (2 Litt.) 388, 389.

"All notes," as used in 3 & 4 Anne, c. 9, declaring that "all notes" whereby any person promises to pay to any other person any sum of money shall be construed to be payable to any person to whom the same is made payable, and that every such note shall be assignable and indorsable as inland bills of exchange, etc., includes a note made in Scotland, the words "all notes" being given a liberal construction, and including foreign as well as inland notes, which are well within the spirit of the act. *Milne v. Graham*, 1 Barn. & C. 192.

#### All borrowed money.

"All borrowed money," as used in a deed of composition of creditors providing that the proceeds arising from the sale of the debtor's property should be used in paying "all borrowed money," etc., includes all sums of money loaned to the debtors, with-

out regard to the mode or the existence of any security or evidence of indebtedness, and the comprehensive monosyllable "all" was sufficient to embrace money borrowed and security by mortgage, or a bond, bill, or note which was not secured. *Murray v. Spencer*, 24 Md. 520, 524.

#### All bridge structures.

"All bridge structures," as used in Laws 1873, p. 37, providing that all bridge structures across any navigable stream forming the boundary between the state of Illinois and any other state shall be assessed by the township where the same is located, does not include a bridge which was constructed and used solely as a part of a railroad track, but applies only to bridges owned by bridge companies. *Anderson v. Chicago, B. & Q. R. Co.*, 7 N. E. 129, 131, 117 Ill. 28.

#### All buildings.

A statute granting mechanics' liens against "all buildings" will not be held to include public buildings and grounds, unless they are, by the express terms of the statute, included within its operation. *Atascosa County v. Angus*, 18 S. W. 563, 83 Tex. 202, 29 Am. St. Rep. 637; *City of Dallas v. Loonie*, 18 S. W. 726, 727, 83 Tex. 291.

"All the buildings thereon," as used in deeds, have in fact no legal operation in the ascertainment of the particular premises conveyed, but are often inserted without any particular meaning. *Crosby v. Parker*, 4 Mass. 110, 114.

#### All business.

In a letter of attorney to ask, demand, and receive of a certain company all money that might become due to the writer on any account and to transact "all business," and on nonpayment use lawful means, the words "all business" did not authorize the attorneys to indorse a bill which they had received, but meant "all business" connected with the subject-matter. *Rossiter v. Rossiter* (N. Y.) 8 Wend. 494, 498, 24 Am. Dec. 62.

"All manner of business," when included in an authority of an agent by which the principal appointed the agent as his general and special agent to transact "all manner of business," did not necessarily authorize the agent to sell stocks or other property of the principal, and, if the agent sold public stock under such indefinite authority, it was necessary for the purchaser, at least when his title to the stocks is called in question, to show that he bought in good faith and paid a fair consideration. *Hodge v. Combs*, 66 U. S. (1 Black) 192, 194, 17 L. Ed. 157.

#### All cases.

The word "all," as used in Rev. St. art. 996, prescribing that the judgments of Courts



of Civil Appeals shall be conclusive on the law and fact in "all" cases of divorce, and that no writ of error shall be allowed thereto from the Supreme Court, is significant that no exception was intended in cases where rights of property were involved in the determination of a divorce case. *Kellett v. Kellett*, 59 S. W. 809, 810, 94 Tex. 206.

"All," as used in the act of 1811 providing that "in all cases" where a levy is made on property which is claimed by a third person, and sufficient security is offered, it shall be the duty of the sheriff to leave the same in the possession of the claimant, means, in all cases where the claimant is in possession of the property he shall not be deprived of it, but it shall be left with him, and does not literally mean in "all cases," as the word "all" is frequently used to signify, not absolutely all, but all of a particular class only. *Phillips v. State*, 15 Ga. 518, 521.

Under St. 1851, c. 50, giving the justices of the Supreme Judicial Court power and authority to hear and determine in equity "all cases of trust arising under deeds, wills, or in the settlement of estates," the court may hear all cases of trust which arise under the contracts in writing of the deceased; that is, to trusts expressly and directly created, but not to those implied by law, or growing out of the official situation, or incidental to the official character of an executor or administrator. *Given v. Simpson*, 5 Me. (5 Greenl.) 303, 305.

A city charter giving the city court jurisdiction "of all cases" in which the cause of action arose within the city gives it jurisdiction of a demand for \$25 for services rendered within the city, though such demand is also cognizable by a justice. *Loomis v. Bourn*, 28 Atl. 569, 571, 63 Conn. 445.

As used in Act 1873, § 18, providing that in all prosecutions for the sale of intoxicating liquors in violations of law, by indictment or otherwise, it shall not be necessary to state the kind of liquor sold, or describe, the place where sold or the name of the person to whom sold, and in "all cases" the person or persons to whom the liquor shall be sold in violation of this act shall be competent witnesses to prove such fact, or any other tending thereto, "all cases" means criminal actions only, and hence, in an action for damages, sustained by a wife from intoxication of her husband, against the persons selling him the intoxicating liquors, the husband is not a competent witness for his wife in such case, in view of the common-law rule, and the legislative policy of the state, by which husband and wife are not competent witnesses for and against each other. *Jackson v. Reeves*, 53 Ind. 231, 233.

"All cases at law," as used in Const. art. 6, § 6, relating to the jurisdiction of courts, has no application to criminal cases. *State v. Rising*, 10 Nev. 97, 101.

Const. art. 1, § 5, declaring that the right of trial by jury shall extend to "all cases at law without regard to the amount in controversy," should be construed to mean civil actions, and to exclude criminal proceedings. *Bennett v. State*, 14 N. W. 912, 914, 57 Wis. 69, 46 Am. Rep. 28.

Code, § 348, as amended in 1857, providing for an appeal to the General Term from a judgment entered on the direction of a single judge in "all cases," means cases tried and decided after hearing the parties and an examination of the issues, and does not apply to a judgment to which the party against whom it is rendered has impliedly assented by his default. *Flake v. Van Wagenen*, 54 N. Y. 25, 28.

Cr. Code, § 158, declaring that, in "all cases" where the punishment shall be by confinement in the penitentiary, the jury shall in their verdict say what term the offender shall be confined, applies only to cases which are tried by a jury, since any other construction would lead to the consequence that on confession of guilt no punishment could be awarded. *Blevings v. People*, 2 Ill. (1 Scam.) 172, 173.

The words "in all cases," as occurring in the constitutional provision that the right to jury trial shall remain invalid "in all cases in which it has been heretofore used," is not confined to the kinds of action or the amounts claimed to be due thereon, but means in all the conditions and circumstances in which it had been heretofore used, including the tribunals and machinery of litigation in which it had been so used. Moreover, the word "jury" in such provision refers as well to the justice's jury of six as to the common-law jury of twelve; and it necessarily follows that the whole provision has reference to justices' juries as much as to common-law juries, and that the statute taking actions of replevin from courts of record, where juries are composed of 12 men, to justices' courts, where there are but 6, is constitutional. *Mullen, P. J.*, dissented, however, both on the meaning of the word "jury" and of the phrase "all cases," referring the word "jury" to the common-law jury, and the phrase "all cases" to actions and proceedings, and hence reached an opposite conclusion as to the constitutionality of the statute. *Knight v. Campbell* (N. Y.) 62 Barb. 16, 25, 26.

#### All children.

A devise to testator's wife and "all" her children who should thereafter be born, etc., will be construed to include only such children as the testator should be the father of, and hence not to include the children of the wife by a second marriage after the testator's death. *McCoy v. Fahrney*, 55 N. E. 61, 63, 182 Ill. 60.

"All children," as used in Comp. Laws 1879, pp. 846, 847, § 2, requiring cities governed by the act to establish a system of free common schools, "free to all children" residing in such city between certain ages, means free to all children without discrimination as to color. *Board of Education of City of Ottawa v. Tinnon*, 26 Kan. 1, 20.

#### All claimants.

In Laws 1883, c. 272, § 14, requiring the claims of persons claiming mechanics' liens to state the names and residence of all the claimants, the phrase "all the claimants" means such claimants only as are interested in the particular claim, and does not mean all persons who have claims against the same property. *Morgan v. Taylor*, 5 N. Y. Supp. 920, 921, 15 Daly, 304.

#### All claims and demands.

"All claims," as used in Code 1876, § 2597, providing that all claims against the estate of a deceased person must be presented within 18 months after the same have accrued, or within 18 months after the grant of letters testamentary or of administration, is to be construed in its ordinary meaning, and cannot be construed to "mean all claims except those of a class not specified." *Ynles- tra v. Tarleton*, 67 Ala. 126, 129.

In a release of "all claims and demands whatsoever," the words are to be restricted to the subject-matter of the release. Thus, where a release acknowledged that the party executing it had received from another a conveyance of certain land valued at \$2,000 in full satisfaction and discharge of "all claims and demands whatsoever," the release was to be restricted to the claims and demands for such land, or to some certain demand of \$2,000 which the conveyance was intended to satisfy. *McIntyre v. Williamson*, 1 Edw. Ch. 34, 39.

A receipt given in full satisfaction of a certain judgment therein specified, and also of "all claims and demands," will not include another suit then pending between the same parties. Language, however general in its form, when used in connection with a particular subject-matter is to be presumed to be used in subordination to that matter, and construed and limited accordingly. *Grunley v. Webb*, 44 Mo. 444, 456, 100 Am. Dec. 304.

The acceptance of an offer to compromise "all claims" in personal action for penalties did not constitute a variation, as all claims must be construed to mean "all known claims." *United States v. Richardson* (U. S.) 9 Fed. 804, 807.

The submission to arbitrators of "all demands" between the parties to the submission includes questions concerning real as well as personal property. Questions concerning real property may be submitted without being specially named, as the law does

not require a specific submission as to the one kind of property more than as to the other. *Munro v. Alaire* (N. Y.) 2 Caines, 820, 827; *Sellick v. Addams* (N. Y.) 15 Johns. 197, 199.

Where defendant bought plaintiff's interest in certain real estate, and in consideration thereof acknowledged payment in full of "all" notes, accounts, and "demands" of every kind and nature which defendant held against plaintiff, "all demands" cannot be construed as limited to some particular demands, but is very comprehensive, and would include a judgment which is a demand and contract of record. *Henry v. Henry*, 11 Ind. 236, 237, 71 Am. Dec. 354.

Gen. St. c. 123, § 1, classifying claims against the estate of a decedent, makes the fourth class include all judgments against the deceased in his lifetime, the fifth class to embrace "all demands," without regard to quality, exhibited within one year, while the sixth class includes all demands thus exhibited after the end of one year. Held, that the phrase "all demands" as used in the fifth class should be construed to mean all demands except judgments, while the same term as used in the sixth class meant all demands, including judgments. *State Bank v. Tutt*, 44 Mo. 366, 367.

Where a bond was conditioned to pay "all demands," and the bond is submitted to referees to determine the amount due, the expression "all demands" embraces not only bills payable at the time of the submission, but those outstanding. *Cheshire Bank v. Robinson*, 2 N. H. 126, 129.

Act April 2, 1806, provides that, when any building shall be torn down by order of the mayor or aldermen in order to prevent a fire in such building spreading to adjoining buildings, all damages accruing to any person interested in such building shall be assessed by a jury, and that, after such assessment has been confirmed, the sum assessed shall be paid in satisfaction of "all demands" of such persons by reason of the tearing down of such building. Held, that "all demands" extends to every claim for damages on the part of those interested in the building, provided such damages were the direct and consequential damages, and includes damages to merchandise in the building. *City of New York v. Lord*, 17 Wend. 285, 294, 18 Wend. 126.

"All demands," as used in a bond conditioned to perform the award of J. of all actions, cause and causes of action, suits, debts, trespasses, damages, and "demands" whatever, and as used in the award by which the plaintiff should pay to the defendant a certain sum in full satisfaction of "all demands," is not to be construed personally, because coupled with debts, trespasses, etc., but, the submission being in general terms.

would carry with it the right to award the possession of a house. *Marks v. Marriot*, 1 *Ld. Raym.* 114.

#### All contracts.

The expression "all contracts," in the provisions of a city charter defining the powers and duties of a city comptroller, and providing that he shall sign all contracts made with the city if the necessary funds shall have been provided to pay the liability that may be incurred against the city under such contract, will be taken in its comprehensive sense to refer to all contracts previously mentioned, namely, such contracts as entail a pecuniary responsibility upon the city, and not limited to contracts by the board of public works. *City of Superior v. Norton* (U. S.) 63 *Fed.* 357, 362, 12 *C. C. A.* 469.

The Michigan franchise tax act of 1891 (Comp. Laws Mich. 1897, § 8574), which requires every foreign corporation which shall hereafter be permitted to transact business in the state to pay a franchise fee, and provides that all contracts made in the state by any corporation which has not first complied with the provision of this act shall be void, is not to be construed literally, for this would include contracts in respect of purely interstate commerce, and make the act repugnant to the interstate commerce clause of the federal Constitution. As construed by the Supreme Court of the state, such statute has no application to a foreign corporation whose business relates entirely to interstate commerce, but imposes a tax upon the franchise or privilege of carrying on business within the state. *Oakland Sugar Mill Co. v. Fred W. Wolf Co.* (U. S.) 118 *Fed.* 239, 243, 55 *C. C. A.* 93.

#### All convenient speed.

See "Convenient Speed."

#### All costs and damages.

"All costs and all damages," as used in Code Civ. Proc. § 559, providing that an undertaking to procure an arrest must, in case it is finally decided that plaintiff is not entitled to the order of arrest, indemnify the defendant for "all costs and damages," not exceeding \$250, must be taken in conjunction, and hence, where costs have been paid to the extent of \$250, the sureties in the undertaking are not further liable for damages. *Sutorius v. Dunstan*, 13 *N. Y. Supp.* 601, 602, 59 *N. Y. Super. Ct.* 166.

Under Comp. St. 1895, c. 50, § 15, providing that persons licensed to sell intoxicating liquors shall pay "all damages" that the community or individuals may sustain in consequence of such traffic, the words "all damages" include loss of means of support to a married woman by reason of death of husband through intemperance, and also the disability or disqualification of a husband,

either total or partial, physical or mental, as partial or total insanity caused by intoxication and incapacitating for labor. *Gran v. Houston*, 64 *N. W.* 245, 247, 45 *Neb.* 813.

Within the meaning of 2 Burns' Rev. St. Ind. 1894, § 5073, "providing that the officers of the corporation shall be liable for failure to make reports or false reports as required by statute," the words "all damages" include unliquidated damages for the breach of a contract, as well as liquidated. *MacVeagh v. Wild* (U. S.) 95 *Fed.* 84, 86.

"All damages and costs," within the meaning of the judiciary act of 1789, requiring the plaintiff in error to give security to prosecute the writ of error to effect, and answer for damages and costs if he fails to make his plea good, when applied to an ordinary foreclosure suit in the courts of the United States does not operate as security for the amount of the original decree, nor for interest accruing thereon pending the plea, nor for the balance due after applying the proceeds of the mortgaged premises, nor for the rents and profits, or use or detention, of the property pending the appeal, but only for the costs of the appeal and the deterioration or waste of the property, and, perhaps, burden accruing on it by nonpayment of taxes and loss by fire if not properly insured. It is very doubtful whether a mere depreciation in the market value is any cause of recovery on the bond. According to the English law, the terms "all damages and costs" would only cover all damages for delay, security for the original judgment being expressly provided for by separate words. *Omaha Hotel Co. v. Kountze*, 2 *Sup. Ct.* 911, 917, 107 *U. S.* 378, 27 *L. Ed.* 609.

#### All courts.

The bankruptcy act of 1841, providing that a discharge shall in "all courts" be deemed a complete discharge of his debts, unless impeached for fraud, authorizes the impeachment in any court, state or federal, in which, independent of the bankrupt act, a suit might properly be brought against the bankrupt. *Tichenor v. Allen* (Va.) 13 *Grat.* 15, 34.

Sess. Acts 1851, p. 479, incorporating the St. Louis & Iron Mountain Railroad Company, and declaring that it "may sue and be sued, plead and be impleaded, defend and be defended, in all courts or places whatsoever," is to be construed in a qualified sense. Hence the right to sue and the liability to be sued are to be exercised and controlled by the provisions of the general law. It does not mean that the railway company can be sued before a probate or county court, or before a justice of the peace, without reference to the nature of the action or the amount in controversy, or that a suit could be brought in a county, remote from the line of the road, where neither the plaintiff nor

any of the officers of the company reside. *Fatchell v. St. Louis & I. M. R. Co.*, 28 Mo. 178, 179.

#### All crops.

A receiver, appointed in a proceeding to foreclose a mortgage on certain land, harvested and sold the crops thereon, paying the proceeds to the mortgagee. Plaintiff, who claimed the crops under a chattel mortgage describing the property as "all and the entire crop of flax and wheat and other grain or produce raised on this land," brought an action against the receiver for the conversion of the crops. Held, that the description of the property was too indefinite and uncertain to have put the receiver on inquiry, and that plaintiff could not recover. *Eggert v. White*, 13 N. W. 426, 59 Iowa, 464.

#### All crossings.

2 Rev. St. (5th Ed.) pp. 689, 690, §§ 55, 56, declaring that cattle guards shall be maintained at "all crossings," is to be literally construed, and hence it is necessary that road crossings adjacent to the station buildings of a railroad should be provided with such guards, notwithstanding that it is inconvenient to build them at such a place. *Bradley v. Buffalo, N. Y. & E. R. Co.*, 84 N. Y. 427, 430.

#### All debts and liabilities.

A will wherein testator directed that the income of his estate previously directed to be paid to his children should not be subject to execution, attachment, or sequestration for "all debts or liabilities" whatsoever, meant all legal, equitable, and moral liabilities, and hence such income could not be subject to the payment of alimony awarded to the divorced wife of one of the children. *Thackara v. Mintzer*, 100 Pa. 151, 155.

Under the words in a deed of "all debts due the grantor," the indebtedness of a partner of the grantor to the partnership will pass, and also a claim which the grantor has on a foreign government for damages for the detention of his ship. *Griffin's Ex'r v. Macaulay's Adm'r (Va.)* 7 Grat. 476, 477.

An assignment for the benefit of creditors, to pay "all debts and liabilities" of the assignor, held to include damages for breach of a contract of sale made before the assignment, though the breach occurred afterward. *In re Ives*, 11 N. Y. Supp. 650, 653.

"All debts," as used in the bankruptcy act of 1841, § 4, providing that, when the bankrupt has conformed to all the requisitions of the act, he shall be entitled to a full and complete discharge of "all his debts," is to be construed to only mean debts contracted after the passage of the act. *Kunzler v. Kobaus (N. Y.)* 5 Hill, 317, 320.

"All debts," as used in Bankr. Act 1867, which declares that the certificate of discharge shall release the bankrupt from "all debts" which were or might have been proved against his estate in bankruptcy, does not embrace a debt due to the United States. *United States v. Herron*, 87 U. S. (20 Wall.) 251, 280, 22 L. Ed. 275.

Where a note is delivered to a bank as collateral security for loans, and the contract of hypothecation recites that the note is deposited as security for "all liability," the phrase "all liability" imports a continuing guaranty, and not a security for a single sum, or exhausted when the loans equal the amount of the note. *Agawam Bank v. Strevver*, 18 N. Y. 502, 513.

The words "all the debts of such bank," as used in Gen. St. 1878, c. 83, § 21, declaring that the stockholders of banks shall be individually liable, in an amount equal to double the amount of the stock owned by them, "for all the debts of such bank," and such liability shall continue for one year after any transfer or sale of stock by any stockholder or stockholders, are general and unqualified in their meaning, and include all debts, without regard to when they were incurred, whether prior or subsequent to a stockholder's becoming such. *Olson v. State Bank*, 59 N. W. 635, 637, 57 Minn. 552.

In acts of assembly, as well as in common parlance, the word "all" is a general rather than a universal term, and it is used in one sense or the other according to the demands of sound reason, and in a statute authorizing the attachment of debts in execution, and declaring that "all" debts so attached shall remain in the hands of the garnishees, it includes debts due by bill of exchange and promissory notes. *Stone v. Elliott*, 11 Ohio St. 252, 258; *Kieffer v. Ehler*, 18 Pa. (6 Harris) 388, 390.

Judgments and promissory notes not due are not included within the term "all debts due defendant," as used in Civ. Prac. Act, § 147, relating to matters subject to attachment. *Perkins v. Guy*, 2 Mont. 15, 22.

#### All directors or trustees.

Gen. St. § 252, provides that "all the directors or trustees" of a corporation shall be jointly and severally liable for all the debts of the company that shall be contracted during the year next preceding the time when a certain statutory report required should have been made and filed, and until such report shall be made. Held, that the words "all the directors or trustees," etc., are not to be construed literally, since such a construction would work manifest injustice, as it might frequently happen that the terms of office of the directors in charge of the corporation might expire after the indebtedness had been created and after the default, and

hence the term should be construed to limit the liability to the trustees chargeable with neglect of duty, which construction leads to a reasonable result, and one which does not create a liability on persons in no way to blame for the default. *Austin v. Berlin*, 22 Pac. 433, 434, 13 Colo. 198.

#### **All disputes.**

Where a contract provided, "To prevent all disputes, it is hereby mutually agreed that the said engineer shall in all cases determine the amount or quantity of the several kinds of work which are to be paid for under the contract, and the amount of compensation at the rates herein provided for," etc., the words "all disputes" were clearly controlled and limited to the distinctly enumerated grounds of anticipated dispute in the same sentence, which are so defined that these general words have no force or meaning unless they relate to anticipated disputes arising out of the work to be done and compensation to be paid. The parties anticipated disputes from no other source, or, if they did, they chose to rely for a settlement of them upon the established tribunals of the country. He was to determine in regard to work done, and has nothing to do with the dispute between the parties arising from a claim for damages for not being permitted to do work. *Lauman v. Young*, 31 Pa. (7 Casey) 306, 309.

#### **All duties and obligations.**

St. 1874, c. 55, authorizing a corporation to purchase the property of another corporation subject to "all the duties, obligations, and restrictions" to which such other corporation may be subject, cannot be construed to mean only those obligations which the corporation owed the public under the charter and the law of the commonwealth, but will include an existing liability on a tort. *New Bedford R. Co. v. Old Colony Ry. Co.*, 120 Mass. 397, 400.

#### **All estates.**

Under a statute imposing an inheritance tax "on all estates, personal and mixed," by the term "all estates," the Legislature meant that which a person shall die seised or possessed of, and shall leave, either by will or through intestacy, to be administered according to the laws of the commonwealth; in other words, his property, real or personal. *Dixon v. Ricketts*, 72 Pac. 947, 950, 26 Utah, 615 (citing *In re Howell's Estate*, 147 Pa. 164, 23 Atl. 403).

#### **All faults.**

See "With All Faults."

#### **All fishing.**

Pen. Code, § 265, prohibiting "all" fishing, horse racing, gambling, "or other public sports" on Sunday, will not be construed to be limited to only such fishing as might con-

stitute a disturbance of the peace. *People v. Moses*, 20 N. Y. Supp. 9, 10, 65 Hun, 161.

#### **All goods, wares, or merchandise.**

Act June 30, 1864, as amended by Act July 13, 1866, § 48, providing that "all goods, wares, merchandise, articles or objects" on which taxes are imposed by the provisions of law, which shall be found in the possession or custody or within the control of any person or persons in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized, etc., and shall be forfeited to the United States, should be construed to include distilled spirits, though they are provided for in a different part of the act by a distinct series of sections, the terms used being of a most general nature, so used as not to admit of any possible escape or evasion, and which necessarily include most of the cases before specifically provided for. *The Distilled Spirits*, 78 U. S. (11 Wall.) 356, 364, 20 L. Ed. 167.

#### **All I am or die possessed of.**

A will devising "all I shall die possessed of" is sufficient to convey the fee in testator's real estate, if there is nothing in other parts of the will to limit or control the operation of the words. *Hitch v. Patten* (Del.) 16 Atl. 558, 572, 8 Houst. 334, 2 L. R. A. 724; *White v. White*, 52 Conn. 518, 521.

In speaking of the common-law rule that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate, it was said by Chancellor Kent in 4 Comm. (13th Ed.) 535, that it did not require the word "heirs" to convey a fee, but that other words denoting an intention to pass the whole interest of the testator, as a devise "of all my estate," "all my interest," "all my property," "my whole remainder," "all I am worth," "all my rights," "all my title," "or all I shall be possessed of," and many other expressions of like import, will carry an estate of inheritance, if there is nothing in the other parts of the will to limit or control the operation of the words. *Mulvane v. Rude*, 45 N. E. 659, 660, 146 Ind. 476.

The words "all I am possessed of," as used in a will devising all testator's estate in personal property, etc., in legal construction relate to and speak from the date of the testator's death, and not from the date of the execution of the will, unless otherwise explained. *Wilde v. Holtzmeyer*, 5 Ves. 811.

A will giving and bequeathing "all that I possess indoors and out of doors" is to be construed as including all of testator's property, both real and personal. *Tolar v. Tolar*, 10 N. C. 74, 75.

#### **All I am worth or own.**

A devise of "all I am worth," without other words to control them, passes real as

well as personal estate. *Hurtep v. Brooman*, 1 Brown, Ch. 437; *Barnes v. Patch*, 8 Ves. 604, 607.

"All I am worth or own," as used in a will, means that an estate of inheritance is created. *White v. White*, 52 Conn. 518, 521.

The phrase "all I am worth," when used in a will providing for the disposition of "all I am worth," is sufficient to pass the fee in testator's real estate, when such intention is manifest from the entire instrument. *Chamberlain v. Owings*, 30 Md. 447, 455; *Hitch v. Patten* (Del.) 16 Atl. 558, 572, 8 Houst. 334, 2 L. R. A. 724. In speaking of the common-law rule that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate, it was said by Chancellor Kent in 4 Comm. (13th Ed.) 535, that it did not require the word "heirs" to convey a fee, but that other words denoting an intention to pass the whole interest of the testator, as a devise "of all my estate," "all my interest," "all my property," "my whole remainder," or "all I shall be possessed of," and many other expressions of like import, will carry an estate of inheritance, if there is nothing in the other parts of the will to limit or control the operation of the words. *Mulvane v. Rude*, 45 N. E. 659, 660, 146 Ind. 476.

#### All I have.

The phrase "all I have," when used in a will providing for the disposition of "all I have," is sufficient to pass the fee in testator's real estate when such intention is manifest from the entire instrument. *Chamberlain v. Owings*, 30 Md. 447, 455.

#### All I have power over.

Where a testator first gives his property generally by the words "all my property," or "all my estate," or "all that I have power over," each of which is sufficient to pass everything, and then proceeds to enumerate particulars, such enumeration of particulars does not abridge or cut down the effect of the general words. *Williams v. Brice*, 51 Atl. 376, 377, 201 Pa. 595.

#### All I now possess.

"All the property I now possess," as used in a will, meant all that the party "owned," and therefore included estates in remainder, despite the use of the word "now." *Brantly v. Kee*, 58 N. C. 332, 337.

"All the estate I now own and possess," as used in a will, must be understood to speak from the time of the testator's death. The estate he then possessed must be held to have passed according to its terms, and therefore includes property acquired after the making of the will. *Haley v. Gatewood*, 12 S. W. 25, 26, 74 Tex. 281.

#### All indictments.

A statute prohibiting the sale of liquors prohibited (a) the sale of wine, gin, brandy, whisky, cider, spirits, and all other kinds of ardent spirits, etc.; (b) of any composition of which wine or any of the liquors above mentioned shall form a general ingredient; (c) of all mixed liquors by a less quantity than five gallons. Another section of the statute provided that, "in all indictments" found under it, it should be sufficient to describe the liquor sold as ardent spirits, without specifying apart the kind or description thereof. Held, that the word "all" in the latter section must be restricted to indictments found for selling any of the simple unmixed liquors named in the act, and that an indictment on the second clause must be for selling a composition not compounded or intended to be used as medicine, and that indictments under the third clause must be for selling a mixed liquor, commonly called so, whatever its appropriate name may be, and hence it could not be sufficient to denominate such "compound" and "mixed liquors" as ardent spirits. *State v. Townley*, 18 N. J. Law (3 Har.) 311, 321.

#### All inhabitants.

"All the inhabitants," as used in the act incorporating the town of Marlborough, meant all those who were inhabitants of the several towns from which the town of Marlborough was formed who were of full age and sui juris, and did not include those who had settlements in other towns. *Town of Marlborough v. Town of Hebron*, 2 Conn. 20, 22.

#### All insurance companies.

In the provisions of Civ. Code, § 2110, providing that all insurance companies shall pay the full amount of the loss sustained upon the property insured by them, providing, etc., the phrase "all insurance companies" is broad enough to cover a mutual insurance company, no exception being made in favor of such companies. *Word v. Southern Mut. Ins. Co.*, 87 S. E. 897, 898, 112 Ga. 585.

#### All interest.

The words "all interest" in a trust deed purporting to convey all interest in a lot has a broader significance than the language "their right, title, and interest," or "all their right, title, and interest." Giving the words their common and obvious meaning, they include the entire property; and therefore the deed is a cloud on the title of the lot, although the mortgagor only owns the east vigintillionth of a vigintillionth of the east  $\frac{1}{64}$  inch of the lot. *Glos v. Furman*, 45 N. E. 1019, 1021, 164 Ill. 585.

"All the interest," as used in a decree authorizing the sale and conveyance of "all the interest" of the parties in suit to certain land, should not be construed as a limitation of the estate conveyed, so as to give effect to

a prior unrecorded deed as against the purchaser under the decree. *Harpham v. Little*, 59 Ill. 509, 513.

An assignment of "all the interest" of a partner in certain land purchased by such partner on the joint account of himself and others, in which the other partners advanced the sum of \$50,000, and in which such partner was entitled to one-third of the net profits, includes only the interest of such partner in the profits of the enterprise which belonged to him as a partner, and did not embrace a collateral benefit which he derived as agent of the firm, or otherwise than as a partner. *Stewart v. Stebbins*, 30 Miss. 66, 83.

#### **All judgments, decrees, or orders.**

"All judicial decisions," as used in Const. art. 6, § 22, providing that all laws and judicial decisions shall be free for publication by any person, construed "to mean what they naturally import, not all such judicial decisions only as the Legislature should direct to be published, which is what they did not import." *Little v. Gould* (U. S.) 15 Fed. Cas. 604, 606.

By act of 1841 all judgments and decrees of the courts of law or equity operated as liens upon the property of a debtor elsewhere than in the county in which the court was held only upon compliance with certain conditions as to filing and recording. Held, that since the act did not, in terms or by necessary implication, include the rights of the state, and since such rights cannot be construed as embraced in the statute unless such an intention is clearly manifest, judgments in favor of the state would operate as liens upon the land of the defendant wherever situated within the state, though the requirement as to recording had not been complied with. *Fisher, J.*, dissenting. Held, however, that the words "all judgments and decrees" embraced those to which the state is a party. *Josselyn v. Stone*, 28 Miss. (6 Cushm.) 753, 765.

The phrase "all orders made and entered in the action," used in a notice of appeal to describe the orders appealed from, is insufficient in failing to point out the particular orders from which the appeal is taken. *Genella v. Relyea*, 32 Cal. 159.

#### **All labor, services, or work.**

While the words "all labor," as used in a Sunday law, are equivalent to the words "labor, business, or work," yet the making of a contract on Sunday is not prohibited by the statute, the intention being to prohibit such work as disturbs the religious observances in the quiet of the Sabbath. *Holden v. O'Brien*, 90 N. W. 531, 86 Minn. 297.

"All services," as used in St. 1897, p. 133, § 1, providing that the salaries of county commissioners shall be in full for "all services," includes mileage. *State v. Trousdale*, 16 Nev. 357, 358.

Within an act providing that the sheriff of the county shall receive a salary in lieu of all costs and fees in criminal cases, and for "all work within the county," the expression "for all work within the county" would include the serving of venire for petit jurors, the proper and reasonable construction being for all work as sheriff within the county for which the county is liable. *Hunter v. Bamberg County*, 41 S. E. 26, 27, 63 S. C. 149.

#### **All laborers.**

Under Comp. Laws 1879, c. 84, entitled an act to protect laborers, mechanics, and others in the construction of railroads, and providing that the contractor shall pay "all laborers," etc., the only limitation to be placed on the words "all laborers" is the limitation imposed by the work which is to be accomplished, to wit, the construction of the railroad. *Mann v. Corrigan*, 28 Kan. 194, 196.

"All," as used in Act July 23, 1868, giving "all" laborers a lien upon the product of their labor until the same is paid for, is not to be construed literally as giving every laborer a lien for his labor, but has reference solely to labor performed on movable property. *Dano v. Mississippi, O. & R. R. Co.*, 27 Ark. 564, 567.

#### **All lands, messuages, etc.**

"All lands," as used in St. 1821, setting "all lands" in a certain list of taxable property, was not all inclusive, but was to be construed as not including lands exempted by prior acts. *Atwater v. Town of Woodbridge*, 6 Conn. 223, 230, 16 Am. Dec. 46.

"All the lands belonging to grantor," as used in a contract for the sale of lands which were specifically described, could not be construed literally, as intending to convey all the grantor's lands; it also appearing that he had previously conveyed lands similarly situated with those specifically described, and that his intention was to avoid granting two conveyances for the same lands. *Gibbs v. Diekma* (U. S.) 26 L. Ed. 177, 178.

Where a deed conveyed "an undivided one-half of all my land in Texas," describing some of it, and then in a subsequent portion of the deed again used the words "all my lands," the last "all my lands" conveys not all of the grantor's land, but only one-half thereof, since it merely repeats the grantor's original purpose of making his conveyance of an undivided interest extend to his entire landed property in the state, light being thrown on his meaning in using the word "all" by the use which he had made of it in the preceding part of the deed, in which he had conveyed an undivided one-half of all his lands. The second "all" in the deed should be construed in connection with the first one, and no greater interest than that expressed in the first passes under the con-

veyance. *Witt v. Harlan*, 2 S. W. 41, 66 Tex. 660.

Where an award of arbitrators was to the effect that plaintiffs should execute a good authentic deed of conveyance to "all the lands" which the plaintiff held by a deed of conveyance from M., but there was no statement as to how much of said land he held, the phrase "deed of conveyance of all the lands which plaintiffs held by deed of conveyance from M." meant that he should convey all, more or less, which he held by that deed. *Whitcomb v. Preston*, 13 Vt. 53, 66.

The phrase "all the land we own adjoining the pond," in a lease thereof, was held, when taken in connection with the description of the land by bounds, to mean that the land described was owned by the lessors, which could not have been said if they were mere tenants in common of the land with another person. *Smith v. Moodus Water Power Co.*, 33 Conn. 460, 462.

A devise of all the testator's messuages, lands, etc., will include money in trust to be invested in land and settled, though not particularly charged on the estate's devise. *Green v. Stephens*, 17 Ves. 64.

#### All laws or usages.

All laws inconsistent herewith, see "Inconsistent—Inconsistency."

As used in *Hill's Code*, § 2998, providing that "all laws" which impose or recognize civil disabilities upon the wife which are not imposed and recognized as existing to the husband are hereby repealed, "all laws" will be construed to include both the statutory and the common law, and hence the section applies to whatever laws impose or recognize civil disabilities in the one that are not recognized in the other. *Ingalls v. Campbell (Or.)* 24 Pac. 904, 906, 18 Or. 461.

"All laws or usages," as used in a lease in which the lessee waives the benefit of "all laws or usages," exempting any property from distress or execution for rent, includes a landlord's warrant as well as an execution for rent. *Beatty v. Rankin*, 21 Atl. 74, 139 Pa. 358.

#### All matters.

A reference to arbitration, submitting "all matters between the parties," authorizes the arbitrators to adjust and settle all claims of whatsoever name, kind, or nature existing between the parties, and justifies an award declaring that defendant's intestate is indebted to plaintiff in a certain sum, and directing the cancellation of two mortgages from plaintiff, which were put in evidence by defendant, the debts secured being adjusted by the arbitrator. *Bryant v. Fisher*, 85 N. C. 69, 72.

"All matters in dispute," as used in a submission for arbitration, will sustain an award made thereunder. *Shackelford v. Purket*, 9 Ky. (2 A. K. Marsh.) 435, 440, 12 Am. Dec. 422.

Const. art. 4, § 18, vesting jurisdiction in the probate court over "all matters in the allotment of dower," applies only to parties who claim in virtue of the title of the deceased as his widow or heirs, and signifies an apportionment of the interest of one or more parties entitled to a share of the estate, and does not include a controversy between the widow and a stranger, who held the deceased's lands adversely to his representatives. *Jiggitts v. Bennett*, 31 Miss. 610, 613.

#### All means within its power.

"All the means within its power," as used in an instruction to the effect that a railroad company was bound to use all the means within its power to prevent killing stock, was a phrase of unlimited import, and imposed on the railroad excessive precautions and a low rate of speed. *St. Louis, I. M. & S. Ry. Co. v. Vincent*, 36 Ark. 451, 455.

#### All moneys.

Rev. St. 1858, § 42, requires that "all moneys" paid for school or university lands shall be paid in specie only, and that receipts therefor shall be countersigned by the secretary of state, or otherwise shall not be evidence of payment. Held, that the words "all moneys," as used in such section, were general, and, as the statute did not restrict the words by express exception, they must receive a general construction, and in connection with the provisions of section 43 must be construed to require the issuance of a duplicate certificate of sale on all sales of land by the commissioners of the school and university lands, whether such sales be for cash or credit. *Harrington v. Smith*, 28 Wis. 43, 59.

The decree of a court in an accounting provided that each party should be allowed interest on all his proper expenditures, and be charged with interest on "all moneys received"; and the question arose whether "all moneys received" should be taken literally, or whether the party should be entitled to deduct his expenditures from the moneys received, and that the interest should be charged on the remainder; and it was held that the language should be so construed as being intended to be subject to any legal right which either had to first apply such moneys to the extinguishment of interest due himself; and hence "all" will not be held to include the interest on the expenditures, which may be deducted from the moneys received. *Reed v. Jones*, 15 Wis. 40, 48.

The phrase, "all moneys belonging to me and uninvested at the time of my death," in



a will devising such moneys, being thus distinguished by the testator from the rest of his estate, operates to render the devise specific. In *re Fow's Estate*, 12 Pa. Co. Ct. R. 133, 134.

#### **All my blood kind.**

Testator died, leaving as his only heirs two half-brothers and one nephew of the whole blood residing in Louisiana, and certain other nephews and nieces living in Texas, and by his will he gave, devised, and bequeathed all his property "to all my blood kind in Louisiana and Texas." It was held that the blood kind should be construed to mean kin, and as the testator had only one relative of the whole blood located in Louisiana, to whom the word "all," if he had intended to exclude his two brothers of the half blood, would not have appropriately applied, the will must be construed to include such brothers of the half blood. *Lusby v. Cobb*, 32 South. 6, 8, 80 Miss. 715.

#### **All my effects.**

The phrase "all my effects, real and personal," used in a devise, passes a fee. *Fogg v. Clark*, 1 N. H. 163, 167.

#### **All my entire possessions.**

A bill of sale describing the property sold as "all my entire possessions, including the certain household furniture and all paraphernalia thereunto belonging to said house," and then mentioning specific articles, both real and personal property, did not include a stock of liquors, although the phrase, "all my entire possessions," taken without qualification, would, of course, carry the liquor, as it would carry everything else that the testator possessed, even the clothes on his back, his personal ornaments, pictures, if he had any, and the material for the next meal. *McAlpine v. Foley*, 25 N. W. 452, 453. 34 Minn. 251, 252.

#### **All my estate.**

A devise of "all the residue of my estate," etc., means all the estate of the testator wherever situated, unless there is something in the context which shows that a more restricted construction will better comport with the clear intent of the testator. *Hale v. Hale*, 17 N. E. 470, 474, 125 Ill. 399.

In speaking of the common-law rule that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate, it was said by Chancellor Kent in 4 Comm. (13th Ed.) 535, that it did not require the word "heirs" to convey a fee, but that other words denoting an intention to pass the whole interest of the testator, as a devise of "all my estate," "all my interest," "all my property," "my whole remainder," "all I am worth," "all my rights," "all my title," or "all I shall be possessed of," and many other like expressions, will

carry an estate, if there is nothing in the other parts of the will to limit or control the operation of the words. *Mulvane v. Rude*, 45 N. E. 659, 660, 146 Ind. 476.

A devise to a wife of one-half of "all my estate," followed by a specific bequest of \$3,000 for immediate support, where the estate was worth only one-half a million, and the testator had been an active, energetic business man, accustomed to use and handle the property as his own, and the whole tenor of the will in minor details indicated his intent to dispose of the whole, held to pass one-half of the whole estate held as community property of the husband and wife. In *re Stewart's Estate*, 15 Pac. 445, 446, 74 Cal. 98.

The language "my estate" or "all my estate," whenever used in a will devising such property, does not necessarily import an intent in the testator to give more than his own interest; and therefore an intent to exclude the dower is not logically inferable from the fact that the gift is to the wife equally with other persons, but he admits that, if an intention to give an immediate interest in the entire corpus of the land can be perceived, the intended equality would be destroyed by letting in the dower. In *re Duffee*, 14 R. I. 47, 52 (citing *Jarm. Wills*).

"All my estate" in a will in which testator gives to his wife for life the income and profits of all his estate, and then gives a legacy of money to an adopted child, operates to exclude such child from being entitled to interest on the legacy during the life of the wife. In *re Vedder*, 2 Con. Sur. 548-558, 15 N. Y. Supp. 798.

A will creating a general trust of "all my estate," real, personal, and mixed, includes income as well as capital, and is not broader than the term "whole estate" as used in a residuary clause defining the residuary estate as testator's whole estate. The words "all" and "whole" are both descriptive of the word "estate," and are equally broad and comprehensive in their import. *Equitable Guarantee & Trust Co. v. Rogers*, 44 Atl. 789, 792, 7 Del. Ch. 398.

"All my estate," as used in a will in a direction of a sale to pay debts, means both real and personal property. *Hilton v. Hilton* (U. S.) 2 MacArthur, 70, 87.

A will in which the testator devised all his real estate to his wife was sufficient to create a fee, and the words must in all instances convey an estate of inheritance, unless there is something in the other parts of the will to control their operation, and to show that they were to have a more limited effect. *Bacon v. Woodward*, 78 Mass. (12 Gray) 376, 379; *Donovan's Lessee v. Donovan* (Del.) 4 Har. 177, 178; *Hitch v. Paten* (Del.) 16 Atl. 558, 572, 8 Houst. 334. 2 L. R. A. 724; *Van Middlesworth v. Schenck*,

8 N. J. Law (3 Halst.) 29, 39 (citing *Countess of Bridgewater v. Duke of Bolton*, 1 Salk. 236; *Barry v. Edgeworth*, 2 P. Wms. 524; *Cooper v. Marten*, 1 Term. R. 411; *Lambert's Lessee v. Paine*, 7 U. S. [8 Cranch] 134, 2 L. Ed. 377); *Kellogg v. Blair*, 47 Mass. (6 Metc.) 322, 325; *Jackson v. Batcock* (N. Y.) 12 Johns. 389, 393.

The words "all my estate" in a will passes a fee or whatever interest the debtor has in the lands, because the word "estate" comprehends not only the land which a man has, but also the interest he has in it. *Terrel v. Sayre*, 3 N. J. Law (2 Penning.) 598, 602; *White v. White*, 52 Conn. 518, 521.

"All my estate," as used in a will devising all of testator's estate in lands which he held in fee, operate to pass the fee, but "all my lands lying in such place" is not sufficient, such words being considered merely as descriptive of the local situation, and only carry an estate for life. *Hitch v. Patten* (Del.) 16 Atl. 558, 565, 8 Houst. 834, 2 L. R. A. 724.

Where a testator first gives his property generally by the words "all my property," or "all my estate," or "all that I have power over," each of which is sufficient to pass everything, and then proceeds to enumerate particulars, such enumeration of particulars does not abridge or cut down the effect of the general words. *Williams v. Brice*, 51 Atl. 376, 377, 201 Pa. 595.

The words "all my estate," in a will, will pass everything a man has under his will; but if the word is coupled with the word "personal," or a local description, then the gift will pass only personalty. *Andrews v. Brumfield*, 32 Miss. 107, 108.

The devise by a testator of "all" his estate, and "all the rest, remainder, and residue of" his estate, disposes of the contingent interests and remainders which he had in an estate that did not vest in him during his life, as well as all estate in possession. *Cruger v. Heyward* (S. C.) 2 De-saus. 422, 430.

Testator devised "all of his estate and effects whatsoever and wheresoever" to F., in trust to pay funeral expenses and debts, and then subjected his said effects bequeathed to F. to pay the following legacies, enumerating among them a gift to S. "of the house his father now dwells in, at the decease of his said father," and giving to the father an annuity, and to the son a sum of money and other pecuniary legacies, and then, after desiring all the legacies to be paid out of his effects by the said F., gave all the rest and remainder of his effects to F. and his heirs forever. Held, that the words, "all my estate and effects whatsoever and wheresoever," were sufficiently broad to include real estate; and hence F. took a remainder in fee, and the house devised to S. after

the estates for life by implication to S.'s father, and a remainder for life only to the son, though the personal estate of the testator was sufficient to pay all the personal charges. *Franklin v. Trout*, 15 East, 394.

#### All my farm.

"All," as used in a devise of "all my homestead farm, being the same devised to me by my father," will pass the whole of the homestead farm, though a part of it was not devised by the father. *Drew v. Drew*, 28 N. H. (8 Fost.) 489, 502.

Testator devised "all that my farm and plantation in C. conveyed to me by the heirs of my deceased wife, and where my son E. now resides, containing about 85 acres, more or less." The testator owned two parcels of land in C., the one a farm containing about 72.62 acres, which had been conveyed to him by the heirs of his deceased wife, and the other containing 14.73 acres, which had been conveyed to him by one L. The two parcels adjoined each other, and had been rented and cultivated together for many years, and testator's son resided on the first parcel, but cultivated both. Held, that the words, "all that my farm," etc., were intended to and did convey only the premises which had been conveyed to the testator by the heirs of his deceased wife, and did not include both parcels. *Evens v. Griscom*, 42 N. J. Law (13 Vroom) 579, 580, 36 Am. Rep. 542.

#### All my heirs.

In a clause of a will reciting that the testator left it to the trustee to distribute either the whole or a part of the capital of his estate among "all my heirs," the words "all my heirs" were not to be taken as meaning solely those who would take in case of intestacy, but included all those who stood in an inheritable relation to him, and that the heirs took as a class. *De Laurencel v. De Boom*, 7 Pac. 758, 759, 67 Cal. 362.

#### All my house.

A bequest of "my house and all that shall be in it at my death" includes cash, but not promissory notes and securities. *Stuart v. Marquis of Bute*, 11 Ves. 657, 662.

A bequest of "my house and all that shall be in it at my death" includes cash and bank notes, but not promissory notes and securities, since they are evidences of title to things out of the house, and not things in it. *Popham v. Lady Aylesbury*, Amb. 68; *Moore v. Moore*, 1 Brown, Ch. 127, 129.

#### All my interest.

In speaking of the common-law rule, that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate, it was said by Chancellor Kent in 4 Comm. (13th Ed.) 535,

that it did not require the word "heirs" to convey a fee, but that other words denoting an intention to pass the whole interest of the testator, as a devise of "all my estate," "all my interest," "all my property," "my whole remainder," "all I am worth," "all my rights," "all my title," or "all I shall be possessed of," and many other like expressions, will carry an estate if there is nothing in the other parts of the will to limit or control the operation of the words. *Mulvane v. Rude*, 45 N. E. 659, 660, 146 Ind. 476.

The phrase "all my interest," when used in connection with a devise of land, passes a fee. *Fogg v. Clark*, 1 N. H. 163, 167.

A will devising "all my interest" is sufficient to convey the fee in testator's real estate, if there is nothing in other parts of the will to limit or control the operation of the words. *Hitch v. Patten* (Del.) 16 Atl. 538, 572, 8 Houst. 334, 2 L. R. A. 724.

"All my interest," as used in a will, creates an estate of inheritance. *White v. White*, 52 Conn. 518, 521.

The phrase "all my interest," as used in a deed conveying to a certain person "all my interest" in all of a certain lot of land described, is equivalent to and conveys the same title as a deed of the land. *Dow v. Whitney*, 16 N. E. 722, 724, 147 Mass. 1.

#### **All my land.**

"The term 'all of my land,' as used in a marriage settlement, by necessary implication and a common understanding, is a description referring to such lands as I may own, evidenced by the public records where land titles are required to be recorded, or to my actual and continuous possession for such time as under the law constitutes a title." *Moayon v. Moayon* (Ky.) 72 S. W. 33, 38, 60 L. R. A. 415.

#### **All my landed estate.**

A will devising "all my landed estate" to a certain beneficiary, and followed by a description of testator's lands, will be construed to only include the land so described, and not to include a house and lot owned by testator, and not so described. *Myers v. Myers* (S. C.) 2 McCord, Eq. 214, 264, 16 Am. Dec. 648.

#### **All my personal property or estate.**

A bequest of "all my personal property" does not create a specific legacy. In *re Woodworth's Estate*, 31 Cal. 595, 601.

A bequest of "all the testator's personal estate" means only all his estate not otherwise disposed of, and is in effect a residuary clause of personalty. *Wilson v. Eden*, 5 Exch. 752, 767.

A will bequeathing to testator's wife "all my personal property," following a bequest

of the homestead farm to the wife during her natural life, cannot be construed to mean all that the words in common acceptance imply, but refers only to his personal effects, such as house, furniture, bric-a-brac, and the like, of which he died possessed. *Tallman v. Tallman*, 23 N. Y. Supp. 734, 741, 3 Misc. Rep. 465.

The phrase "all my personal property," employed in a will, is sufficiently broad to include all personal property which the testator could dispose of at the time of his death, unless there be something else in the will to qualify or limit it. *Frick v. Frick*, 33 Atl. 462, 463, 82 Md. 218.

A bequest by a testator of "all my personal estate" has always been held, where there were no expressions in the will requiring a different construction, to mean simply the balance of the personal estate that should be left after the payment of his debts and other charges, such as those of burial and administration. *Cooch's Ex'r v. Cooch's Adm'r* (Del.) 5 Houst. 540, 564, 1 Am. St. Rep. 161.

#### **All my property.**

In speaking of the common-law rule, that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate, it was said by Chancellor Kent in 4 Comm. (13th Ed.) 535, that it did not require the word "heirs" to convey a fee, but that other words denoting an intention to pass the whole interest of the testator, as a devise "of all my estate," "all my interest," "all my property," "my whole remainder," "all I am worth," "all my rights," "all my title," or "all I shall be possessed of," and many other expressions of like import, will carry an estate of inheritance, if there is nothing in the other parts of the will to limit or control the operation of the words. *Mulvane v. Rude*, 45 N. E. 659, 660, 146 Ind. 476.

The phrase "all my property," as used in a will, is as extensive and comprehensive as "all my estate," or "all my effects, real and personal," or "all I am worth," and signifies all the right or interest which the testator had in land or chattels. *Jackson v. Housel* (N. Y.) 17 Johns. 281, 284.

The words "all my property, both real and personal," as used in a will, accompanied with the charge of the debts and power of sale, are sufficient to carry a fee in the real property of the testator. *Carpenter v. Brown*, 6 R. I. 383, 385.

A will leaving to testator's wife one-third part "of all my property," both real and personal, gives the wife a fee of one-third of the realty. *Roseboom v. Roseboom*, 81 N. Y. 356, 358.

Where testator bequeathed one-half of "all my property" to a particular benefi-

ary, the words "all my property" should be construed as meaning that which remained after payment of testator's debts and expenses of administration. *Briggs v. Hosford*, 39 Mass. (22 Pick.) 288, 290.

The phrase "all my property," as used in a will by which testator gives "to my wife the one-third part of all my property," meant his real and personal property subject to the payment of his debts, but did not subject it to the payment of legacies. *Reed v. Addington*, 4 Ves. 578.

A will by which testator gave to a certain person "all my property of every description," whether real, personal, or mixed, after paying all just debts, and in case such beneficiary should die not leaving any legitimate heirs of her body then all the property so granted to her by the will should go to others named, should be construed as giving the beneficiary all the estate and interest that was subject to disposition by the testator liable for the payment of his debts, subject to be divested on the happening of the contingency named in the will, and not a life estate only. *Platt v. Sinton*, 37 Ohio St. 353, 354.

A bequest of "all my property of every description" to my great friend and relative J. "shows an intention to appoint a universal legatee, and therefore not only tangible property, but moneys, stocks, bonds, and choses in action" are included therein. *Hurdle v. Outlaw*, 55 N. C. 75, 77.

Where a testator devised "all my property, personal and real, after paying my just debts and claims," such devise vested an estate in fee in the devisee, and not a life estate. It is well settled that in order to convey a fee the use of the word "heirs" is not necessary; any other word or words denoting the intention of the testator to pass his whole estate or interest to the devisee, such as a devise of "all my estate," "all my interest," "all my property," "my whole remainder," "all I am worth or own," "all my right," "all my title," or "all I shall die possessed of," and other expressions of like import, will create an estate of inheritance if there is nothing to limit or control the operation of such words or expressions. *Ross v. Ross*, 35 N. E. 9, 10, 135 Ind. 367.

Where a testator's will gives to a certain devisee "all my property," the phrase "all my property" means that an estate of inheritance is created, or, in other words, imports the absolute property in the testator's real estate. *Nicholls v. Butcher*, 18 Ves. 193, 195.

A will devising the same to testator's wife for life, with the exception of certain specified property, is a general, and not a specific, bequest. *Mayo v. Bland*, 4 Md. Ch. 484.

#### **All my real estate.**

"All my real estate," as used in a will, is to be construed not merely to mean the lands,

but to include all interest which the testator has in them, so as to pass an estate of inheritance if he has one. *Godfrey v. Humphrey*, 35 Mass. (18 Pick.) 537, 539, 29 Am. Dec. 621.

A will directing the executor to sell "all the real estate and effects" of the testator, and safely invest the proceeds, etc., means all my real estate and personal property, and implied an intention on the testator's part that the executor should turn into money all the testator's property that might remain at his death in some other form than investments, and safely invest the amount so that all his estate should be in money-producing investments. *King v. Grant*, 10 Atl. 505, 506, 55 Conn. 166.

A will devising "all of testator's real estate," without more words, is not sufficient to carry an estate for years in lands and tenements which testator had at his decease from the executor of the devisee, since a term for years in lands and tenements are regarded as contracts affecting the estate, but not vesting it, the lessee having the term only or the user for the time prescribed by his contract, but not the possession or seisin of the legal estate. *Bates v. Sparrell*, 10 Mass. 323, 325.

Where a deed of assignment in trust for the payment of certain debts granted "all my real estate," and schedule thereof was declared to be annexed thereto, the phrase, "all my real estate," was restricted and qualified in its operation by the reference to a schedule, and hence property not described in the schedule did not pass. *Gilbert v. North American Fire Ins. Co.* (N. Y.) 23 Wend. 43, 45, 35 Am. Dec. 543.

All the real estate which a mortgagor owns in certain towns, within the meaning of a mortgage of all the real estate which he owns in such towns of whatsoever name or nature, includes his interest in lands of which he is an owner in common. *Drew v. Carroll*, 28 N. E. 148, 149, 154 Mass. 181.

#### **All my real or personal estate or property.**

A devise in a will of "my real and personal property" indicates an intention to give an estate of inheritance. *Morrison v. Semple* (Pa.) 6 Bin. 94, 97.

The words, "all the estate, both real and personal," in a deed describing the property conveyed as "all the estate, both real and personal," to which the grantor is entitled in law or in equity, in possession, remainder, or reversion, is sufficient, as between the parties, to pass all real estate owned by the grantor, but it is not a sufficient description to impart record notice to a subsequent purchaser from the grantor of a conveyance affecting the land. Actual notice of the deed and its contents would not affect such pur-

chaser, unless he had notice that the land purchased by him was embraced in the deed. *Mundy v. Vawter* (Va.) 3 Grat. 518, 545.

A provision in a will that "all my property, both real and personal, shall be for the sole use of my beloved J.," gives a fee to the widow. *Rodenfels v. Schumann*, 17 Atl. 688, 689, 45 N. J. Eq. (18 Stew.) 383.

A will by which testator bequeathed to his wife "all my real and personal property, to hold and enjoy forever," imported an intent to convey the fee, and were sufficient for the purpose. Lord Mansfield says no technical words are necessary in a will to convey an estate, and if the testator makes use of words tantamount to those necessary to convey a fee, as if he says "given in fee simple," or "all my real and personal estate," that will carry all his interest in the land devised, and will pass a fee if testator has a fee in the premises. *Gaskin v. Gaskin*, Cowp. 659. If a man devises all his estate it comprehends all that he has, for the word "estate" is genus generalissimum, and includes all things, real and personal. *Bolton v. Bowne*, 18 N. J. Law (3 Har.) 210, 213.

A devise to the testator's wife of all his property, "both real and personal, forever," passes the fee in the real estate; nor is such construction affected by a subsequent clause in the will whereby the testator declared that after her death he gave an additional annuity to a person to whom he had before given a mere annuity preceding the devise to the wife, the testator's intent to use the words, all his property, etc., in a more restricted sense, not being shown by such subsequent clause. *Lady Dacre v. Roper*, 11 East, 518.

In a will giving to the wife the use and improvement of "all" the real and personal estate, the word "all," as applied to the real estate, comprised the whole, as no portion of it had been disposed of. As applied to the personal estate, it meant all there was left, a portion having already been given, and the residue was "all" the personal estate. *Alsop v. Russell*, 38 Conn. 99, 102.

A conveyance of all the estate, both real and personal, to which a grantor is entitled, in law or equity, in possession, remainder, or reversion, passes the grantor's whole estate. *Mundy v. Vawter* (Va.) 3 Grat. 518, 545.

A will wherein testator devised in a residuary clause all his estate, "whether real or personal," meant that testator devised real estate as well as personalty, and hence the devise included a mortgage held by him. *Ballard v. Carter*, 22 Mass. (5 Pick.) 112, 115, 16 Am. Dec. 377.

A will devising "all my estate, real and personal," is to be construed as a disposal of all of testator's property after the payment of his debts and the expenses of administra-

tion. *Lamb v. Lamb*, 28 Mass. (11 Pick.) 371, 376.

"All estates," as used in *Purd. Dig.* 2149 (Act May 6, 1867), providing that "all estates," real, personal, and mixed, of every kind whatsoever, situated within the state, passing from any person who may die seised or possessed of such estates, either by will or under the intestate laws of the state, other than for the use of father, mother, husband, wife, and children and lineal descendants, where the wife or widow or son of the person dying seised or possessed thereof shall be subject to tax, except where the estate is of less value than \$250, must be construed as meaning the property possessed by the decedent, and not the individual legacies, the word "estate" being ordinarily applied to property of decedents, and therefore where the estate exceeds \$250 in value the tax must be levied upon all collateral legacies, regardless of the amount of the legacy. In *re Howell's Estate*, 23 Atl. 403, 147 Pa. 164.

#### All my right or title.

The use of the phrase "all my right" in a will devising all testator's right in property, including realty, means that an estate of inheritance is created. *White v. White*, 52 Conn. 518, 521.

A will devising "all my right" is sufficient to convey the fee in testator's real estate, if there is nothing in other parts of the will to limit or control the operation of the words. *Hitch v. Patten* (Del.) 16 Atl. 553, 572, 8 Houst. 334, 2 L. R. A. 724.

A will devising "all my title" is sufficient to convey the fee in testator's real estate, if there is nothing in other parts of the will to limit or control the operation of the words. *Hitch v. Patten* (Del.) 16 Atl. 553, 572, 8 Houst. 334, 2 L. R. A. 724.

In speaking of the common-law rule, that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate, it was said by Chancellor Kent in 4 Comm. (13th Ed.) 535, that it did not require the word "heirs" to convey a fee, but that other words denoting an intention to pass the whole interest of the testator, as a devise "of all my estate," "all my interest," "all my property," "my whole remainder," "all I am worth," "all my rights," "all my title," or "all I shall be possessed of," and many other expressions of like import, will carry an estate of inheritance, if there is nothing in the other parts of the will to limit or control the operation of the words. *Mulvane v. Rude*, 45 N. E. 659, 660, 146 Ind. 476.

#### All the oil.

Where the owner of the right to operate and mine for oil on certain premises sold all his interest therein, and in the contract of sale provided that "all the oil produced upon

the above premises shall be the property of the vendee, or, if any be sold, the avails thereof shall belong to him," and at the time of the sale there was some oil in store in the tanks on the premises, such oil was included and passed by the sale. *Willets v. Brown*, 42 Hun, 140, 143.

#### All officers.

"All officers," as used in Const. art. 6, § 4, authorizing the removal of all officers, construed to include municipal as well as county and state officers. *Houseman v. Commonwealth*, 100 Pa. 222, 230.

The constitutional amendment regulating elections, and providing that the term of "all officers" whose successors would, under the law as it existed at the time of their election, be elected in an odd-numbered year, refers only to county and township officers, and does not include a municipal office. *Griffith v. Manning* (Kan.) 73 Pac. 75, 76.

"All officers," as used in Const. 1874, § 9, providing that "all officers" for a term of years shall hold their offices during good behavior, was not limited to such officers only as were subject to impeachment. *Houseman v. Commonwealth*, 100 Pa. 222, 230.

#### All ordinances.

As used in a bond given by a liquor dealer, conditioned that he would abide and keep "all ordinances of the mayor and council regulating the retailing of spirituous liquors," "all ordinances" meant all legal ordinances, and did not embrace an ordinance which was ultra vires or for any other reason void. *Gilham v. Wells*, 64 Ga. 192, 199.

#### All outstanding warrants.

Act March 13, 1885, to legalize void evidences of municipal indebtedness (section 4), provides that it shall be the duty of the county treasurer of Nelson county to negotiate the sale of certain bonds, and to call in "all outstanding warrants" whenever the bonds are sold, and he, the said treasurer, shall be allowed 2 per cent. commission for negotiating said bonds and paying out said money, etc. Held, that the words "all outstanding warrants" could not be limited to mean only all such warrants as the county commissioners might direct, since as to valid warrants the first section of the act, while in form permissive, was in fact mandatory on the board of county commissioners, requiring the issuance of such bonds for the payment of such warrants; and "all outstanding warrants," as used in the act, was to be treated in the same manner, since it cannot be presumed that the Legislature intended to clothe the county commissioners with power to determine the validity of municipal indebtedness. *Erskine v. Nelson County*, 58 N. W. 348, 351, 352, 4 N. D. 63, 27 L. R. A. 696.

#### All payments.

An assignment of a mortgage providing that we do hereby guaranty the collection of such mortgage, and "all payments thereon at maturity," makes the assignors guarantors of the whole debt, though there is no bond accompanying the mortgage, and the mortgagor was not liable upon the mortgage. *Waters v. Chase*, 21 Atl. 882, 142 Pa. 463.

#### All persons.

Act Sess. 28, c. 55, § 9, exempting from toll, for passing a bridge over the Schoharie river, "all persons drawing firewood for their own family use," extends as well to a person drawing his firewood at one time with the assistance of his neighbors and others hired for the purpose as if he himself drew but one load in one day, and therefore exempts all persons so drawing. *Wooster v. Van Vechten* (N. Y.) 10 Johns. 467.

"All persons," as used in the treaty with Mexico, December 11, 1861 (12 Stat. 1199, art. 1), providing that the contracting parties shall, on requisition, deliver up "all persons" accused of crime, etc., if used without qualification would necessarily include all persons, citizens and aliens alike, and under that general designation the executive it is believed could not withhold the surrender of an American citizen upon requisition made by the republic of Mexico. *Ex parte McCabe* (U. S.) 46 Fed. 363, 374, 12 L. R. A. 589.

Act 1899, No. 205, providing that officers in custody of any county, city, or town records shall furnish proper and reasonable facilities for the inspection and examination of the records, to "all persons" having occasion to make such examination, is not confined to persons owning or interested in land, but applies to "all persons" who may desire to inspect the records and make memorandums, and includes an abstractor seeking information for private gain. *Burton v. Tuite*, 44 N. W. 282, 285, 78 Mich. 363, 7 L. R. A. 73.

"All," as used in Comp. St. c. 56, § 11, providing that "all" persons who shall sell liquor without a license shall be guilty, etc., means every one without exception, and is limited to no class of persons, and includes both wholesale and retail liquor dealers. *State v. Cummings*, 22 N. W. 545, 547, 17 Neb. 311.

"All persons," as used in Rev. St. c. 17, providing that persons engaged in blasting rock shall give seasonable notice, so that "all persons" approaching shall have time to retire to a safe distance from the place of explosion, includes only those not engaged about the quarry. *Hare v. McIntire*, 19 Atl. 453, 454, 82 Me. 240, 8 L. R. A. 450, 17 Am. St. Rep. 476.

Const. art. 1, § 9, declares that "all persons shall be bailable by sufficient sureties." It was decided in *State v. Ward*, 9 N. C. (2

Hawks) 443, that this provision was not applicable to prisoners after conviction, and that no discretion was conferred on the trial court or judge to admit to bail in such a case. In *Longworth's Case*, 7 La. Ann. 247, after a review of the cases, it was held that the prisoner was entitled to bail, as a matter of right, after conviction as well as before, and that it was not within the discretion of the court to deny it. The question was before the Supreme Court of California in *Ex parte Voll*, 41 Cal. 29, and the conclusion announced was that the right to bail after conviction was not absolute, but was within the discretion of the court. However, the court says: "We are impressed with the thought that the use of the words 'all persons,' instead of 'all persons before conviction,' was for a purpose, and not accidental, and that therefore it should be held that the right to bail after conviction was within the discretion of the court." *Ford v. State*, 60 N. W. 960, 961, 42 Neb. 418.

Const. art. 1, § 7, providing that "all persons" shall be bailable by sufficient surety, unless for capital offenses, when the proof is evident or the presumption great, is not to be construed in its literal sense, and, as so construed, including a convict with an appeal pending. *Ex parte Voll*, 41 Cal. 29, 33.

The Bill of Rights, providing that "all persons" shall be liable to bail on sufficient sureties, does not mean that "all persons" under all circumstances shall be entitled to bail, but refers to a class of persons each and all of whom shall be bailed, except as therein provided, and must be construed and controlled by the provision in Const. U. S. art. 4, § 2, providing that a person charged in any state with treason, felony, or any other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authorities of the state from which he fled, be delivered up to the state having jurisdiction of the crime; since if, on arrest under a warrant of extradition, bail is allowable, the federal Constitution is set at naught, and delivery in the state having jurisdiction of the offense would have its price regulated generally by the amount of the bail bond, and a fundamental provision which was intended to apply to all classes of citizens would be restricted to the poor and unfortunate who were unable to furnish bail. *Ex parte Erwin*, 7 Tex. App. 288, 295.

Mass. Act 1793, c. 34, declares that all persons shall gain residence in the town by dwelling and having their home there when it was incorporated into a town. It was held that the words "all persons" as there used was intended to include only those who were legally capable of gaining a settlement in their own right in any other mode, and hence inasmuch as an illegitimate child was incapable of gaining a residence in a town in its own right, but had a residence which

was derivative from the residence of its mother, such child could not gain a legal residence in a town by being an actual resident therein at the time of its incorporation. *Inhabitants of Milo v. Inhabitants of Killmarnock*, 11 Me. (2 Fairf.) 455, 457. This case followed *Inhabitants of Hallowell v. Inhabitants of Gardiner*, 1 Me. (1 Greenl.) 93, 101, where it was held that "all persons" did not include a married woman or a slave, they not being legally capable of gaining a settlement in any other mode.

The provision "all persons having any claim against the estate" in a notice directing the presentation of such claims is of so comprehensive a character as to embrace and include creditors, legatees, and persons entitled to distribution. *Fillyau v. Laverty*, 3 Fla. 72, 106.

#### All prisoners.

"All prisoners," as used in section 9 of the Bill of Rights, declaring that all prisoners shall be bailable unless for capital offenses when the proof is evident, means only prisoners who have not been tried and convicted in the district court. *Ex parte Ezell*, 40 Tex. 451, 454, 19 Am. Rep. 32.

#### All probate matters.

Const. 1870, art. 6, § 20, provided that the General Assembly might provide for the establishment of a probate court in each county having a population over 50,000, and that such courts shall have original jurisdiction of "all probate matters." Held, that the words "all probate matters" were used in their broadest and most general sense, and therefore authorized the Legislature to give such courts jurisdiction of proceedings by guardians for the sale of the real estate of their wards. *Winch v. Tobin*, 107 Ill. 212, 216.

#### All proceedings.

The act of 1874 (P. L. 219) providing for the removal of "all proceedings" in a criminal cause to the Supreme Court does not authorize the removal of matters which had theretofore rested solely in the discretion of the court below, such as the denial of a motion for new trial. *Alexander v. Commonwealth*, 105 Pa. 1, 11, 12.

Where an order provides "that all proceedings be stayed" in a case for a definite time, it operates to prohibit entry of judgment while such order is in force. It stops further progress in the case at the point where the order attaches. *Uhe v. Chicago, M. & St. P. Ry. Co.*, 57 N. W. 484, 485, 4 S. D. 505, 507.

#### All property.

The terms "property" and "all property" in a statute relating to taxation of railroad and canal companies are not interchangeable

terms, and one cannot be substituted for the other. *State Board of Assessors v. Central R. Co.*, 4 Atl. 578, 606, 48 N. J. Law, 146.

Rev. St. 1852, p. 481, which exempts farm lands included within the limits of a city from taxation for municipal purposes, is not repealed by section 42 of the Acts of 1857, giving the common council of cities power to collect ad valorem tax on "all property" within the city. *Blain v. Bailey*, 25 Ind. 165, 166.

Within the provision of a statute providing that "all property," real and personal, from which an income or revenue is derived, shall be subject to taxation, the waterworks of the city from which a revenue is derived is not exempt from taxation for county purposes. *Erie County v. Waterworks Com'rs*, 6 Atl. 138, 113 Pa. 363.

"All property in the state," within the meaning of the constitutional provision that all property in the state shall be taxed in proportion to its value, cannot be construed to mean either all the property the Legislature may designate, or all except such as the Legislature may exempt. The phrase means all private property, or all property other than that belonging to the United States or the state. *People v. McCreery*, 84 Cal. 432, 456.

"All the property," as used in Act Feb., 1878, providing that "all the property" of every corporation formed under the act should be exempt from taxation for a period of six years, is a phrase of wide import, and includes the capital stock of such corporations. *Santa Fé County Com'rs v. New Mexico & S. P. R. Co.*, 2 Pac. 376, 383, 3 N. M. 116.

Const. 1874, art. 16, § 5, declaring that "all property" subject to taxation shall be taxed according to its value, means all private property of every possible description, or all property situate in the state other than that belonging to the state or general government, and it does not mean all such property as the Legislature may designate, or all except such as the Legislature may exempt. *Little Rock & Ft. S. Ry. v. Worthen*, 46 Ark. 312, 327.

The expression in the charter of a municipal corporation, authorizing the municipality to tax "all property within the corporate limits" thereof, is not open to a broader construction than the phrase "all taxable property of the state," and cannot open a wider field for the exercise of the power, and, since the expression "taxable property of the state" does not embrace the bonds of the state in an act levying a tax on the people of the state, the phrase in the charter will not be construed to include the taxing of its own bonds, in the absence of express authority for that purpose. *City of Macon v. Jones*, 67 Ga. 489, 492.

An assignment for creditors conveyed to the assignee "all property of every description belonging to the assignor, the same being embraced in a schedule annexed," and, after the assignment, property purchased by the assignor, not previously delivered, was delivered and receipted for by the assignee, and was claimed under the assignment. Held, that the term "all property of every description" was a general term, and if used alone would convey all the property in which the assignor had an interest, but that the words "the same being embraced in a schedule annexed," which were special words, limited the grant, and the assignment should be construed according to the rule of construction that, where a general clause in an instrument of conveyance is followed by special words in accordance therewith, the grant will be limited to the special matter, and hence the assignment only included those articles embraced in the schedule. *Belding Bros. & Co. v. Frankland*, 76 Tenn. (8 Lea) 67, 70, 41 Am. Rep. 630.

A gift of "all property" will not only pass real estate, but will pass all the interest of the testator in the estate. *Thomas v. Phelps*, 4 Russ. 348, 351.

Where testator bequeathed certain property to his wife for life, with remainder over of a part of such property to his children, followed by a general bequest of all the property "in which his widow has given the life estate to another child," the phrase "all the property" was not intended to include the entire amount given to the wife, but should be construed as meaning all the property not otherwise disposed of. *West v. Randle*, 3 S. E. 454, 456, 79 Ga. 28.

Where testator by one clause of his will gave his wife personal property, and in the following clause devised to her real estate for life, and added, "but on her decease the remainder of all the property that I give to my said wife I give and devise to my son," held, that the words "all the property" in the last clause applied only to the real estate. *Howland v. Howland*, 100 Mass. 222, 223.

#### All purposes.

In Const. art. 11, § 6, providing that the aggregate amount of indebtedness of any county "for all purposes" shall not exceed a certain amount, "all purposes" includes all debts, without regard to the method of their contraction, and covers every kind of indebtedness, whether the same be incurred for necessary running expenses or in the consummation of other legitimate municipal objects. *People v. May*, 12 Pac. 838, 840, 9 Colo. 404.

#### All qualified or legal voters.

Where a right to remonstrate against the issuance of a license to sell intoxicating liquors is given to "all" legal voters, it includes



every legal voter. *White v. Furgeson*, 64 N. E. 49, 53, 29 Ind. App. 144.

The phrase "all the qualified voters," in a statute providing that towns may issue bonds in aid of a railroad when authorized by "all the qualified voters," was construed to mean simply "by the qualified voters," or "by the voters," which terms have always been held to mean by a majority of the qualified voters. Such a statute requires a majority of all voters qualified to vote, and not merely a majority of those voting. *Glenn v. Wray*, 36 S. E. 167, 169, 128 N. C. 730.

#### **All real estate.**

Act 1873 provided that all real estate within the commonwealth should be liable to taxation for all such purposes "as now is or hereafter may be provided by general laws." Held, that the exemption of the property of soldiers, as found in the bounty acts, was not repealed by statute, inasmuch as a general statute, without negative words, is not to be construed to repeal a previous statute which is particular or special, though the provisions in the two differ. *Rounds v. Waymart Borough*, 81 Pa. (31 P. F. Smith) 395, 397.

An indictment charging defendant with falsely representing that he was the owner of several parcels of real estate does not sufficiently negative the truth of such representations by the allegation that defendant was not then and there the owner of "all" of such real estate, inasmuch as he might have been the owner of all save some insignificant parcel of the land. *State v. Trisler*, 81 N. E. 881, 49 Ohio St. 583.

#### **All rents and profits.**

Where one who was entitled to the rents and profits of an estate until a certain date died previous to said date, leaving a will bequeathing "all of the rents and profits" of such estate, only the rents and profits accruing from and after the testator's death passed. *Tissen v. Tissen*, 1 P. Wms. 500, 503.

#### **All repairs.**

A covenant in a lease to repair, uphold, and support, or to well and sufficiently repair, or to keep in repair and leave as found, or to repair and keep in repair, or to keep in good repair, natural wear and tear excepted, or to make all necessary repairs, or to deliver up in tenantable repair, or to deliver up the premises in as good a condition as they now are, all impose upon the covenantor the duty of rebuilding or restoring the premises destroyed or injured by the elements. *Armstrong v. Maybee*, 48 Pac. 737, 738, 17 Wash. 24, 61 Am. St. Rep. 898.

A covenant by a lessee to make all "inside and outside repairs" is simply a general

covenant under which the lessee was bound to make all ordinary repairs, but was not called upon to make those which were extraordinary, such as those caused by a violent storm. *May v. Gillis*, 62 N. E. 385, 386, 169 N. Y. 330.

#### **All rest, residue, and remainder.**

"All the rest," as used in a will in which testator gave certain legacies to his sisters, and gave and bequeathed to his wife "all the rest" of his lands and tenements, of themselves import a devise of the fee, but, unless aided by the context, the devisee, whether he be a sole or a residuary devisee, will, if there be no words of limitation, take only a life estate. *Wright v. Page*, 23 U. S. (10 Wheat.) 204, 205, 6 L. Ed. 303.

Where a will authorizes executors to sell testator's real estate expressly at their discretion, and directs them to convert into money and invest "all the rest" of testator's estate not already in money, the words "all the rest" exclude the real estate. *Graydon's Ex'rs v. Graydon*, 23 N. J. Eq. (8 C. E. Green) 229, 233.

Where testator devised "all the residue and remainder of my estate," such phrase creates a fee, though no words of limitation or inheritance are added. *Parker v. Parker*, 46 Mass. (5 Metc.) 134, 138.

In a will the words "all the rest of my lands" do not of themselves import a devise of a fee, but, unless aided by the context, the devisee, whether sole or residuary, will, if there are no words of limitation, take only a life estate. *Wright v. Page*, 23 U. S. (10 Wheat.) 204, 230, 6 L. Ed. 303.

A bequest in a will by which testator gave all his household furniture, wearing apparel, cattle, horses, carriages, tools, produce, etc., and "all the rest and residue" of his estate not thereinbefore bequeathed or devised or mentioned, should be construed as a general residuary bequest, making the person designated the testator's residuary legatee, the same as he would have been had the enumeration of specific articles been omitted, for such enumeration prior to the words "rest and residue" does not necessarily alter their meaning. *Le Rougetel v. Mann*, 63 N. H. 472, 473, 3 Atl. 746.

"All the rest and residue," as used in a will making specific devises, and then directing the disposition of "all the rest and residue" of testator's property, includes all of testator's property not included in the specific devises. *Prowitt v. Rodman*, 37 N. Y. 42, 49.

"All the rest and residue," as used in a bond requiring a testatrix to make and return a true and perfect inventory of all "the rest and residue" of the goods and chattels

of the estate, means what remains for distribution according to law, or what is left after payment of the intestate's debts. *Carrol v. Connet*, 25 Ky. (2 J. J. Marsh.) 195, 201.

"All the rest and residue of my estate," as used in a will, is intended as "a general description of all the property testator had left in the world, whether real, personal, or mixed, after the payment of debts and specific legacies. In the older cases such an expression was interpreted in a more restricted sense, and did not include real property, but the tendency of modern holdings is to construe the phrase according to its popular signification, as including property of every variety." *Chapman v. Chick*, 16 Atl. 407, 409, 81 Me. 109; *Burkitt v. Chapman*, 1 H. Bl. 223, 228.

Where testator gave a life estate in certain real estate to his wife, a devise by another clause of the will of "all the residue of his estate" to his wife enlarges the life estate to a fee, and cannot be regarded as intended to embrace only the personal estate. *Warner v. Willard*, 9 Atl. 136, 137, 54 Conn. 470.

"All the rest, residue, and remainder of my estate," as used in the residuary clause of a will disposing of all the "rest, residue, and remainder of testator's estate," means real estate as well as personality. *Hackett v. Commonwealth*, 102 Pa. 505, 514.

"All the rest, residue, and remainder of my estate," within the meaning of a will declaring testator's intention to be to dispose of "all the rest, residue, and remainder of my estate," is to be construed to mean all such estate, both in quantity and quality. In *re Jeremy's Estate*, 35 Atl. 847, 178 Pa. 477.

#### **All right, title, and interest.**

"All," as used in partition deeds conveying "all right, title, and interest of the said parties of the first part," is not ambiguous, and a reservation of a part cannot be implied, but the entire estate and interest of such parties passed under such deed. *Snyder v. Grandstaff*, 31 S. E. 647, 650, 96 Va. 473, 70 Am. St. Rep. 863.

An attachment of "all the right, title, and interest" which a debtor has in lands is a good attachment of the land itself. *Millett v. Blake*, 18 Atl. 293, 295, 81 Me. 531, 10 Am. St. Rep. 275.

"All right and title," as used in Homestead Act July 1, 1873, declaring that every householder having a family shall be entitled to a certain estate or homestead, and such homestead and "all right and title therein" shall be exempt from attachment, is to be construed literally as to all the right which the head of the family has in the premises, and includes the lot of ground occupied as a residence, and is not limited to

the mere homestead right of occupancy. *Hartman v. Schultz*, 101 Ill. 437, 440.

#### **All risks.**

A policy insuring a floating dry dock against "all risks" should be construed to include all river and harbor risks, so far as those risks are applicable to floating docks. *Marcy v. Sun Mut. Ins. Co.*, 11 La. Ann. 748, 749.

#### **All sailing.**

The term "all sailing," as used in the contract of a steamship company for the carriage of cattle on certain specified vessels "all sailing" during certain months, should not be read "all vessels that may sail," but should be construed to import a warranty that all the vessels named will sail during such month. *Morris v. Chesapeake & O. S. S. Co. (U. S.)* 125 Fed. 62, 67.

#### **All seminaries of learning.**

Gen. St. 1878, c. 11, § 5, exempting from taxation "all seminaries of learning," with the books and furniture therein, and the grounds attached, includes seminaries for young ladies erected by private persons and supported by their patrons. It means all seminaries of learning open for the instruction of the young and dissemination of knowledge. It is not necessary that the school shall belong to and be a part of the general educational system provided by the state, any more than colleges and academies within its bounds founded and sustained by private patronage. The character, objects, and benefits of such an institution are public in their nature. *Nelson v. Stryker Seminary*, 53 N. W. 1133, 1134, 52 Minn. 144.

#### **All sorts or manufactures of wool.**

"All sorts of wool," as used in Navigation Act 43 Geo. III, c. 155, § 13, do not include cotton wool, especially where the words "wool" and "cotton wool" are used in another clause, and in the same section of the act, as distinct commodities. Therefore the importation of cotton in a Portuguese vessel owned by a British subject, the captain and crew of which are Portuguese, is contrary to the act. *Pearce v. Cowie*, 1 Holt, N. P. 69, 70.

Act Cong. March 3, 1883, Schedule K, imposing a duty of 35 per cent. on "all manufactures of wool of every description made wholly or in part of wool, not specially enumerated or provided for" in the act, does not include manufactures which are composed partly of wool but the component part of chief value of which is silk, for the reason that Schedule L. of the same act imposes a duty of 50 per cent. on all goods, wares, and merchandise made of silk, or of which silk is the component material of chief value. *Hartman v. Meyer*, 10 Sup. Ct. 751, 135 U. S. 237, 34 L. Ed. 110.

**All spawls and rubbish.**

A condition in a lease of a quarry to deliver the premises at the expiration of the lease in as good condition as they are now, all spawls and rubbish to be removed, merely requires the removal of such spawls and rubbish as accumulated during the term of the lease, and not those on the ground when the tenant took possession. The words "all spawls and rubbish to be removed" are but a part of the general clause which was designed to secure a return of the premises in as good condition as they now are, and only amplified that expression. *Coppinger v. Armstrong*, 8 Ill. App. 210, 213.

**All stations.**

A bill of lading giving the vessel "liberty to call at any port or ports for whatever purpose, \* \* \* and to tow and assist vessels in all stations," authorized only assistance to vessels needing help in all stations that might be met with in the ordinary course of the voyage, and did not justify the vessel in making a material deviation to assist a disabled vessel. *Ardan S. S. Co. v. Theband* (U. S.) 35 Fed. 620, 622.

**All stockholders.**

"All stockholders," as used in a statute providing that stockholders of corporations shall be held for the corporate debts, must, in the absence of any legislative intent to the contrary, be regarded as including not only those who were such at the time the indebtedness was incurred, but all those who successively stand in their shoes in respect to the stock. *Brown v. Hitchcock*, 36 Ohio St. 667, 681.

**All summer.**

In an action for slander, an allegation that defendant stated that plaintiff had been stealing from him "all summer" is not proved by the words, "he is stealing from us every day." *Smith v. Moore*, 52 Atl. 320, 322, 74 Vt. 81.

**All sums collected.**

A city ordinance providing that the city attorney should receive 10 per cent. "on all sums collected for the city" includes all sums collected in both civil suits and criminal suits, and the ordinance does not make any distinction between the sums collected in such suits. *City of Austin v. Johns*, 62 Tex. 179, 183.

**All taxes.**

Where a lease requires the lessee to pay "all taxes" on the demised premises, "all taxes" means merely general taxes, and does not make the lessee liable for a special sewer assessment. *Ittner v. Robinson*, 52 N. W. 846, 847, 35 Neb. 133.

**All that therein exists.**

A will giving testator's wife the homestead, and all articles of goods in my house, personal furniture, household furniture, and "all that therein exists," will pass money contained in an iron box in the house. *Perea v. Barela*, 23 Pac. 766, 771, 5 N. M. 458.

**All the proceeds of estate.**

"All the proceeds," as used in a will whereby testator gave to his wife all his real and personal estate, requesting that at her death she divide equally between certain persons "all the proceeds" of testator's estate, meant the entire body of the estate, subject to such sales and conversions thereof as the interest or the interests of the parties might require, and did not mean merely the rents and profits of the corpus of the estate. *Knox v. Knox*, 18 N. W. 155, 157, 59 Wis. 172, 48 Am. Rep. 487.

**All the estate.**

A devise of "all the estate" is as comprehensive and extensive as one of "all my estate," and carries the fee. *Lambert's Lessee v. Paine*, 7 U. S. (3 Cranch) 97, 138, 2 L. Ed. 377.

A devise of "all the testator's estate" includes a fee simple in his real estate, "for an estate means interest, and all the interest of testator must mean a fee simple if the testator has one." *Van Middlesworth v. Schenck*, 8 N. J. Law (3 Halst.) 29, 39.

"All the estate, real and personal, of every nature and description, in law or equity," as used in Bankr. Law 1800, § 5, declaring that it shall be the duty of the commissioners, after a party has been declared a bankrupt, to take into their possession all the estate, real and personal, of every nature and description, to which the bankrupt may be entitled either in law or equity, "are broad enough to cover every description of vested right and interest attached to or growing out of property." *Comegys v. Vasse*, 26 U. S. (1 Pet.) 193, 218, 7 L. Ed. 106; *Williams v. Heard*, 11 Sup. Ct. 885, 888, 140 U. S. 529, 35 L. Ed. 550.

"All the estate," as used in a guardian's bond, obligating him to file an inventory of "all the estate" which he shall have received or taken possession of, meant and was confined to an obligation to file an inventory "of the estate of the infant" received by him, as it would lead to an absurdity to assign to the terms in question a meaning which would convert them into a stipulation that the guardian in the bond bound himself to put in an account of every estate that belonged to strangers that might come into his hands. *Ordinary v. Heishon*, 42 N. J. Law (13 Vroom) 15, 18.

**All times.**

See "At All Times."

**All the water.**

A deed granted a right to lay a pipe to a designated spring on the grantor's premises, and to convey "all the water" "of said spring which can be taken through the pipe." Held, that the phrase "all the water" did not authorize the grantee to excavate and thereby get water from neighboring springs, so that he could obtain water to the full capacity of the pipe, but that he was only entitled to take such water as might flow from the spring designated, through such pipe. *Furner v. Seabury*, 81 N. E. 1004, 135 N. Y. 50.

A grant by an irrigation ditch company to a lumber company of a right of way for a flume across the grantor's ditch provided that the crossing should be made in such a way as not to stop or impede the flow of "all" the water which the ditch might or could carry. In construing the term "all" as used in this grant, the court says that it is used to signify the "maximum quantity of"; that it was not in contemplation that every drop of running water should be absolutely stopped or absolutely impeded, but that there should be no stoppage or impediment to the maximum quantity of water which the ditch was capable of carrying, so that the grant was with a proviso that the crossing should not impede the maximum quantity, and not that it should not impede the flow of all the water in the ditch. *Centerville & K. Irr. Ditch Co. v. Sanger Lumber Co.*, 73 Pac. 1079, 1080, 140 Cal. 385.

**All who may feel interested.**

A common carrier engaged in carrying federal mail, and also in the transportation of passengers, wrote a letter to the postmaster at one of the offices from which he was accustomed to carry mail, informing him that on a certain day one of his vessels which did not ordinarily stop or receive mail or passengers at that place would stop there, and requesting the postmaster for a mail in readiness, and to "advise all who may feel interested in the above." Held, that the expression "all who may feel interested" did not refer alone to persons interested in the arrival and departure of the mail, but, under the circumstances, included all those who wished to take passage on the vessel, so that a person offering himself as a passenger, and prevented from being accepted by the failure of the boat to stop, was entitled to recover damages for breach of special contract. *Heirn v. McCaughan*, 32 Miss. 17, 45, 66 Am. Dec. 588.

**All words.**

Code 1873, c. 145, § 2, providing that "all words" which are considered as insults and lead to violence and breach of the peace shall be actionable, will be construed to include written or printed words of such character. *Chaffin v. Lynch*, 1 S. E. 803, 807, 83 Va. 106.

**All unpaid taxes.**

Laws 1859, c. 22, § 5, providing that the title vested by a tax deed shall be subject to "all unpaid taxes and charges" which are a lien on the land, mean only such unpaid taxes and charges as may have accrued subsequently to the sale on which the deed issued. *Sayles v. Davis*, 22 Wis. 225, 230.

**ALL AND EVERY OTHER.**

"All and every other my lands, tenements, and hereditaments," as used in a devise, were general words, and were sufficient to pass a remote reversion in real estate and lands to be purchased and settled by the testator. *Attorney General v. Vigor*, 8 Ves. 256, 294.

**ALL AND EVERYTHING.**

"All and everything," as used in a will devising "all and everything" that testator shall receive from his mother's estate, is of similar import and as comprehensive as the expressions "all I have," "all I am worth," or "everything I may die possessed of," and will pass the fee in his real estate, such intention being manifested from the will as a whole. *Chamberlain v. Owings*, 30 Md. 447, 455.

**ALL AND SINGULAR.**

The words "all and singular my real estate," in a will devising "all and singular my real estate," is broad enough to include all real estate possessed by the testator at the time of his death, including property acquired by him after making the will. *McClaskey v. Barr* (U. S.) 54 Fed. 781, 798.

**ALL FAULTS.**

See "With all Faults."

**ALL INTENTS AND PURPOSES.**

See "To All Intents and Purposes."

**ALL OTHER.****All other acts.**

Act Jan. 4, 1860, incorporating the St. Joseph board of public schools, section 1, defining the boundaries of the corporation, giving it its corporate name, conferring perpetual succession, authorizing it to sue and be sued, and providing that it may purchase, receive, and hold property, real and personal, may lease, sell, or dispose of the same, and do "all other acts as natural persons," means acts within the powers granted but not specified. Corporations obtain powers by grant exclusively, and from their thus limited character can claim such implied powers only as are necessary to carry out the obvious

object and intention of the charter. Especially is this true in cases where the act of incorporation, when properly construed, provides for the very contingencies which are claimed to have existed, creating a necessity for the implied powers. Hence, where the charter provided that the school board should cause an estimate of the amount of money necessary to be raised for the purpose of building and repairing schoolhouses and furnishing the same, together with the amount necessary to meet other expenses, to be made out and certified, and the county court should cause the amount so certified to be levied upon all taxable property and collected, provided the taxes should not exceed a certain per cent., the school board had no implied power to issue bonds for the purpose of raising money to build schoolhouses. *Erwin v. St. Joseph's Board of Public Schools* (U. S.) 12 Fed. 680, 682.

Under a charter of a corporation authorizing it to do "all other acts as natural persons," its power is limited to such other acts as were authorized by the corporate charter or statutes of the state applicable to such corporations, and the charter cannot be construed as removing all limitations inseparable from corporate existence, and to confer on the corporation power to engage in a business of a different character from that for which it was organized. *Gauze v. Clarks-ville* (U. S.) 10 Fed. Cas. 96, 98.

#### **All other business, trades, etc.**

Rev. St. § 4644, subd. 15, conferring power upon the city to license, tax, and regulate auctioneers, grocers, commission merchants, retailers, merchants, agents, real estate agents and brokers, horse and cattle dealers, mercantile agents and insurance agents, banking and other corporations and institutions, and "all other business, trades, avocations, or professions whatever," does not include abstracters of titles, though the words are sufficiently comprehensive to embrace the avocation of an abstractor of titles, considered as standing alone, independent of the preceding parts of the section and other provisions of the statute in *pari materia*. But it is among the well-recognized rules of construction that, when a particular enumeration or words are followed by general terms or words, the latter are to be understood as limited in their scope and application to persons and things of the same kind or character as those specified in the preceding parts. This rule applies to statutes, as well as to private instruments, that general words are restricted in their operation by the context, the apparent intent; and in every enumeration of particulars, followed by general terms, the latter are to be restricted to cases *ejusdem generis*. *City of St. Joseph v. Porter*, 29 Mo. App. 605, 608.

Under the same provision in a city charter, the words "all other business, trades,

avocations, or professions" were, under the rule of *ejusdem generis*, held not to authorize the city to license lawyers. *City of St. Louis v. Laughlin*, 49 Mo. 559, 564.

#### **All other chattel or personal property.**

"All other articles of personal property," as used in Laws 1872, c. 148, requiring assessments of merchandise, goods, etc., in the town or ward where located, and specifying in a later clause for the assessments of certain enumerated property, and providing that "all other articles of personal property" shall be assessed where the owner resides, is not to be construed as meaning all other personal property not before mentioned in the clause in which the phrase is found, since such a construction would destroy the rule first prescribed in reference to the taxation of merchants' goods. *Mitchell v. Town of Plover*, 11 N. W. 27, 30, 53 Wis. 548.

At the time of making a will, testator's estate consisted of United States bonds, a certificate of deposit, a small amount of currency, and some wearing apparel. He gave all his real and personal property to his father during the life of another, and on the death of such other a sister was to take \$100, and the second sister \$100 in money and "all other personal property," and the will then recited that the remainder of all the property should go to the father. Held, that the words "all my other personal property" in the legacy to the latter sister meant testator's personal effects other than the money and securities. *Wolf v. Schoeffner*, 51 Wis. 53, 54, 8 N. W. 8, 11.

In construing a mortgage given by a railroad company on the road and its rolling stock and "all other personal property, right thereto and interest therein," it was said by the court that the phrase "all other personal property, right thereto and interest therein," was probably intended, from the connection in which it was found, to refer to property appurtenant to the road and employed in its operation, and which had not been enumerated. *Pennock v. Coe*, 64 U. S. (23 How.) 117, 126, 16 L. Ed. 436.

"All other chattel property," as used in a will making several specific bequests and afterwards bequeathing "all other chattel property," should be construed as restricted in its meaning to the same class of property as that which had been previously mentioned specifically; as, for instance, where testator bequeathed to his niece all his goods, chattels, household stuff, furniture, and other things which should be in his house at A., it was decreed that cash found at the testator's house did not pass, for the words "other things" should be construed to mean things of like nature and species with those before specified. *Peaslee v. Fletcher's Estate*, 14 Atl. 1, 3, 60 Vt. 188, 6 Am. St. Rep. 103.

**All other collections of antiquities.**

Rev. St. § 2505, providing that cabinets of coins, medals, and "all other collections of antiquities" shall be exempt from duty, embraces all collections of antiquities within the ordinary meaning of those words, and is not limited to collections of antiquities ejusdem generis, as coins and medals. *Sixty-Five Terra Cotta Vases* (U. S.) 10 Fed. 880, 882.

**All other demands.**

Under Rev. St. c. 128, a submission to a referee in an action of trespass then pending, "and all other demands and costs already accrued on or growing out of said suit," is a reference of all demands between the parties. *Harmon v. Jennings*, 22 Me. (9 Shep.) 240, 241.

**All other goods, implements, etc.**

A mortgage on goods described as a general stock of millinery, stock of ladies' notions, consisting of hats, etc., or "all other goods now on hand or to be purchased and used in the business of a general millinery store," means only such millinery goods as are on hand or may be added by purchase for sale, that being the business of a general millinery store. *Chapin v. Garretson*, 52 N. W. 104, 105, 85 Iowa. 377.

"All other implements of industry," as used in Gen. St. p. 473, § 3, providing that every person residing in the state and being a head of a family shall have exempt from seizure and sale one sewing machine, all spinning wheels and looms, and "all other implements of industry," and all other household furniture not herein enumerated, means "all other household implements of industry, or all other implements of industry appertaining to houses, such as sewing machines, spinning wheels, looms, etc." *Rasure v. Hart*, 18 Kan. 340, 344, 26 Am. Rep. 772.

"All other paper not specially provided for," as used in Tariff Act Oct. 1, 1890, c. 1244, par. 422 (26 Stat. 599), does not include merchandise imported and invoiced as crêpe, or crêpe tissue, which, according to the finding of the board of general appraisers, is made in a tissue paper mill, and invoiced, advertised, and sold as "tissue." *Dennison Mfg. Co. v. United States* (U. S.) 66 Fed. 728, 729.

"All other seeds not otherwise provided for," as used in 9 Stat. 49, placing on the free list garden seeds and "all other seeds not otherwise provided for," is not restricted to seeds imported for agricultural purposes, but includes seeds imported for any purpose which are not otherwise provided for. *Boving v. Lawrence* (U. S.) 3 Fed. Cas. 1024.

"All other soaps not provided for," as used in the last clause of Tariff Act Oct. 1, 1890, c. 1244, par. 79, 26 Stat. 570, includes a medical soap containing 20 per cent. of

carbolic acid and used for curative purposes. *Park v. United States* (U. S.) 66 Fed. 731.

**All other land or property.**

In construing a mortgage given by the Alabama & Chattanooga Railroad Company to the state of Alabama upon "all lands granted by the United States, to and for the benefit of this company; \* \* \* the telegraph line and telegraph offices along the line of said road and belonging to said company; also the machine shops and all other property in said states of Alabama, Georgia, Tennessee, and Mississippi belonging to said company; also all coal mines now open or hereafter to be opened and worked belonging to said company, and all iron or other mineral lands and all iron manufacturing establishments now in operation or hereafter to be constructed"—the court held that the words "all other property" was not intended to include lands or interests in lands in the four states through which the road passed, other than those mentioned especially in the mortgage, and said: "While the company enumerated with great particularity its land grant from Congress, its telegraph lines and offices, its machine shops and its coal mines, it is quite unreasonable to suppose that it would have been thus needlessly minute in its description of the property conveyed, enumerating with great particularity the four or five classes of property, mostly real estate, which were intended to pass, if it had also intended that the three words 'all other property' should stand for everything in the four states which the company owned, and especially all its lands. These words, which are found neither in the beginning of the granting clause, as a general phrase to be afterwards emphasized by a more minute description, nor at the end, as a summary of what had preceded them, have their appropriate use in the precise place where they are found. We say they are there appropriate, because, in conveying the telegraph offices, the machine shops, the coal mines, the iron mines, and the manufacturing establishments, there might in them be found much property belonging to the company about which a doubt would arise whether it was a part of these offices, mines, machine shops, and manufacturing establishments. All such doubt or ambiguity is removed by declaring that all the property of the grantors in these places or used in any of these pursuits is conveyed. For this purpose the phrase 'all other property' is apt, and is used in the right place, in a description designedly minute and elaborate." *Alabama v. Montague*, 6 Sup. Ct. 911, 913, 914, 117 U. S. 611, 29 L. Ed. 1003.

A gift in a will of "all other land," or of "all land not hereinbefore devised," may be regarded as a devise of the residue, and not as indicating an intention to exclude lapsed, specific gifts. *Moffett v. Elmendorf*, 46 N. E. 845, 849, 152 N. Y. 475, 57 Am. St.

Rep. 529 (citing *Cogswell v. Armstrong*, 2 Kay & J. 227; *Green v. Dunn*, 20 Beav. 6; *Culsha v. Cheese*, 7 Hare, 236; *Carter v. Haswell*, 26 Law J. Ch. 576; *Burton v. Newbery*, 1 Ch. Div. 241; *Roberts v. Cooke*, 16 Ves. 451).

#### **All other liens.**

The phrase "all other liens," as used in a deed providing that the grantee shall assume all unpaid taxes and mortgages shown of record, and all other liens, including an attachment, will be construed ejusdem generis, and held to apply only to liens of record, under the ancient maxim that "general words shall be restrained unto the fitness of the matter and person." *Whicker v. Hushaw*, 64 N. E. 460, 462, 159 Ind. 1.

#### **All other losses.**

Where a policy insures a ship against the usual perils of the sea, and contains the general clause against "all other losses and misfortunes" which shall come to the damage of the ship, and an accident happens in the course of necessary repairs, the ship being upon a railway, or in dock, or hove down upon a beach, it is a peril ejusdem generis with those named in the policy. *Swift v. Union Mut. Marine Ins. Co.*, 122 Mass. 573, 575.

#### **All other metals.**

"An act of parliament imposed certain duties on copper, brass, pewter, tin, and all other metals not enumerated, and it was held that the latter words did not include gold and silver." In *re Barre Water Co.* 20 Atl. 109, 110, 62 Vt. 27, 9 L. R. A. 195; *Cashier v. Holmes*, 2 Barn. & Adol. 592, 596.

#### **All other mineral districts.**

"All other mineral districts," within the act of Congress providing that persons may cut timber on public lands in certain states, and all other mineral districts of the United States, for domestic, mining, or agricultural purposes, does not include the mineral land of the state of Oregon. *English v. United States* (U. S.) 116 Fed. 625, 626, 54 C. C. A. 81 (citing *United States v. Smith* [U. S.] 11 Fed. 487; *Same v. Benjamin* [U. S.] 21 Fed. 285).

#### **All other officers.**

The term "all other officers," as used in a constitutional provision designating a separate mode of election for "county officers" and "city, town and village officers" and "all other officers," includes such officers as are not required to reside and perform the duties of their office either within their counties or within their cities, and includes, above all, an officer who is appointed both for city and county, and neither performs all his work within the city and county, nor is

obliged to reside in either. In *re Whiting*, 2 Barb. 513, 516.

"All other school officers," as used in How. Ann. St. § 5132, as amended by the act of 1885 requiring a majority vote to elect the trustees and "all other school officers," means the moderator, director, and assessor, who comprise the board of the primary school district. *Cleveland v. Amy*, 50 N. W. 293, 88 Mich. 374.

#### **All other ordinances.**

"All other ordinances of said city," as used in a bond requiring an applicant for a license to keep a barroom to observe all other ordinances of said city, means all other ordinances on the subject of licensing barrooms and drinking shops, and not all of the ordinances of the city. In *re Schneider*, 8 Pac. 289, 293, 11 Or. 288.

#### **All other perils, losses, etc.**

Where a marine policy insures the vessel against perils of the seas, men of war, fire, etc., and "all other perils, losses and misfortunes that shall come to the damage of the ship," such phrase means only such perils as are ejusdem generis with those particularly enumerated. *Phillips v. Barber*, 5 Barn. & Ald. 161, 163.

#### **All other permanent fixtures.**

The phrase "all other permanent fixtures," in a fire policy reciting that the insurer shall not be liable unless liability is specifically assumed for loss to store or office furniture or fixtures, and describing the property insured as a building including gas, steam, and water pipes, and "all other permanent fixtures," is used in connection with such fixtures as gas, steam, and water pipes, and does not cover counters, shelving, and office furniture, which might be removed without injury to the building. *Banyer v. Albany Ins. Co.*, 83 N. Y. Supp. 65, 66, 85 App. Div. 122.

#### **All other places.**

A place where intoxicating liquors are sold at retail is not within the phrase "all other places of accommodation and amusement," as used in *Bates' Ann. St. § 4426*, subd. 1, which provides for the equal accommodation of all persons at inns, restaurants, eating houses, barber shops, public conveyances on land or water, theaters, and all other places of public accommodation and amusement, there being considerable dissimilarity between saloons and the places previously mentioned. *Kellar v. Koerber*, 55 N. E. 1002, 1003, 61 Ohio St. 388.

#### **All other proceedings.**

Pol. Code, § 3787, providing that a tax deed duly acknowledged is conclusive evidence of the regularity of "all other proceed-

ings" from the assessment, inclusive, up to the execution of the deed, refers to the acts and proceedings required to be done and had at the hands of the public officers intrusted with the various steps leading up to the execution of the tax deed, and not to something required to be done by the applicant for the deed. Such a deed is not prima facie evidence that the tax purchaser served the 30-day notice on the owner before the expiration of the time for redemption or before he applied for a deed. *Miller v. Miller*, 81 Pac. 247, 248, 96 Cal. 376, 81 Am. St. Rep. 229.

#### ALL POLICIES CONCURRENT.

An insurance policy providing that permission was thereto given for carpenters to erect an addition, "all policies concurrent," indicates that the parties intended to agree that the policy to which this permission was attached and made a part should concur with the other policies in the terms of the permission, and that therefore the property in the addition was to be covered by all the policies. *Butterworth v. Western Assur. Co.*, 132 Mass. 489, 494.

#### ALL POSSIBLE CARE, SKILL, OR FORESIGHT.

"All possible care" has a broader and more unlimited meaning than "utmost care," which is the degree of care required of a carrier of passengers. *Houston & T. C. R. Co. v. George (Tex.)* 60 S. W. 813, 314.

In an instruction that a carrier of passengers must use "all possible care," the phrase "all possible care" has a broader and more unlimited meaning than "utmost care." The word "possible" as used in this connection means "capable of being done." From the charges given, the jury must have understood that the carrier was bound to do everything that it was capable of doing to prevent the injury. The term "all possible care" might be understood by one man to mean all that the party could foresee, while it might mean to another all that might have been done as viewed after the occurrence; and the law does not require everything to be done which might be foreseen, but only such as might appear to be necessary. Thus the instruction was erroneous. *International & G. N. Ry. Co. v. Welch*, 24 S. W. 390, 391, 86 Tex. 203, 40 Am. St. Rep. 829.

"All possible skill and care," as applied to the operation of a street railway, means every reasonable precaution in the management and operation of the cars to prevent injury to passengers; that is, good tracks, safe cars, experienced drivers, careful management, and judicious operation in every respect. *Topeka City Ry. Co. v. Higgs*, 16 Pac. 667, 674, 38 Kan. 375, 5 Am. St. Rep. 754.

"All possible foresight," as used with reference to the care required of a street railway company, means more than "all possible skill and care," and imports, in addition, anticipation, if not knowledge, that the operation of such cars will result in danger to passengers, and that there must be some action with reference to the future, a provident care to guard against such occurrences, and a wise forethought and prudent provision that will avert the threatened evil, if human thought or action can do so. *Topeka City Ry. Co. v. Higgs*, 16 Pac. 667, 674, 38 Kan. 375, 5 Am. St. Rep. 754.

#### ALL POSSIBLE DISPATCH.

See "With All Possible Dispatch."

#### ALL RAIL.

Where the contract of a carrier is that the goods shall be carried "all rail," such expression constitutes a direction by the owner and an agreement by the carrier for transportation by rail as far as practicable, and hence the necessary crossing of ferries is not a deviation. *Maghee v. Camden & A. R. Transp. Co.*, 45 N. Y. 514, 521.

#### ALL REASONABLE CARE AND CAUTION.

The expression "all reasonable care and caution" would seem to require a higher degree than ordinary care, which is the care a railroad company is required to use in keeping its apparatus to prevent the escape of fire to adjoining property in repair. *St. Louis S. W. Ry. Co. of Texas v. Gentry (Tex.)* 74 S. W. 607, 608 (citing *International & G. N. Ry. Co. v. Timmermann*, 61 Tex. 660, 663).

#### ALL RIGHT.

A statement by the agent of an insurance company, on being informed that insured property was vacant, that "it was all right," was held to be a waiver of a condition providing that the policy should be void if the premises became unoccupied without the consent of the company indorsed on the policy. *Palmer v. St. Paul Fire & Marine Ins. Co.*, 44 Wis. 201, 207.

The words "all right," in a telegraph message, "all right, sell 100 bales of each described" at a certain price, indicate that this was a reply to some previous message, and are notice of such fact to the telegraph operator. *Western Union Tel. Co. v. Birge-Forbes Co.*, 69 S. W. 181, 182, 29 Tex. Civ. App. 526.

The words "all right," in a statement by the seller of a horse to the buyer that the horse is all right, amounts to a warranty that the horse is reasonably fit for the use for which it is desired by the purchaser. It



is what the purchaser would naturally understand and the seller must be presumed to have intended. *Smith v. Justice*, 13 Wis. 600, 602.

A warranty that a span of ponies is "all right for livery purposes" is not a warranty that they are not with foal. *Whitney v. Taylor*, 54 Barb. 536, 539.

### ALL SUCH.

Where a city charter authorized the city to license "all such" business, callings, trades, and employments as a common council may require to be licensed and as are not prohibited by the laws of the state, the words "all such" were employed as indicative of qualification in reference to that subdivision only. The reading is plain and the meaning manifest—all such business, callings, trades, and employment as the common council may require to be licensed and as are not prohibited by the laws of the state, the two latter clauses alone setting the limit of the delegated power. The provision is broad enough to include all that the common council may require to be licensed under the restriction of the succeeding clause. *Lent v. Portland*, 71 Pac. 645, 647, 42 Or. 488.

### ALLEGATION.

See "Immaterial Allegation or Averment"; "Material Allegation."

"Allegations," in law, are statements of facts in pleadings, affirmed on one side and denied on the other. *Nash v. Towne*, 72 U. S. (5 Wall.) 689, 699, 18 L. Ed. 527.

The word "allegation," in legal parlance, usually denotes the formal averments of the parties interested, setting forth the issue, which they are prepared to prove. Mere allegations, usually undenied, are not usually a sufficient foundation for a judicial or a quasi judicial determination. In accordance with this definition, Laws 1880, c. 14, being a portion of the charter of the city, providing that after hearing the proofs and allegations of all parties interested in land taken for public improvements, the common council shall assign a time for hearing objections to the confirmation of the commissioners' report, and at the time assigned shall hear the allegations of all persons interested, and take proof in relation thereto, and confirm the same, or set it aside, does not authorize the council to set aside such report on the unverified allegations, not supported by proof, of the alderman who represents the ward in which the street was proposed to be obtained, and of the assistant city attorney. *Schneider v. City of Rochester*, 54 N. E. 721, 722, 160 N. Y. 165.

An "allegation," as the term is used in pleadings, is the statement of what one can

prove; the positive assertion of a fact. It is not the office of a demurrer to allege facts, and hence a statute providing that "allegations in pleadings shall be liberally construed" does not mean that demurrers shall be liberally construed. *Merrill v. Pepperdine*, 36 N. E. 921, 922, 9 Ind. App. 416.

### ALLEGATION OF FACULTIES.

Where alimony is demanded, the statement of the wife as to the means at the disposal of the husband is technically called an "allegation of faculties." *Wright v. Wright*, 3 Tex. 168, 179.

### ALLEGE—ALLEGED.

As alleged or otherwise, see "Otherwise."

In an indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676] relating to conspiracies to defraud the United States and charging accused with an intent to defraud by obtaining a dismissal of certain suits which might be brought by the United States to recover certain lands "alleged" to have been fraudulently obtained from the United States, "alleged" must be taken in its usual significance of meaning "claimed," and hence the indictment is defective, since the use of the word "alleged" leaves the fraud a question. *United States v. Milner* (U. S.) 36 Fed. 890, 891.

Where an answer in an action for damages for infringement of a patent for an improvement in net fabrics admits that a portion of the goods sold by respondents was fabric "alleged" by the complainant to be such as is described and claimed in said letters patent, "alleged" should be construed to mean "alleged" in the bill. *Chase v. Fillebrown* (U. S.) 58 Fed. 374, 376.

"Alleged," as used in Const. 1848, art. 2, § 9, providing for a trial before a jury of the county in which the offense is alleged to have been committed, means as "charged" or "stated" in the indictment or information. *Watt v. People*, 126 Ill. 9, 33, 18 N. E. 340, 1 L. R. A. 403.

"There may be a difference in meaning between the word 'alleges' in the original section and the words 'setting forth' in the amended section (Act 1881, § 10, as amended by Laws 1889, c. 30, § 7, providing that: 'When any creditor . . . shall petition to the court or judge, . . . setting forth that such debtor has' concealed and keeps a large amount of his unexempt property, and all evidence thereof, from his said assignee, with intent to delay and defraud his creditors'), but, whatever the difference may be, it is too slight to indicate an intent to change the rule on so important a matter as to what the creditor must state in order to

be allowed to search the conscience of the insolvent. In re Harrison, 46 Minn. 331, 334, 48 N. W. 1132, 1133.

#### As admission of truth.

The words "alleged fact" in a reply, referring to an allegation of defendant in the answer as an alleged fact, cannot be considered as an admission of the truth of such fact. *Day v. Mill Owners' Mut. Fire Ins. Co.*, 38 N. W. 113, 117, 75 Iowa, 694.

The word "alleged," in an instruction referring to an instrument as an "alleged" codicil of a will, cannot be construed as casting discredit upon its validity, any more than would a reference to the codicil, without the use of the word "alleged," be an announcement in favor of its validity; by such use of the word the jury cannot be considered to have been instructed that the instrument was not a codicil. *Smith v. Henline*, 51 N. E. 227, 232, 174 Ill. 184.

The use of the word "alleged" in instructions in a personal injury case, which refers to the "alleged" negligence of a party, can only be construed as showing that the court is noncommittal on the question of whether there is or there is not negligence. *West Chicago St. R. Co. v. Petters*, 63 N. E. 662, 664, 196 Ill. 298.

## ALLEGIANCE.

"Allegiance," as the term is generally used, means fealty or fidelity to the government of which the person is either a citizen or subject. *Murray v. The Charming Betsy*, 6 U. S. (2 Cranch) 64, 120, 2 L. Ed. 208.

"Allegiance" was said by Mr. Justice Story to be "nothing more than the tie or duty of obedience of a subject to the sovereign, under whose protection he is." *United States v. Wong Kim Ark*, 18 Sup. Ct. 456, 461, 169 U. S. 649, 42 L. Ed. 890.

Allegiance is that duty which is due from every citizen to the state, a political duty binding on him who enjoys the protection of the commonwealth, to render service and fealty to the federal government. It is that duty which is reciprocal to the right of protection, arising from the political relations between the government and the citizen. *Wallace v. Harmstad*, 44 Pa. (8 Wright) 492, 501.

By "allegiance" is meant the obligation to fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign, in return for the protection which he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. A citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen

or subject of another government or sovereign, and an alien while domiciled in a country owes it a temporary allegiance, which is continuous during his residence. *Carlisle v. United States*, 83 U. S. (16 Wall.) 147, 154, 21 L. Ed. 426.

"Allegiance," as defined by Blackstone, "is the tie or ligamen which binds the subject to the King, in return for that protection which the King affords the subject. Allegiance, both expressed and implied, is of two sorts, the one natural, the other local, the former being perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the King's dominions immediately upon their birth, for immediately upon their birth they are under the King's protection. Natural allegiance is perpetual, and for this reason, evidently founded on the nature of government. Allegiance is a debt due from the subject upon an implied contract with the prince that so long as the one affords protection the other will demean himself faithfully. Natural-born subjects have a great variety of rights which they acquire by being born within the King's allegiance, which can never be forfeited but by their own misbehavior; but the rights of aliens are much more circumscribed, being acquired only by residence, and lost whenever they remove. If an alien could acquire a permanent property in lands, he must owe an allegiance equally permanent to the King, which would probably be inconsistent with that which he owes his natural liege lord; besides, that thereby the nation might, in time, be subject to foreign influence and feel many other inconveniences." Indians within the state are not aliens, but citizens owing allegiance to the government of a state, for they receive protection from the government and are subject to its laws. They are born in allegiance to the government of the state. *Jackson v. Goodell*, 20 Johns. 188, 191.

Allegiance is the obligation of fidelity and obedience which every citizen owes to the state. *Pol. Code Cal.* 1903, § 55; *Pol. Code Mont.* 1895, § 81; *Rev. Codes N. D.* 1899, § 14.

## ALLEGIANCE BY BIRTH.

"Allegiance by birth" is said to be that which arises from being born within the dominions and under the protection of a particular sovereign. *United States v. Wong Kim Ark*, 18 Sup. Ct. 456, 461, 169 U. S. 649, 42 L. Ed. 890.

## ALLEY.

An alley is not meant primarily as a substitute for a street, but only as a local accommodation to a limited neighborhood, and the public has no general right of way through it. *Beecher v. People*, 38 Mich. 289, 291, 31 Am.

Rep. 316; *Horton v. Williams*, 58 N. W. 369, 99 Mich. 423, 427.

An "alley" "is conventionally understood, in its relation to towns and cities, to mean a narrow street in common use." *Bailey v. Culver*, 12 Mo. App. 175, 183.

The use of the words "street" and "alley," in exclusion of the more general term "highway," in Rev. St. c. 113, § 9, which enacts that any person found drunk in any street, "alley," or other place shall be punished therefor, indicates that the public road of the country was not intended, but only the avenues of the compact part of the town. *State v. Stevens*, 36 N. H. 59, 63.

"Streets and alleys" ordinarily relate exclusively to the ways or thoroughfares of towns and cities. They are laid out and dedicated to public use, and especially for the use and convenience of the property holders of the towns or cities, by the proprietor thereof, or laid out and established for the same purposes by the corporation authorities. *Debolt v. Carter*, 31 Ind. 355, 367.

An "alley" is a narrow way, less in size than a street, and if a public one it is a highway, and in general is governed by the rules applicable to streets. *Kalteyer v. Sullivan*, 46 S. W. 288, 290, 18 Tex. Civ. App. 488.

An alley is no more than a way subject to a modified supervision and liable to be used for drainage and other urban service under municipal regulations, and is intended for the convenience of adjacent property, but it is not a "highway" in the proper sense of the term, nor intended for general travel or passage like streets. *Paul v. City of Detroit*, 32 Mich. 108, 111; *Face v. City of Ionia*, 51 N. W. 184, 186, 90 Mich. 104.

An alley is not a public highway so that an obstruction thereof can be regarded as a public wrong. *Bagley v. People*, 5 N. W. 415, 43 Mich. 355, 38 Am. Rep. 192.

#### In boundaries.

Where the owner of an alley and adjoining lots conveys part of them, describing them as fronting on a certain street and "with a depth of 85 feet to an alley 15 feet in width," the description is to be construed as carrying title to the middle of the alley, with an easement of way over the other half. *Lindsay v. Jones*, 26 Pac. 297, 21 Nev. 72.

#### As easement in surface only.

An "alleyway," as the term is used to denote an easement to lots bordering on an alley, means simply the right to use the same for ingress and egress to and from the lots, and does not include any right to the land beneath or above the surface; hence the owner of such easement is not entitled to an injunction to restrain the owner of the land

from joining two buildings abutting the "alley" at an elevation of 10 feet, leaving a sufficient space for the use of the "alley" as a way. *Sutton v. Groll*, 5 Atl. 901, 902, 42 N. J. Eq. (15 Stew.) 213.

#### Opening to a street.

A conveyance granting an easement to a "right of way of an alley" construed to mean a passageway leading from the land conveyed, and not to be satisfied by a mere open space of land in the rear of the land conveyed which is inclosed by other lands over which the grantee has no right to pass. *McConnell v. Rathbun*, 9 N. W. 426, 46 Mich. 303.

"Alley," as used in an order directing defendants to restore a certain "alley," so as to allow the plaintiff free and common use thereof by opening an "alley" of a certain width over the rear of defendant's lot, means an open and unobstructed way of less than the usual width of a street, and the order to open and provide an alley is not fulfilled by providing a passageway through which a person may pass by opening and closing doors and gates; such means of passage are not within the reasonable and natural understanding of an "alleyway." *Appeal of Hacke (Pa.)* 31 Pittsb. Leg. J. 315, 316.

#### As a private way.

Where the term "alley" is used in a deed or in a plat, it will be taken to mean a private alley, where the term "private" is prefixed, or where the context requires that a different meaning than that of a public alley is to be assigned to the term. *Elliott, Roads & S. (2d Ed.)* § 24; *City of Chicago v. Borden*, 60 N. E. 915, 918, 190 Ill. 430 (quoting *Elliott, Roads & S. [2d Ed.]* § 24).

#### Street distinguished.

An "alley" is a narrow passageway in a city, as distinguished from a public street. *Praigg v. Western Paving & Supply Co.*, 42 N. E. 750, 751, 143 Ind. 358; *Winston v. Johnson*, 45 N. W. 958, 959, 42 Minn. 398; see, also, *Face v. City of Ionia*, 51 N. W. 184, 186, 90 Mich. 104.

In *Bailey v. Culver*, 12 Mo. App. 183, an alley was said, when not private, to mean a narrow street in common use, and was declared a road in *Re Sharet's Road*, 8 Pa. (8 Barr) 92. In *Bagley v. People*, 43 Mich. 355, 5 N. W. 415, 38 Am. Rep. 192, the court said: "It is designed more especially for the use and accommodation of the owners of property abutting thereon, and to give the public the same unqualified rights therein would defeat the very end and object intended." See, also, *Horton v. Williams*, 99 Mich. 427, 58 N. W. 369. Alleys are not intended to be substitutes for streets, but to serve as means of accommodation to a limited neighborhood for chiefly local conven-

lence. *Beecher v. People*, 38 Mich. 289, 291, 31 Am. Rep. 316 (cited in *Dodge v. Hart*, 83 N. W. 1063, 1064, 113 Iowa, 685, where it is said that "the principal purpose of a public alley is to furnish the owners of abutting lots and those dealing with them convenient access thereto. The main lines of travel are in the streets").

While the word "alleys" generally means narrow passageways in cities, its use in a constitutional provision furnishes no reason for claiming that streets were embraced within the provision. In *re Woolsey*, 95 N. Y. 135, 140.

Where a statute declares that all streets, roads, and alleys in a particular village, which have been worked and improved and are now used as such, shall be deemed public highways, the question whether a certain way is a street, road, or alley is one to be determined by the fact whether it comes within the provision of the statute, and not by the rules of the common law or the general statutes. *Hickok v. Village of Plattsburgh*, 41 Barb. 130, 131.

## ALLOCATION.

"Allocation" is the formal address of the judge to the prisoner asking him why sentence should not be pronounced. *State v. Ball*, 27 Mo. 324, 326.

## ALLODIAL.

Const. art. 1, § 14, provides that all lands within the state are declared to be allodial, and feudal tenures are prohibited. Held, that the word "allodial" means free, not subject to the burdens and restrictions on alienation connected with feudal tenures; but this provision does not prohibit the Legislature from regulating the conveyance of dower or other rights growing out of the domestic relations as relating to title to real property. *Barker v. Dayton*, 28 Wis. 387, 384.

"Allodial lands," at common law, were those in which the owner had a complete and absolute property, free from all services to any particular lord. *Wallace v. Harmstad*, 44 Pa. (8 Wright) 492, 499.

## ALLODIUM.

"As defined by Blackstone, allodium is the land possessed by a man in his own right, without owing any rent or service to any superior." *McCartee v. Orphan Asylum Soc.*, 9 Cow. 511, 513, 18 Am. Dec. 516 (quoting 2 Bl. Comm. 104).

## ALLONGE.

"Allonge" is an additional piece of paper attached to a note or a similar instrument in

order to make further indorsement thereon. *Fountain v. Bookstaver*, 31 N. E. 17, 141 Ill. 461; *Crosby v. Roub*, 16 Wis. 616, 626, 84 Am. Dec. 720.

An allonge is a slip of paper which, when convenient or necessary, may be annexed to an instrument on which subsequent indorsements may be written, which shall have the same effect as if written on the instrument itself, such paper being deemed a part thereof. *Haug v. Riley*, 29 S. E. 44, 46, 101 Ga. 372, 40 L. R. A. 244; *French v. Turner*, 15 Ind. 59, 62; *Crutchfield v. Easton*, 18 Ala. 337, 338.

Where an indorsement of a negotiable paper is made on a piece of paper so attached to the original instrument as in effect to become part thereof or be incorporated into it, such addition is called an "allonge." That device had its origin in cases where the back of the instrument had been covered with indorsements or writing, leaving no room for further indorsements thereon. An indorsement on such a paper transfers the instrument. *Bishop v. Chase*, 56 S. W. 1090, 1093, 156 Mo. 153, 79 Am. St. Rep. 515; *Osgood's Adm'rs v. Artt* (U. S.) 17 Fed. 575, 577.

"Allonge," as defined by Webster, is a paper attached to a bill of exchange for receiving indorsements too numerous to be written on the back of the bill itself, and hence where the mortgage was assigned by writing indorsed on the back of it, the mortgage not being attached to a note which was neither assigned nor indorsed, and there being plenty of room remaining blank on the back of the note for indorsement, the term "allonge" could not be construed to include such mortgage, and thus operate as an assignment of the note, in that the mortgage was to be regarded as an allonge to the note. *Doll v. Hollenbeck*, 28 N. W. 286, 288, 19 Neb. 639.

## ALLOPATHIC PRACTICE.

"Allopathic practice is the ordinary method of practicing medicine, adopted by the great body of learned and eminent physicians, which is taught in their institutions, established by their highest authorities, and accepted by the larger and more respectable portion of the community"; but whether a physician practices such method or not cannot be proved by general reputation as a physician. *Bradbury v. Bardin*, 34 Conn. 452, 453.

## ALLOT.

The language used in treaties to Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of

the treaty, they should be considered as used only in the latter sense, and to contend that the word "allotted," in reference to land guarantied to Indians in certain treaties, indicates a favor conveyed rather than a right acknowledged, would do injustice to the understanding of the parties. *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 582, 8 L. Ed. 483; *Minnesota v. Hitchcock*, 22 Sup. Ct. 650, 659, 185 U. S. 373, 46 L. Ed. 954.

"Allotted," as used in a contract declaring that the shares of stockholders were "allotted" to them on the distribution, etc., means "issued" or "paid." *Anthony v. American Glucose Co.*, 41 N. E. 23, 25, 146 N. Y. 407.

#### As conveying full title.

To "allot" is usually understood as meaning to set apart a portion of a particular thing or things to some particular person. *Glenn v. Glenn*, 41 Ala. 582. In the case of *Best v. Polk*, 85 U. S. (18 Wall.) 112, 21 L. Ed. 805, where by the terms of a treaty there was no provision for a patent, the term "allotted" was held to pass the full title. *Meehan v. Jones* (U. S.) 70 Fed. 453, 454.

To "allot" means to set apart a thing to a person as his share, as to allot a fund or land; and the term "allotted," in a deed in partition, in itself implies a full partition of the land. *Fort v. Allen*, 14 S. E. 685, 686, 110 N. C. 183.

## ALLOW.

See "Duly Allowed."

"Allow" is defined as follows: "To grant, to admit; to suffer; to yield; to grant license to; to permit; to tolerate; to fix; to give." *Thurman v. Adams* (Miss.) 33 South. 944, 945.

"Allowed," as used in the indorsement by a justice of the peace on a statement of appeal that it was filed and "allowed," is equivalent to "adopted" in Comp. Laws, requiring the statement on appeal to be settled or "adopted" by the justice. *City of Chamberlain v. Putnam*, 73 N. W. 201, 202, 10 S. D. 360.

In Rev. Code, c. 9, § 1, providing that the probate court shall have jurisdiction and authority to examine and "allow" the accounts of executors, administrators, and guardians, "allow" means nothing but the sanction or approbation which the court gives to the acts of the executor or administrator as manifested by the allowance of the account. *Gildart's Heirs v. Starke*, 2 Miss. (1 How.) 450, 457.

A verdict is not "allowed" and recorded within Gen. St. c. 149, § 21, giving complainant in an action for assessment of damages for flooding lands the right to elect to take damages in gross within three months after

the verdict is "allowed," until the exceptions have been overruled by the Supreme Court, and complainant was entitled to judgment and execution upon the verdict of the sheriff's jury. *Hamilton v. Farrar*, 131 Mass. 572, 573.

#### As claimed.

Comp. Laws, § 1324, provides for an appeal from a determination or an award of damages on the establishment of a highway, provided the amount "allowed" in such bill does not exceed \$100; and section 1327 provides for an appeal to the circuit court in case the amount of damages claimed exceed \$100. Held, that the word "allowed," as used in section 1324, will be held to mean "claimed on appeal," and not the amount allowed by the supervisors. *Town of Dell Rapids v. Irving*, 68 N. W. 313, 314, 9 S. D. 222.

#### Right of determination implied.

To "allow" an account or claim is to accept or admit it as a legal demand, and the authority to audit and allow an account primarily implies the right to determine whether it is an accurate and just claim. Authority to allow an account does not necessarily negative the power to disallow. *People v. Gilroy*, 31 N. Y. Supp. 776, 780, 82 Hun, 500.

#### As direct in will.

In a will which recited, "I 'allow' my daughter Mary to take care of my said daughter Betsy," "allow" was used as meaning "direct." *Cabeen v. Gordon*, 1 Hill, Eq. 51, 56.

"Allow," as used in a will devising testator's real estate to his wife for life, and providing that after the death of my said wife I "allow" all my estate to be disposed of at public sale, the proceeds to be equally divided between certain beneficiaries, "allow" is "here used in the sense of positive direction, for without the sale the testator's expressed intention in respect to distribution could not be carried out." *Ramsey v. Hanlon* (U. S.) 33 Fed. 425, 428.

#### Discretion indicated.

In Pol. Code, § 4597, providing that the whole number of deputies "allowed" the sheriff is one undersheriff and not to exceed the following number of deputies, "allowed" is not used in the sense of a power granted to the sheriff to exercise his discretion in making appointments within the maximum limits, but he is subject to the control of the board of commissions. *Jobb v. Meagher County*, 51 Pac. 1034, 1038, 20 Mont. 424.

Rev. St. c. 64, § 18, authorizing the court to appoint or "allow" any person as next friend of an infant to commence or defend a suit in his behalf, means that the court shall have a discretion in appointing or allowing other than the guardian to institute

or defend such suit. *Patterson v. Pullman*, 104 Ill. 80, 87.

#### As entering allowance.

In Rev. St. § 4461, providing that the commissioners shall, upon actual view of the premises sought to be taken for public use for the construction of a ditch, fix and "allow" compensation for the lands appropriated to each person or corporation making application, the word "allow" relates to the entering upon their journal an order fixing and allowing the amount of compensation to a landowner who has made application therefor, which act exhausts their power. Nothing remains but for the county auditor to draw his warrant on the county treasurer for the sum so allowed. *Zimmerman v. Canfield*, 42 Ohio St. 463, 468.

#### As fix.

"Allowed," as used in Rev. St. U. S. § 5197 [U. S. Comp. St. 1901, p. 3493], providing that any national bank may charge the interest "allowed" by the laws of the state where it is located, means fixed or established by the law of such state. *Guild v. First Nat. Bank*, 57 N. W. 499, 501, 4 S. D. 566.

In the national banking act authorizing the national banks to charge and receive interest at the rate "allowed" by the laws of the state or territory where the bank is located, and declaring that when no rate is "fixed" by the laws of the state or territory they are "allowed" a rate not exceeding 7 per cent., the word "fixed" is used in the same sense as the word "allowed." *Hinds v. Marmolejo*, 60 Cal. 229, 231; *Daggs v. Phoenix Nat. Bank* (Ariz.) 53 Pac. 201, 204; *Wolverton v. Exchange Nat. Bank*, 39 Pac. 247, 248, 11 Wash. 94.

"Allow," as used in Sess. Laws 1885, p. 83, providing that the district attorneys shall receive such salaries for their services as the board of county commissioners of the proper county shall "allow," is synonymous with the word "fix" as used in a resolution of the board stating that they "fix" the salary of the district attorney at a certain sum. *Polk v. Minnehaha County*, 37 N. W. 93, 94, 5 Dak. 129.

#### As give, grant, or pay.

In a will which recited that testatrix bequeathed to her daughter Betsy one mulatto girl, and that at Betsy's decease testatrix allowed another daughter to have the mulatto girl, "allow" was used as synonymous with "give." *Cabeen v. Gordon*, 1 Hill, Eq. 51, 58.

"Allow," as used in an agreement providing that one of the parties thereto was to "allow" the other a certain sum yearly out of a certain fund, is used in the sense of "give" or "pay." This sense, though uncom-

mon, is not entirely unknown. *Straus v. Wanamaker*, 34 Atl. 648, 652, 175 Pa. 213.

In the supplementary articles to the Choctaw treaty of September 28, 1830 (7 Stat. 340), wherein no provision is made for patents, the terms "shall be entitled to," "there is allowed," "may locate," "shall be granted," "there is given," are used synonymously with respect to reservations. *Meehan v. Jones* (U. S.) 70 Fed. 453, 455.

#### As intend.

In a written instrument executed by defendant reciting that "this is to show that I allow to give" W. J. a certain sum to be paid in two years after date, "allow" is equivalent to "intend" to give, and simply expresses a present intention to give the person named therein the sum stipulated within two years, and constitutes no valid obligation which can furnish a sufficient ground for an action. *Harmon v. James*, 7 Ind. 263, 264.

A will providing that "I also 'allow' my son Henry to give his mother a support off my plantation during her lifetime," expresses an intention that his son should support his wife, during her life, off the plantation, the testator being an illiterate man, and it not being uncommon for that class of persons to use the word "allow" as synonymous with that of intention—"I allow to go to town to morrow," "I allow for my wife to have a support off my plantation when I die," etc. The testator used the word "allow" in this clause of the will as expressive of his intention that his son, to whom he had given his homestead, should support his mother off the same during her life. *Hunter v. Stembridge*, 12 Ga. 192, 194.

#### Knowledge implied.

"The word 'allow' is defined thus: 'To suffer; to tolerate;' and, as used in a definition of 'permit' as to allow, implies knowledge of what is to be permitted." *Gregory v. United States* (U. S.) 10 Fed. Cas. 1195, 1198.

The term "allow" implies knowledge and consent. Under Code, § 1590, providing that any person who shall sell or give away any liquors unlawfully, or allow the same to be sold or given away, knowledge of the person charged is necessary. *Thurman v. Adams* (Miss.) 33 South. 944, 945.

#### As permit.

Permit distinguished, see "Permission—Permit."

A provision in a will "allowing" the wife to have any part of the dwelling house means that she is "permitted" to have such part, and confers a personal privilege merely. *Kearns v. Kearns*, 107 Pa. 575, 578.

A contract for the purchase of a boiler, providing that it shall be "allowed 130

pounds of steam working pressure by United States inspectors," should not be construed as an assurance that the boiler contracted for would produce and maintain a working pressure of that amount, but should be held to refer only to the capacity of the boiler, and plainly refers to the government inspection of boilers under Rev. St. U. S. § 4418 [U. S. Comp. St. 1901, p. 3024], and that it would be such a boiler that such inspectors would permit a working pressure of 130 pounds and set the safety valves accordingly. *Milwaukee Boiler Co. v. Duncan*, 58 N. W. 232, 234, 87 Wis. 120, 41 Am. St. Rep. 33.

The word "allow" is not as positive as the word "permit," being more of a synonym with the word "suffer," while the word "permit" denotes a decided assent. *Wilson v. State*, 46 N. E. 1050, 1051, 19 Ind. App. 389.

"Allowing," as used in a reservation in a deed commencing with the grantee "forever hereafter allowing all persons to pass, repass," etc., presupposes the absence of a right to pass and repass without the permission of the grantee, so as to create, not a reservation or an exception, but a condition subsequent. *Parsons v. Miller* (N. Y.) 15 Wend. 561, 564.

"Allowed," as used in an insurance policy providing that it shall be void if there be kept, used, or "allowed" gasoline on the premises, means "allowed to be kept or used by some third person," and will be so construed, even though such meaning is covered by the words "kept" and "used," so that the condition is not violated by merely permitting gasoline to be carried through the building on the premises. *London & L. Fire Ins. Co. v. Fischer* (U. S.) 92 Fed. 500, 502, 34 C. C. A. 503.

#### **Power to permit or refuse implied.**

"Allow," as used in a contract whereby an improvement company sold the hydraulic power arising from a dam and a canal, covenanting that it would not construct or "allow" to be constructed any dam or other work below on said river which should raise the water beyond the ordinary stage at the foot of the rapids, must be construed to have been used in its ordinary and popular sense, implying an understanding or expectation of the parties at the time that the improvement company would continue in such relation to the property that it might, if so disposed, by some affirmative act on its part facilitate or permit the construction of a dam below the rapids, which the contract intended to prevent. The word "allow," in its ordinary sense, means "to grant," "to admit," "to afford," or "to yield," "to grant license to," "to permit," from which is implied a power to grant some privilege or permission, and hence there was no breach of covenant where a dam had been constructed so as to raise the water above the ordinary stage at the point mentioned by the United States govern-

ment after its purchase of the property of the improvement company, for the purpose of improving navigation, after a foreclosure sale under a deed of trust given by the improvement company in which it had made no exception or reservation in respect to the construction of the dam below its water power, since it was not in a position to allow any such thing when the government entered upon the enterprise of improving the water power of the river, and rebuild the dam below the dam of the improvement company. The improvement company was in a position where it could prevent nothing; it could suffer nothing. The United States could proceed in the construction of this dam independently of the improvement company, without its consent, against its protest. When the United States stepped in and acquired dominion and control of the property for the purpose of improving the navigation, it had the right by virtue of its sovereign power to build a dam, and its act was not one covenanted against by the improvement company. *Doty v. Lawson* (U. S.) 14 Fed. 892, 893.

The word "allow" is ordinarily equivalent to the word "permit" or to the words "consent to." Its use in any given case assumes the existence of a power to refuse to allow, permit, or consent to, and the right to elect whether to grant or withhold the allowance or permission asked for. *Marshall v. Franklin Fire Ins. Co.*, 35 Atl. 204, 176 Pa. 628, 34 L. R. A. 159.

#### **As proved.**

Laws 1887, c. 548, requires the court to remove an assignee for creditors on the application of a majority of the creditors representing a majority in value of the debts "allowed." Held, that the term "allowed" as so used was evidently an oversight on the mistaken supposition of the Legislature that the statute provided for the allowance of claims, and that, in view of the fact that no such provision or proceeding existed, the word "allowed" must be given a reasonable construction, and be held to mean "allowed by the assignor or assignee" or "proved." The word "allowed" is not therefore to be limited to the establishment of a claim by judgment or order of court. *Burt v. Barnes*, 58 N. W. 790, 791, 87 Wis. 519.

#### **Something to allow from implied.**

In Act March 23, 1837 (P. L. 48), authorizing the chancellor to "allow" the commissioners, upon a commission in the nature of a writ de lunatico inquirendo, reasonable compensation, and the jurors fixed fees out of the estate of the person subject to the inquisition, the word "allow" impliedly premises a fund in court. It does not contemplate payment from the estate of the subject of the inquisition when no offices should be found. In *re Farrell*, 27 Atl. 813, 816, 51 N. J. Eq. (6 Dick.) 353.

**ALLOWANCE.**

See "Additional Allowance"; "Extra Allowance"; "Reasonable Allowance."  
Of widow, see "Statutory Allowances."

An "allowance" is that which is allowed; a share or portion allotted or granted; an appropriation for any purpose; a stated quantity, as of food or drink (Webster). *De Roche v. De Roche* (N. D.) 94 N. W. 767, 770.

"Allowance," as applied to accounts of executors and administrators, means nothing more than the sanction or approbation which the court gives to acts of the executor or administrator as manifested by his account. *Gildart's Heirs v. Starke*, 2 Miss. (1 How.) 450, 457.

**As act of judicial officer.**

The word "allowance" in Code, § 139, does not mean the act of the attorney in proceedings for the claim and delivery of personal property. It means the act of a judicial officer, and not one whose duties are purely ministerial. *Adams v. Henry* (N. Y.) 3 Wkly. Dig. 22.

**As compensation.**

An "allowance" is something conceded as a compensation; abatement; deduction; and in 1 Rev. St. 1876, p. 62, authorizing "allowances" by the board of commissioners of a county, permits a payment to a person for services voluntarily rendered and things voluntarily purchased for the county. *Carroll County Com'rs v. Richardson*, 54 Ind. 153, 159.

"Allowances," in an order granting trustees just "allowances," entitled them only to charges and expenses, but not to compensation. *State Bank at Elizabeth v. Marsh*, 1 N. J. Eq. (Saxt.) 288, 297.

**As fees or salary.**

Under a statute providing that fees of county officers shall be increased 50 per cent., "allowances" made to the sheriff for feeding prisoners are not increased, the word "fees" not including "allowances," which means, according to Webster, "to put upon allowance; to restrain or limit to a certain quantity of provisions or drink." The word "allowance" does not signify the compensation the sheriff earns by arresting prisoners or summoning juries or performing duties of like character, they being peculiar to the office which he holds, and under which he becomes entitled to fees. *Feagin v. Comptroller*, 42 Ala. 516, 522.

In construing Const. art. 3, § 8, prohibiting the Legislature from passing a private or local bill creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said

officers are elected or appointed, the court comments on the meaning of the word "allowance," and the omission of the words "salaries" and "stipends," which are defined as requital of some supposed service paid yearly or even portions of the year, and are the subject of a contract between the parties. The courts say: "We have yet to discover any employment of the word 'allowance' by lawmakers or others which is the exact equivalent of either of the words 'salary' or 'compensation.' Reference to the works of lexicographers shows Webster's definition to be: The act of allowing; granting or admitting; permission or license; that which is allowed; a portion appointed; a limited quantity of meat and drink when provisions fall short; a customary deduction from the gross weight of goods. The substance of the definitions is that an allowance is gratuitous; it ceases at the pleasure of the donor. Worcester gives a definition similar to that of Crabbe, but refers to the word 'salary' as one of the synonyms of 'allowance,' distinguishing them, however, by stating that the latter is gratuitous, and the former a stated compensation payable under a contract. Richardson's English Dictionary gives: To permit; to concede; to suffer; to ascend; to yield. Other lexicographers give definitions similar to those of Worcester and Crabbe, and seem to exclude the idea that the terms are analogous, except perhaps in a very loose and imperfect sense. It seems to us that the authors of the Constitution did not intend to include salaried officers within the meaning of the clause in question." *Mangan v. City of Brooklyn*, 98 N. Y. 585, 597, 50 Am. Rep. 705.

**As a gift or devise.**

The term "allowance" is ordinarily only another name for a gift or gratuity to a child or some other dependent. *Taylor v. Staples*, 8 R. I. 170, 179, 5 Am. Rep. 556.

A will providing that after the testator's property had remained with his family for the term of one year, then, after the "allowance of one-third of my property to my widow," the remainder should be divided among testator's children, entitles the widow to one-third of the testator's real and personal property in fee simple absolutely. *White v. Commonwealth*, 1 Atl. 33, 34, 110 Pa. 90.

**As a legal demand.**

"Allowance," as used in 1 Rev. St. 1876, p. 476, § 15, providing that a board of county commissioners shall make no "allowance" not specially required by the act to any county officer, either directly or indirectly, nor to any clerk, deputy, bailiff, or employé of such officer, should not be construed as embracing a legal demand which any of the officers named might have against the county, but only such matters as would otherwise, under other laws, have rested in the discretion



of the board. The law was not intended to take away the right of the board to allow all legal demands or accounts chargeable against the county, and hence the board could allow a sheriff for the value of certain candles, brooms, mops, and coal purchased by him for the use of the jail thereof, and necessary therefor and used therein. *Marion County Com'rs v. Reissner*, 58 Ind. 280, 263.

#### **Allowance to soldier or officer.**

A soldier who had enlisted for 3 years deserted at the expiration of 10 months, and, after being subsequently arrested, was restored to duty, with the loss of all pay and allowance due or to become due during the term of his enlistment. He was thereafter honorably discharged. Held, that under the term, "allowance" as used in the judgment of forfeiture everything was embraced which could be recovered by the government from the soldier in consideration of his enlistment and services, except a stipulated money compensation designated as "pay." *United States v. Landers*, 92 U. S. 77, 81, 23 L. Ed. 603.

The term "allowances" is sometimes used synonymously with "emoluments," as indirect or contingent remuneration, which may or may not be earned, but which is sometimes in the nature of compensation, and sometimes in the nature of reimbursement; but as used in a statute providing that military officers upon their discharge shall receive one year's pay and "allowances," it does not include commutation for traveling expenses, and hence the omission of such term from an amendment of such statute did not affect the right of such officers, upon their discharge, to a commutation for traveling expenses from the place where they are mustered out or discharged to the place where they were enlisted. *Sherburne's Adm'r v. United States*, 16 Ct. Cl. 491, 496, 500.

Acts Feb. 14, 1885, and Sept. 30, 1890, provide that a hospital steward after being retired is entitled to 75 per cent. of the pay and "allowances" of the rank on which he was retired. Held, that the word "allowances" does not include commutation for fuel and quarters. *Lander v. United States*, 30 Ct. Cl. 311, 318.

#### **Allowance to wife in divorce statutes.**

Under Civ. Code, § 139, which provides that, where a divorce is granted for an offense of the husband, the court may compel him to make such suitable "allowance" to the wife for her life, or for a shorter time, as it may deem just, the "allowance" will be construed as something more than a substitute for her interest in the community of property, or her right or inheritance in the property of the husband, and to be compensation for the work done to the wife. It proceeds upon the theory that the husband entered upon an obligation which, among other things, bound him to support the wife

during the period of their joint lives, and gave to her a right to share in the fruits and accumulations of his skill, and that by his own wrong deeds he forced her to sever the relation which enabled her to enforce this obligation, and for the wrong by which he thus deprived her from the benefit of the obligation he must make her compensation. *In re Spencer*, 23 Pac. 395, 396, 83 Cal. 460, 17 Am. St. Rep. 266.

The allowance specified in a statute providing that if a wife has no separate estate, or if it be insufficient for her maintenance, the chancellor, upon granting a divorce, must decree her an "allowance" out of the estate of the husband, "is not in fact alimony in the sense of the ecclesiastical law of England, but it is more strictly an arrangement in law, by a division of the estate of the parties, so as to return to the wife her just portion of that property which mutually belongs to both during the marriage, and which the labor and care of both may have equally contributed to procure and preserve. This allowance was intended to supply the wife with the means of commencing life anew after her expulsion from the household of the husband and the withdrawal of his liability for her maintenance and support, and to place her above actual destitution." *Smith v. Smith*, 45 Ala. 264, 268.

"Allowance," as used in Civ. Code, § 139, providing that, when a divorce is granted for an offense of the husband, the court may compel him to make such "suitable allowance" to the wife for her support for life, or for a shorter period as the court may deem just, construed to include the allowance of a gross sum to the wife. *Robinson v. Robinson*, 21 Pac. 1095, 1096, 79 Cal. 511 (citing *Jeter v. Jeter*, 36 Ala. 391; *Platt v. Platt*, 9 Ohio [9 Ham.] 37).

The term "allowance," as used in Rev. Code 1899, § 2761, providing that on divorce the court may grant alimony in a gross amount in lieu of an allowance at stated periods, permits the court to grant a gross sum as an allowance. *De Roche v. De Roche* (N. D.) 94 N. W. 767, 770.

#### **ALLOWED BY LAW.**

When the term "allowed by law" is used in a statute, it is to be construed as meaning allowed by the statute law, and not to have reference to the general law or legal right. *Brinkerhoff v. Bostwick*, 1 N. E. 613, 665, 99 N. Y. 185.

The compensation from fees allowed a civil officer, to an amount to be prescribed by the Commissioner of Internal Revenue, not to exceed a certain amount a day, is compensation "allowed by law," within 18 Stat. c. 328, § 3, prohibiting civil officers from receiving any compensation in addition to that "allowed them by law," the Commis-

sioner's authority to fix such compensation, the Comptroller's authority to pass it, and the Treasurer's authority to pay it, all being "allowed by law." *Hedrick v. United States*, 16 Ct. Cl. 88, 103.

## ALLUDE.

To "allude" means to refer to something not directly mentioned, to have reference to, and as used in Gen. St. tit. 1, c. 73, § 7, providing that, on the trial of all indictments against persons charged with crime, the neglect of a defendant to testify shall not be "alluded" to or commented upon by the prosecuting attorney or the court, the court rightly refuses an instruction in reference to such failure to testify. *State v. Pearce*, 57 N. W. 652, 655, 56 Minn. 228.

## ALLUVIAL.

Earthy deposits made to a tract of land situated along a river which become incorporated with the soil of the tract are usually called "alluvial accretions," and become the property of the riparian owner. *Welch v. Browning*, 87 N. W. 430, 431, 115 Iowa, 690.

"Alluvion" has been defined to be those accumulations of sand, earth, and loose stones or gravel brought down by rivers, which, when spread out to any extent, form what is called "alluvial land." It is an addition made to land by washing of the seas or rivers, and its characteristic is its imperceptible increase, so that it cannot be perceived how much is added in each moment of time. *Freeland v. Pennsylvania R. Co.*, 47 Atl. 745, 747, 197 Pa. 529, 58 L. R. A. 206, 80 Am. St. Rep. 850.

## ALLUVION.

As defined in Roman law, "alluvion" is an addition of soil to land by a river, so gradually and in so short a period that the change is imperceptible, or, to use a common expression, a latent addition, and Justinian says that it is added so gradually that no one can perceive how much is added at any one moment (Inst. Bk. 2, tit. 1, § 20), and the same rule was expressed in the English jurisprudence, and Bracton says (Book 2, c. 2) that alluvion is lands gained from the sea by a washing up of sand and earth so as in time to make it terra firma, and that if the gain be little by little, by small and imperceptible degrees, it shall go to the owner of the adjoining land. The test as to what is gradual and imperceptible in the sense of the rule is that the witnesses could see from time to time that progress had been made in the formation of the land, but could not perceive it while the process of formation was going on. In the light of the authorities, "alluvion" may be defined as addition to

riparian land, gradually and imperceptibly made by the water to which the land is contiguous. *Jefferis v. East Omaha Land Co.*, 10 Sup. Ct. 518, 521, 134 U. S. 178, 33 L. Ed. 872; *St. Clair County v. Lovington*, 90 U. S. (23 Wall.) 46, 68, 23 L. Ed. 59.

"Alluvion," according to the common law, is an addition made to land by the washing of the sea or other stream, where the increase is so gradual in its progress that it cannot be perceived how much is added at any moment of time. Land thus formed belongs to the proprietor of the adjacent land to which it is attached. *Warren v. Chambers*, 25 Ark. 120, 121, 91 Am. Dec. 538, 4 Am. Rep. 23; *Adams v. Frothingham*, 3 Mass. 352, 358, 3 Am. Dec. 151; *Lovington v. St. Clair County*, 64 Ill. 56, 58, 16 Am. Rep. 516; *De Bary Baya Merchants' Line v. Jacksonville, T. & K. W. Ry. Co. (U. S.)* 40 Fed. 392, 393; *Hubbard v. Manwell*, 14 Atl. 693, 696, 60 Vt. 235, 6 Am. St. Rep. 110; *Coulthard v. Stevens*, 50 N. W. 983, 984, 84 Iowa, 241, 35 Am. St. Rep. 304 (citing *Benson v. Morrow*, 61 Mo. 345, 352).

"Alluvion," as defined by the Civil Code of Louisiana, "is the accretions which are formed successively and imperceptibly to any soil situated on the shores of any creek or run." *Saulet v. Shepherd*, 71 U. S. (4 Wall.) 502, 508, 18 L. Ed. 442; *Municipality No. 2 v. New Orleans Cotton Press*, 18 La. 122, 167, 36 Am. Dec. 624.

To acquire title by alluvion, it is necessary that its increase should be imperceptible. *Halsey v. McCormick*, 18 N. Y. 147, 149.

Alluvion is the land formed by sedimentary deposits and added to an ordinary tract by the imperceptible action of the waters bordering the latter. It is a mode of acquiring property by natural law, *jure gentium*, by those principles and maxims which regulated the conduct of men before the formation of civil society, and is recognized by the statutory law as a means of the acquisition of property. *Sapp v. Frazier*, 26 South. 378, 380, 51 La. Ann. 1718, 72 Am. St. Rep. 493. "The right to such increase is said to rest in the law of nature, and is analogous to the right of an owner of the tree to its fruits, and the owner of flocks and herds to their natural increase. The owner takes the chances of injury and benefit arising from the situation of his property. If there be a gradual loss, he must bear it; if a gradual gain, it is his." *Hubbard v. Manwell*, 14 Atl. 693, 696, 60 Vt. 235, 6 Am. St. Rep. 110.

"Alluvion" has been defined to be those accumulations of sand, earth, and loose stones or gravel brought down by rivers, which, when spread out to any extent, form what is called "alluvial land." It is an addition made to land by washing of the seas or rivers, and its characteristic is its imperceptible

increase, so that it cannot be perceived how much is added in each moment of time. *Freeland v. Pennsylvania R. Co.*, 47 Atl. 745, 747, 197 Pa. 529, 58 L. R. A. 206, 80 Am. St. Rep. 850.

The right to alluvion is a right attached to the land, and one who owns the fee simple of such land owns all that becomes attached to that part of it bordered by the water. Washburn says (3 Washb. Real Prop. 59) that "this right to alluvion is considered as an interest appurtenant to the principal land, and belonging in the nature of an incident to the ownership of that, rather than something acquired by prescription or possession in the ordinary legal sense of the terms." *Kinzie v. Winston* (U. S.) 14 Fed. Cas. 649, 652.

Title by alluvion is a purely accessory right, attaching exclusively to riparian proprietorship, and incapable of existing without it. *White v. Leovy*, 22 South. 931, 943, 49 La. Ann. 1660.

#### **Accretion distinguished.**

"Alluvion" is the deposit on the lands of a riparian owner caused by the gradual and continued action of the water. It "is applied to the deposit itself, while 'accretion' rather denotes the act." *St. Louis, I. M. & S. Ry. Co. v. Ramsey*, 13 S. W. 931, 933, 53 Ark. 314.

#### **Avulsion distinguished.**

"Alluvion" is a secret increase made to land by the sea, and is so gradually added that it cannot be known at what moment the addition took place. It is contradistinguished from those large additions which are made to land when the sea suddenly recedes, or when it casts up by its immediate and manifest force large quantities of earth and sand. *Linthicum v. Cone*, 2 Atl. 826, 827, 828, 64 Md. 439, 54 Am. Rep. 775; *St. Clair County v. Lovington*, 90 U. S. (23 Wall.) 46, 66, 23 L. Ed. 59.

#### **As reliction.**

There is no "alluvion" without some kind of reliction, for the sea shuts out itself. *Ocean City Ass'n v. Shriver*, 46 Atl. 690, 692, 64 N. J. Law, 550, 51 L. R. A. 425.

"Alluvion" may be defined as an addition to riparian land, gradually and imperceptibly made by the water to the land which is contiguous. It is different from "reliction." *St. Clair County v. Lovington*, 85 U. S. (23 Wall.) 46, 23 L. Ed. 59.

### **ALLUVIUM.**

"Alluvium" is used in the mining law to designate that superficial deposit on the earth's surface which is movable, as contrasted with the immovable mass that lies below. *Stevens v. Williams* (U. S.) 23 Fed. Cas. 44.

### **ALMS.**

"Alms," as used in St. 5 & 6 Wm. IV, c. 76, § 9, declaring that persons who have received parochial relief or other alms shall not be entitled to hold office, applies only to parochial alms, and not such as might be rendered by persons not connected with established charities. *Reg. v. Lichfield*, 2 Adol. & El. (N. S.) 693.

### **ALMSHOUSE.**

The word "almshouse," as used and defined in the New York poor laws, means a place where the poor are maintained at the public expense. *People v. Lyke*, 53 N. E. 802, 803, 159 N. Y. 149.

"Almshouse," being defined in Poor Law 1896, § 2, as a place where poor are maintained at public expense, includes any place, and not merely a county poorhouse or a place specially provided. In re *McCutcheon*, 56 N. Y. Supp. 370, 372, 25 Misc. Rep. 650.

#### **As exempt from legacy tax.**

An almshouse is an institution supported by charity which makes no charge whatever for the benefits rendered, and a charitable institution which maintains a home and provides lodging and meals free, but which also maintains a day nursery for which it makes a small charge, is not an almshouse, and hence is not exempt from the legacy tax. In re *Vanderbilt's Estate*, 10 N. Y. Supp. 239, 2 Con. Sur. 319.

An association to improve the condition of the poor, which dispenses its benefits without any charge whatever, and keeps a place where money is disbursed to the needy, is an "almshouse," within the definition of a pure charity, so as to exempt a legacy to it from the legacy tax, although it has no house where the poor are lodged. In re *Lenox's Estate*, 9 N. Y. Supp. 895, 896.

A charitable institution depending wholly on voluntary contributions, and performing a work of pure charity in taking care of sick and disabled indigent persons, is an "almshouse" within Rev. St. p. 338, § 4, exempting devisees to the same from the collateral inheritance tax. In re *Curtis' Estate*, 7 N. Y. Supp. 207, 208.

#### **As exempt from taxation.**

"Almshouse," as used in Rev. St. (7th Ed.) p. 982, § 4, subd. 4, providing that every poorhouse, almshouse, etc., shall be exempt from taxation, means any institution whose inmates are supported wholly by charity. In re *Herr's Will*, 10 N. Y. Supp. 680, 57 Hun. 591.

"Almshouse" "is defined by Webster as a house appropriated to the poor." Thus a house devoted to the purpose of affording

pecuniary relief to persons of Swiss origin in need of assistance is an almshouse, within a statute exempting such property from taxation. *People v. City of New York* (N. Y.) 36 Hun, 311, 812.

Either of the terms "almshouse," "poorhouse," "schoolhouse," or "house of industry," within the meaning of statutes exempting such houses from taxation, includes buildings owned by the Church Charity Foundation, and used for the care, maintenance, education, and support of aged and indigent persons and indigent orphans and half-orphan children, and other children left in a destitute and unprotected state or condition. *Church Charity Foundation v. People* (N. Y.) 6 Dem. Sur. 154, 157.

An institution incorporated as a colored orphan asylum, for the purpose of maintaining a place of refuge for the colored orphans, where they should be boarded and suitably educated, is exempt from taxation under 1 Rev. St. p. 388, § 4, subd. 4, as an almshouse, where it is appropriated wholly for the poor, where they have a place of refuge, and are clothed, boarded, and suitably educated gratuitously; and the fact that it is a private corporation is immaterial. *Association for Colored Orphans v. City of New York*, 12 N. E. 279, 281, 104 N. Y. 583.

"Almshouse," as used in Rev. St. pt. 1, c. 13, tit. 1, § 4, subd. 4, exempting almshouses from taxation, is a house appropriated for the poor, and does not include an institution which required the persons admitted to pay an entrance fee and to transfer their property, in case they had any, to the institution. *In re Keech's Estate*, 7 N. Y. Supp. 331, 332.

The term "almshouse," within the meaning of the law exempting almshouses from taxation, includes a hospital for the gratuitous medical and surgical relief of the poor and used as a hospital for indigent sick, and as a dispensary to relieve the poor, for which no charge or return is exacted. *Western Dispensary v. City of New York*, 4 N. Y. Supp. 547, 56 N. Y. Super. Ct. (24 Jones & S.) 361.

The term "almshouse" in 1 Rev. St. p. 388, § 84, exempting every poorhouse, almshouse, etc., from taxation, includes the Vassar Brothers' Home for Aged Men, incorporated under the general law for charitable purposes, although applicants for admission are required to pay a certain fee and to turn over their property, if they have any, to the home. *In re Vassar*, 27 N. E. 394, 397, 127 N. Y. 1.

## ALONE.

"Alone," as added to a requested instruction, which was given as modified, that if the jury had any reasonable doubt as to whether or not a certain confession was obtained by

threats or promises they should not convict on such confession "alone," does not modify or change the meaning of the instruction as requested, since the instruction embodies all that is expressed by the word "alone," and its use cannot be regarded as prejudicial. *Bartley v. People*, 40 N. E. 831, 833, 156 Ill. 234.

## ALONG.

Under the word "along," and as an adverb, in Webster's Dictionary, is the following: "Sax., andlang or ondlang; Fr., au-long, lelong. See Long. The Saxons always prefixed 'and' or 'ond,' and the sense seems to be, by the length or opposite the length, or in the direction of the length." The first definition given is: "By the length; lengthwise; in a line with the length; as the troops marched along the bank of the river, or along the highway." The first definition given of the word "long" is: "Extended, drawn out in a line, or in the direction of length, opposed to short, and contradistinguished from 'broad' or 'wide.' Long is a relative term; for a thing may be long in respect to one thing, and short with respect to another." *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579, 585.

### As across.

The omission of the word "across" in the amendment of a statute which authorized the construction of a railroad "across, along, or upon" any highway, the amendment providing that nothing therein contained should be construed to authorize the construction of a railroad upon or along any highway without an order of the Supreme Court authorizing the same, was construed in the case of *Osborne v. Railroad Co.*, 27 Hun, 589, not to show that the consent of the Supreme Court was not required in order to authorize a railroad company to cross a highway, but the words "upon or along" were held to include such crossings. *New York L. & W. Ry. Co. v. Roll*, 66 N. Y. Supp. 748, 751, 82 Misc. Rep. 321.

As used in General Railroad Act 1872, § 5, providing that, in the case of the construction of a railway "along" highways, plank roads, turnpikes, or canals, such railway shall either first obtain the consent of the lawful authorities having control or jurisdiction of the same, or condemn the same, under the provisions of any eminent domain law now or hereafter in force in this state, "along" means "by the length of," as distinguished from across; and hence where a railway constructed its track across the highways in an incorporated town, where such track intersected the highways, it was not necessary for the railway company to obtain permission of the board of county commissioners, since such constructions did not constitute the building of a track "along" the

highway. *Cook County v. Great Western R. Co.*, 10 N. E. 564, 567, 119 Ill. 218.

A barbed-wire fence running diagonally across a yard from the house to the corner of a street is not maintained "along" a sidewalk, within St. 1884, c. 272, § 1, prohibiting the construction of barbed-wire fences along a sidewalk upon a public street. *Quigley v. Clough*, 53 N. E. 884, 173 Mass. 429, 45 L. R. A. 500, 73 Am. St. Rep. 303.

#### As adjacent to.

"Along" refers to the waters adjacent to and easily reached from the coast line, and, while "upon" relates to any given spot or place, the word "along" extends the suggestion to the very northern from the very southernmost point of that coast line. *American Fisheries Co. v. Lennen* (U. S.) 118 Fed. 869, 873.

#### As adjoining.

In Wag. St. p. 310, § 43, requiring every railway to erect and maintain fences on the sides of the road where the same passed through, and "along" or adjoining inclosed and cultivated fields, or uninclosed prairie lands, and making it liable for injuries to stock caused by neglect to maintain such fences, "along" is synonymous with the term "adjoining"; both words as used imply contiguity, contact. *Walton v. St. Louis, I. M. & S. Ry. Co.*, 67 Mo. 56-58.

#### As alongside of.

"Along," as used in Code, § 1287, allowing telegraph companies to construct their lines "along" any of the roads or railroads, as to country roads means to go along, upon, or on them; that is, in the way country roads are used by the public. They are highways for the uses of the public, and all people may pass along or upon them, at their pleasure and in their own way. The railroad is a highway of a different sort. To grant its use to others than the owners thereof would be to destroy its value and its usefulness. The lexicographers define "along" as "by the length of," as distinguished from "across," and plainly it has such meaning in the statute, and as so used evidently means, as to railroads, that the telegraph line is to run in the direction lengthwise of the railroad; alongside and equidistant from it, throughout all its parts, so that neither shall meet or touch; not in or upon the railroad strip. *Postal Telegraph Co. v. Norfolk & W. R. Co.*, 14 S. E. 803, 805, 88 Va. 926.

The word "along" in a statute giving a railroad company the right to construct its line across, "along," and upon any stream of water, or water course, street, or highway, turnpike or canal, when considered in reference to a street, cannot mean along the side of a street, because such meaning confers no right whatever in respect to the street,

but leaves the railroad to make its way through the adjoining lots owned by individuals without the consent of the city or any aid of the statute. *Arbenz v. Wheeling & H. R. Co.*, 10 S. E. 14, 17, 33 W. Va. 1, 5 L. R. A. 871.

#### As in the vicinity of.

In construing Code 1897, § 427, providing that the board of supervisors shall have power to change and establish a highway along a stream, when it can avoid bridging such stream, the court said that the word "along" has a somewhat elastic meaning, even when used in its most technical sense. As used in this statute, it is evidently not to be construed as meaning on the immediate bank of the stream, so that the construction of a road within the vicinity of the stream, and within a reasonable distance thereof, is authorized. *Stahr v. Carter*, 90 N. W. 64, 65, 116 Iowa, 380.

In an act of the Legislature reciting that it is for the protection of farmers and owners of cattle residing "along" the line of any railroad, and making the railroad company liable for cattle killed in consequence of the neglect of the railroad company to fence its track, the words "along the line of" mean in the vicinity of; otherwise only such stock owners as own or occupy land adjoining the lines of railway would be protected; and so even those who are in the lawful occupancy of highways crossing the railroads, unless they were adjoining landowners, would not be within the terms of the act. *Dunkirk & A. V. R. Co. v. Mead*, 90 Pa. 454, 458, 8 Wkly. Notes Cas. 206, 208.

The statutes declare a railroad company responsible for an injury by fire communicated to any building, and declare that the railroad shall have an insurable interest in property for which it may be held responsible in damages "along its route." Held, that the company's liability only existed with regard to property which lay "along its route," which meant property sufficiently near to railroad as to be exposed to danger of fire from its engines. *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579, 585. If the property is so near the railroad that it in fact took fire from the engine, it must be deemed to be situated along the route of the railway. *Martin v. Grand Trunk Ry. of Canada*, 32 Atl. 976, 977, 87 Me. 411.

Under Gen. St. Vt. c. 28, § 79 (a like statute), it is held that the phrase "along its route" means in proximity to the rails on which the locomotive engine runs, and applies to buildings or property along the route, whether they are outside the lines of the roadway of the railroad or lawfully within those lines. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 472, 23 L. Ed. 356.

Under a like statute (St. 1840, c. 85, § 1), "along its route" was held to mean a build-

ing which is near and adjacent to the road, so as to be exposed to danger by fire from engines, but without limiting or defining any distance, and the phrase is not to be construed as limiting the operation of the act to the very first building which might be touched with a spark. *Hart v. Western R. Corp.*, 54 Mass. (13 Metc.) 99, 104, 46 Am. Dec. 719.

In the statute (Rev. St. §§ 4358, 4359) providing that railroads shall be liable for damages caused by disease being communicated from diseased cattle in course of transportation to other cattle in the neighborhood or along the line of such transportation, the expression "along the line of the road" means in a line with it; by the side of it; near to it. *Coyle v. Chicago & A. R. Co.*, 27 Mo. App. 584, 593.

#### As on or over.

A declaration alleging that plaintiff was walking "along" the sidewalk at the time of an injury is equivalent to a statement that she was on the sidewalk. *Town of Nappanee v. Rukman*, 34 N. E. 609, 610, 7 Ind. App. 361.

Within the meaning of Laws 1899, c. 152, § 2, declaring that no bicycle side paths shall be constructed "upon or along" any regularly constructed or maintained sidewalk, "along" is synonymous with the word "upon" as so used, the provision being intended to prevent the appropriation of any portion of a regularly constructed sidewalk for a bicycle path, and not to forbid the construction of a bicycle path at the side of or adjoining any such sidewalk. *Ryan v. Preston*, 66 N. Y. Supp. 132, 163, 32 Misc. Rep. 92.

A municipal ordinance authorizing the construction of railroad tracks "along" an alley does not necessarily mean by the side of, and, when considered in connection with another portion of the ordinance authorizing the construction of the road "on, over, and along" certain other alleys, it will be construed as being synonymous with "on," "over," and "along" as there used. *Heath v. Des Moines & St. L. Ry. Co.*, 15 N. W. 573, 574, 61 Iowa, 11.

The term "along," as used in a description in a deed as along the shore, means "on," and includes the shore. *Church v. Meeker*, 34 Conn. 421, 425.

A statute authorizing a railroad company to construct their road "along" the river means beside or alongside, and does not authorize the railroad company to construct its road in or on the river, since the meaning of the word "along" must be controlled by the subject-matter, and a railroad cannot be built in a river unless it is first filled in, and it cannot be presumed that the company had authority to fill in the river. *Stevens v. Erie Ry. Co.*, 21 N. J. Eq. (8 C. E. Green) 259, 261.

A statute conferring on a railroad company the right to construct its road along a river, and to acquire the rights of the shore owners, gave the right to the railroad company only to construct its line along the bank of the river, and would not be construed by implication to confer on it the right to take the lands between the high and low water mark, since, though by local custom the shore owner was entitled to use the land between the high and low water mark, such privilege was a mere license from the state, which was the sole owner of such land, which the Legislature had the right to revoke. *Stevens v. Paterson & N. R. Co.*, 34 N. J. Law (5 Vroom) 532, 537, 3 Am. St. Rep. 269.

"Along," as used in Rev. St. arts. 721, 722, authorizing a corporation organized to construct channels in the waters of the gulf "along and across" any of the bays on the coast to the mainland, etc., is not to be construed as synonymous with or as meaning "upon," so as to require a construction across the waters, but should be construed separately from the other preposition used, and hence authorizes a construction on the land adjacent to the bay as well as on the bay itself. *Crary v. Port Arthur Channel & Dock Co.*, 47 S. W. 967, 969, 92 Tex. 275; *Davis v. Port Arthur Channel & Dock Co.* (U. S.) 87 Fed. 512, 515, 31 O. C. A. 99.

Laws 1890, c. 565, § 4, permitting a railroad company to construct its road "across, along or upon" any highway, means only a casual or incidental occupation and use of the highway, and does not authorize a company to build its entire railway along the highway. *Burt v. Lima & H. F. R. Co.*, 21 N. Y. Supp. 482, 483.

"Along," as used in Code 1887, c. 54, § 50, relating to the use of public streets by railroad companies, means along in the street, at, above or below the common level of the existing or changed surface of the street, according as the particular facts and circumstances may require, but does not authorize an occupancy by the railroad, for its exclusive use, of the entire street, or of such considerable portion of it as would substantially prevent the use of it by the public. *Arbenz v. Wheeling & H. R. Co.*, 10 S. E. 14, 17, 33 W. Va. 1, 5 L. R. A. 371.

#### As parallel to.

Gen. St. c. 45, § 6, providing that a person owning lands adjoining a highway may construct a sidewalk within such highway "along the line of such land," does not necessarily import that the part of the sidewalk finished for travel must at all points touch or be parallel to the line of the land, but it may happen that owing to the peculiarities of the land, or because of the direction which foot travel had before taken, that it would be more convenient and better to finish the

sidewalk in a direction not exactly parallel with the landowner's fence. *Commonwealth v. Franklin*, 133 Mass. 569, 570.

Code, § 1287, authorizing telegraph and telephone companies to construct and operate their lines "along and parallel to any of the railroads of the state," meant conforming to, having the same direction of, tendency with, the railroad, and not that the lines should extend in the same direction, and in all parts be equally distant. *Postal Telegraph Cable Co. v. Farmville & P. R. Co.*, 32 S. E. 468, 470, 96 Va. 661.

#### As up to or reaching.

A deed conveyed 30 acres of land, more or less, off of what was known as a "mill track," beginning at a white oak stump at a named bridge on the road, running from the old mill seat to P.'s, and running "along" P.'s line to high-water mark on the west bank. Held, that the word "along," as used in such description in the sentence "along a line," etc., did not signify that the object to which the line ran must be on the line, but rather the reverse. "Along," in this sense, is used as equivalent to "up to"; "extending to"; "reaching to." *Benton v. Horsley*, 71 Ga. 619, 628.

C. and M. were owners of adjoining lots, both claiming from the same source. M.'s lot had been previously contracted to be sold to O., who was then in possession under his contract. A brick building stood on C.'s lot at the date of the conveyance, and C.'s deed described the land as continuing the same course "along the front of said building 79 feet 9 inches, to the corner thereof, being the north line of the premises contracted to O.; thence easterly, along the southern side of the brick wall of the said building, 77 feet, to an alley." M. erected a building on his lot, constructing his north wall up to and against C.'s south brick wall; and C., claiming that his deed carried him to the southern line of the foundation wall instead of the southern line of the brick wall of the building, brought ejectment for the intervening 6 or 8 inches. Held, that the word "along," as there used, meant up to, and that the division line between the lots mentioned in C.'s deed was intended to be a straight line from the corner of the building to the rear of the lot, and that the term corner of the building and "along the southern side of the brick wall" clearly limited C.'s southern line to the outer surface of the brick wall, and therefore that C. had no title to the strip of land in question. *Cornes v. Minot* (N. Y.) 42 Barb. 60, 65.

#### Along the bank or shore.

"Along the bank," as used in a description of land defining one of the boundary lines as extending "along the banks" of a river, and running "on the bank," limited the conveyance to a line drawn on the bank,

and did not extend ad flum aquae to the center of the stream. *Howard v. Ingersoll*, 54 U. S. (13 How.) 381, 417, 14 L. Ed. 189.

"Along," when used in the description in a deed, means "by, on, or over," according to the subject-matter and context, and in a description along the shore means "on," and includes the shore. *Church v. Meeker*, 34 Conn. 421, 425.

"Along the shore," as used in a deed describing a boundary as "along the shore," included the strip between high and low water mark, since the word "shore" means the land washed by the seas between high and low water mark. *Oakes v. De Lancey*, 24 N. Y. Supp. 539, 540, 71 Hun. 49.

A conveyance of a lot in a city was described as a mill lot beginning and running easterly to the Genesee river; thence southerly, "along the shore" of the said river, to B. street. Held, that the word "along" as there used meant a boundary line drawn along the shore at low-water mark, which constituted the grantee's eastern boundary, and hence the grantee took no title to any part of the bed of the stream. *Child v. Starr* (N. Y.) 4 Hill, 369, 380; *Starr v. Child* (N. Y.) 20 Wend. 149, 153; *Jacquemin v. Finnegan*, 80 N. Y. Supp. 207, 211, 39 Misc. Rep. 628; *French v. Bankhead* (Va.) 11 Grat. 136, 155.

"Along" the shore line means on a line parallel with and three miles from the shore. *Pol. Code Cal.* 1903, § 3907.

#### Along the bay or pond.

The use of the words "along the bay" in the charter of a village describing one boundary as being along a certain bay is not to be construed as having been used for the purpose of giving an absolute and fixed boundary at the shore as it then existed, but to designate a shifting terminus at the shore as it might exist at any time thereafter, whether it extends into the bay by natural cause, or by artificial structures erected for the purposes of commerce. *Bechtel v. Village of Edgewater* (N. Y.) 45 Hun. 240, 242.

A description of land in a deed describing the property as commencing at a known monument on the shore of a nonnavigable lake or pond, and running thence "along said pond," does not show an intention to convey only to the shore of the pond, but conveyed all the land to the center of the pond. The course and distance given represent the sinuosity of the line of connection of the water with the shore, and the boundary as "along the pond," as generally understood, means on its water. And the fact that the length of the lines running to and from the monuments at the pond is the distance to and from them on the bank does not of itself affect the question, since such is usually the case in the description of land

bounded on streams in which the grants are treated as *ad flum aquæ*. And as said by Mr. Justice Cowan in *Luce v. Carley*, where the grant is so framed as to touch the water of the river, one-half the bed of the stream is included by construction of law. This, of course, means to the extent of the boundary in contact with the water. It is a matter of common knowledge in respect to lands bordering on streams and other bodies of water that it is usual in surveys, when made, to so describe the uplands as to compute the number of acres they contain, as generally in them, exclusive of the soil beneath the water, is mainly the value, and the quantity of the uplands embraced in a conveyance constitutes, in view of the situation, the basis for measuring the consideration. *Gouverneur v. National Ice Co.*, 81 N. E. 865, 870, 134 N. Y. 355, 18 L. R. A. 695, 30 Am. St. Rep. 669.

#### Along the highway, road, or street.

General words of description bounding land "along a highway," or "upon a highway," or as "running to a highway," are expressive of an intention to convey to the middle of the highway; but when, from the description, it is manifest that the parties intended to restrict the conveyance to the line of the highway or street, no part of the highway or street passes. *Anderson v. James*, 27 N. Y. Super. Ct. (4 Rob.) 35, 37; *Jackson v. Hathaway* (N. Y.) 15 Johns. 447, 453, 8 Am. Dec. 263; *Witter v. Harvey* (S. O.) 1 McCord, 67, 71, 10 Am. Dec. 650; *Hunt v. Brown*, 23 Atl. 1029, 75 Md. 481.

The words "along a highway," when used in a deed describing a boundary of the land conveyed as being "along a highway," will be construed, in the absence of anything showing a contrary intention, as fixing the boundary of the land at the center of the highway. *Buck v. Squiers*, 22 Vt. 484, 489; *Holloway v. Delano*, 18 N. Y. Supp. 700, 703, 64 Hun. 27; *Trustees of Hawesville v. Lander*, 71 Ky. (8 Bush) 679, 680; *Moody v. Palmer*, 50 Cal. 31, 37 (citing *Paul v. Carver*, 26 Pa. [2 Casey] 223, 67 Am. Dec. 413; *Newhall v. Ireson*, 62 Mass. [8 Cush.] 598, 54 Am. Dec. 790); *Fraser v. Ott*, 30 Pac. 793, 794, 95 Cal. 661. The same rule applies to a private street as well in the city as in the country, opened by the grantor, upon which he sells house lots bounding upon it. *Trustees of Hawesville v. Lander*, 71 Ky. (8 Bush) 679, 680.

A grant of land described as bounded "along" or "by" or "on" a highway carries the fee to the center of the highway, if the grantor owns so far. *Baltimore & O. R. Co. v. Gould*, 8 Atl. 754, 756, 67 Md. 60.

In a description in a deed describing one of the lines as "running thence northwesterly 'along' Spring place, 25 feet," "along"

meant that the limitation of the grantee's deed was a line drawn along the side of the street, and therefore did not convey any portion of the street. *Pollock v. Morris*, 51 N. Y. Super. Ct. (19 Jones & S.) 112, 116.

The words "along the road," used in a deed to describe a boundary, commencing in the middle of the road, operates to fix the boundary line as the center of such road. *Winter v. Peterson*, 24 N. J. Law (4 Zab.) 524, 527, 61 Am. Dec. 678; *Herring v. Fish*, 3 N. Y. Super. Ct. (1 Sandf.) 344, 348; *Cochran v. Smith*, 26 N. Y. Supp. 103, 105, 73 Hun. 597.

A description in a deed which gave one boundary of the land conveyed as "along" said road meant a grant to the edge of the road, and did not pass title to the highway to the center thereof. *Kings County Fire Ins. Co. v. Stevens*, 87 N. Y. 287, 291, 41 Am. Rep. 361.

The words "along the road," used by one who has laid out a road entirely on his own land, but on the margin thereof, in a conveyance of the land described in one boundary as being along said road, operates to fix the boundary along the outer boundary of the road from the land conveyed, and therefore the grantee acquires the fee in the road. *Haberman v. Baker*, 28 N. E. 370, 371, 128 N. Y. 253, 13 L. R. A. 611.

Where the words "along the street" are used in a conveyance to describe a boundary of land, the purchaser acquires title to the center of the street, though such boundary line is described as commencing at a point on the side of the street, as nothing short of an intention expressed in *ipsissimis verbis* to exclude the highway can exclude it. *Salter v. Jonas*, 39 N. J. Law (10 Vroom) 469-470, 23 Am. Rep. 229.

The words "along the street," when used to describe the boundary of real property, will ordinarily carry to the grantee the fee of the street to its middle line; but if two points on the side line of the street are fixed as the beginning and end of the course, the boundary will be upon the side line of the street. *Patten v. New York El. R. Co.* (N. Y.) 3 Abb. N. C. 306, 342.

#### Along the line of the street.

As used in Act March 23, 1876, providing for the widening of a certain street in the city of San Francisco, defining the district benefited thereby, and appointing a board of commissioners to carry out the work, section 6, prescribing a notice to the "property owners along the line of said street" that the board was then organized, the words "property owners along the line of said street" are not equivalent to the words "owners of property fronting on said street." *Lent v. Tillson*, 14 Pac. 71, 75, 72 Cal. 404.



**Along a mountain or ridge.**

Along a mountain or ridge means summit point or summit line, unless otherwise expressed. Pol. Code Cal. 1903, § 3905. The words "to," "on," or "along" a mountain range or mountains mean the summit point or summit line of such range of mountains. Rev. St. Ariz. 1901, par. 929.

The words "to," "on," "along," "with," or "by" a mountain or ridge mean summit point or summit line, unless otherwise expressed. Pol. Code Mont. 1895, § 4105.

**Along the river or stream.**

Along the river, as used in the description of a deed which described one boundary of the land conveyed as running "along" a certain river, meant that the grantee took title to the center of the main channel of the stream. *Walton v. Tift* (N. Y.) 14 Barb. 216, 219.

Where a grant of land is so formed as to touch the water of the river, and run thence along the river as it winds and turns, and the parties did not expressly except the river, if it be above the tide, one-half of the bed of the stream is included by construction of law. *Luce v. Carley* (N. Y.) 24 Wend. 451, 452, 35 Am. Dec. 637.

In a patent from the state of New York the lines of a land grant were described as proceeding along the shore of Lake Ontario; and then up along the shore of Oswego river; thence along the bound of a certain tract of land to Oneida Lake; and thence along the shore of such lake to a certain creek; thence along such creek to the place of beginning. Having in view the situation at the date of the grant, its fair construction is that the center of the river was intended as the boundary line, and the grant should be held to extend to the center of the Oswego river. *Van Buren v. Baker*, 12 N. Y. St. Rep. 209, 210.

"Along said stream," as used in Sess. Laws 1862, p. 48, § 13, prohibiting the diversion of any stream from its original channel to the detriment of any miner or others along the line of said stream, and requiring that there shall be at all times left sufficient water in said stream for use of miners and others "along said stream," is equivalent to the phrase "on the bank, margin, or neighborhood," as used in Sess. Laws 1861, p. 67, § 1, providing that persons having claims on the bank, margin, or neighborhood of any stream shall be entitled to the use of the water thereof, and includes all lands in the immediate valley of the stream of water, etc. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 451.

Along a creek, river, slough, strait, or bay means the middle of the main channel thereof, unless otherwise expressed. Pol. Code Cal. 1903, § 3906; Pol. Code Mont. 1895, § 4104.

**Along the route.**

Under a statute authorizing commissioners to be appointed for any town site "along the route" of a certain railroad, for the purposes of railroad aid, a town which it is impossible to avoid in proceeding from one terminus of the railroad to the other is "along the route" of such railroad. *Phelps v. Lewiston* (U. S.) 19 Fed. Cas. 450, 460.

**Along the side of the street.**

In the case of land bounded by a highway, the grant extends to the center of the highway; but, where it is bounded by and "along the side" of such highway, the boundary is fixed at the side thereof, leaving still in the grantor the fee of the land over which the highway passes, subject only to the easement of public right of way. *Child v. Starr* (N. Y.) 4 Hill, 869, 882.

The words "along the southerly side," in describing a boundary in the conveyance of land as being on the southerly side of a certain street, the boundary running to the street, thence along the southerly side of the street, westwardly, etc., was construed as fixing the boundary on the south side of the street, and not at the center. *Anderson v. James*, 27 N. Y. Super. Ct. (4 Rob.) 35, 37.

**ALONGSIDE.**

A bill of lading of iron shipped by boat, providing that the iron should be taken from "alongside," and discharged at a certain rate per day, must be construed to mean that the consignee should take the iron at the end of the voyage from where the ordinary appliances of the ship would leave it in discharging—"at the end of the ship's tackle," on the wharf, if the ship were discharging at a wharf; on a lighter, if the ship could not reach a wharf and was discharging in the stream. It cannot be construed to impose upon the carrier the duty of moving the iron over the wharf to the land, beyond where the ordinary appliances of the ship would leave it, but the expense of moving the iron to the land must fall upon the consignee. *Turnbull v. Citizens' Bank of Louisiana* (U. S.) 16 Fed. 145, 147.

A bill of lading specifying that coal was to be delivered "alongside" means that the cargo was to be unloaded at the expense of the consignees. *Kilroy v. Delaware & H. Canal Co.*, 30 N. Y. St. Rep. 724, 725.

**ALONG WITH.**

A rule of court providing that no dilatory plea shall be received unless the party offering it shall file, along with the plea, an affidavit proving the truth thereof, means that the affidavit shall be filed at the time the plea is filed, and the filing of an affidavit after demurrer, and not until the time of argument, is insufficient, since the plea and the

evidence to support it must be put in together. *Trenton Bank v. Wallace*, 9 N. J. Law (4 Halst.) 83, 84.

## ALLOOF.

"Aloof" may mean separate or apart, but also carries with it the meaning of standing off or at a distance; and hence, in a prosecution under a statute against gaming at an outhouse where people resort, an instruction that the house must be one standing "aloof" from occupied houses is not correct. *Downey v. State*, 22 South. 479, 481, 115 Ala. 108.

## ALREADY.

In P. L. 149, exempting suits "already" commenced from the operation of the statute, "already" refers to present, and not future, time, and the meaning of the phrase, "suits already commenced," is not the same as where suits shall have been commenced. *Appeal of Manufacturers' Natural Gas Co.*, 18 Atl. 630, 631, 130 Pa. 283.

"Already done," as used in an ordinance directing the laying of sidewalks where not "already done," has no other signification in the ordinance than to exclude its application to the parts of the line where work contemplated had been done, and continued to be in such state that further attention was unnecessary. It applies to existing, and not to the prior, condition of the subject-matter. In *re Burmeister* (N. Y.) 6 Wkly. Dig. 197.

"Already" means previously to some specified time, so that, as used in Laws 1869, c. 40, § 1, providing that the clerk of the Supreme Court shall have in addition to the fees "already" prescribed, such per diem, etc., it has the effect of continuing the right to charge the fees which had theretofore been prescribed by statute, though the statutes which have prescribed them have been repealed. *Harrison v. Masonic Mut. Ben. Soc.*, 59 Pac. 266, 267, 61 Kan. 134.

### In statutes as affecting application.

Pub. Laws 1874, c. 215, requiring notice to the selectmen of a town of the nature and attendant circumstances of an injury caused by a defective way within sixty days of the occurrence of the accident, except in cases of injuries "already sustained," took effect at the expiration of thirty days after the adjournment of the Legislature that enacted it, and was approved March 13, 1874. Held that the words "already sustained" must be construed as referring to the time when the act took effect, and not to the date of its passage, and hence the act had no application to an injury received on March 7, 1874. *Jackman v. Inhabitants of Garland*, 64 Me. 133, 135.

"Already," as used in Act April 9, 1883 (P. L. p. 414), providing that any mutual insurance companies already chartered by the Legislature, or already organized under the general laws of the state, may, after giving 90 days' notice in three of the public papers in the state, change to joint-stock companies by proceeding in accordance with the provisions of the act, is fairly susceptible of two interpretations—one as applying to the date of the passage of the act, and the other to the date of the application for change; and, inasmuch as the first construction would make the act unconstitutional, it must be construed as referring to the time when the change was desired to be made. *Schwarzwalder v. Tegen*, 43 Atl. 587, 589, 58 N. J. Eq. 319.

"Already accrued," as used in Code 1848, § 73, changing the operation of the statute of limitations, but relieving from the effect of such changes causes of action "already accrued," and providing that the statutes "now in force" should be applicable to them, should be construed as applying not merely at the date of the original enactment, but to any subsequent amendment as of the date of such amendment. Causes of action "already accrued" are intended and saved as well at the date of the change affected by the amendment as at the date of the change accomplished by the original law. *Gollitot v. City of New York*, 87 N. Y. 441, 444.

In the provision of the Constitution that "no county, city, school district or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted," etc., the words "already" and "hereafter" plainly have reference to the same time; that is, the time at which the Constitution acquired life and force by its adoption. *List v. City of Wheeling*, 7 W. Va. 501, 522.

St. 1870, c. 389, § 8, which declared that nothing contained in the act should affect any penalty or forfeiture "already incurred" under the provision of any law in force prior to the passage of the act, means that the act should not affect any penalty incurred before the taking effect of the statute. *Commonwealth v. Bennett*, 108 Mass. 30, 32, 11 Am. Rep. 304.

## ALSO.

### See "And Also."

The word "also," prefixed to a sentence in a will, serves to point out the beginning of a new devise or a new bequest. It imports no more than "item," and is, in such case, of the same signification as "moreover." *Evans v. Knorr* (Pa.) 4 Rawle, 86, 68.

The word "also," as used in Rev. Code 1819, c. 96, § 18, providing that in making ti-

tie by descent it shall be no bar to the party that any ancestor through whom he derives his descent from the intestate is an alien, and bastards shall "also" be capable of inheriting or transmitting inheritance on the part of the mother in like manner as if they had been legitimate children, is introduced simply to mark the transition, and cannot be construed to authorize the inference that similar provisions were in contemplation for the two cases. *Garland v. Harrison* (Va.) 8 Leigh, 368, 384.

**As in addition to.**

"Also," as used in a deed exempting what is granted, thereby means "likewise, in like manner, in addition to," denoting that something is added to what preceded it. *Panton v. Tefft*, 22 Ill. (12 Peck) 367, 375.

"Also," as used in a lease providing for the rental of a building, together with power, not exceeding six-horse, for the conduct of the lessee's business, that of a steam laundry, "also" steam for washing machines and dry rooms, means in addition; besides; as well; further; too. *Reynolds v. Washington Real-Estate Co.*, 49 Atl. 707, 709, 23 R. I. 197.

In a sale of a specific quantity of land, and "also" the prior right to use one-half the waters of a certain creek, "also" has the meaning attached to the word by lexicographers, meaning "in like manner" or "in addition to" the land above described. *Dalton v. Bowker*, 8 Nev. 190, 201.

"Also" is defined by Webster to mean in like manner, further, in addition to, and when used in a statute providing that a new county should not be created unless the question of segregation should first be submitted to a vote of the people of K. county, and "also" to the voters of that part proposed to be detached from S. county, means that the question should be submitted to the vote of K. county, and in addition thereto should be submitted to the voters of the part intended to be segregated. *Van Dusen v. Fridley*, 43 N. W. 703, 704, 6 Dak. 322.

"Also," as used in a deed reciting that the grantor reserves to herself the possession, use, enjoyment, and control of a tract of land for and during her natural life, and reserves "also" the care and support of her daughter for and during her natural life, created a charge on the rents and profits of the lands for the care and maintenance of the daughter during her life, and not only during the life of the grantor. *Wall v. Wall*, 35 S. E. 811, 126 N. C. 405.

"Also" means furthermore; in addition; in like manner; likewise; and, as used in Const. art. 12, § 1, providing that the legislative assembly may "also" impose a license both upon persons and upon corporations doing business in the state, is used in the sense of a conjunctive, and will not be held to car-

ry over into the sentence the idea of the sentence which precedes, and make the section say that the Legislature may also impose such license tax for the support and maintenance of the state and for the support and maintenance of the county. *State v. Camp Sing*, 44 Pac. 516, 518, 18 Mont. 128, 32 L. R. A. 635, 56 Am. St. Rep. 551.

The word "also," in a clause of a city charter empowering the mayor to try all offenders against the ordinances of the city in a summary manner, without a jury, with the right of appeal to the city council, presided over by the mayor or an alderman, which shall sit as a jury to try the facts involved, and may also reverse, modify, or affirm all or any of the rulings of the mayor in the first trial of the case, shows that the province of the alderman was not to be confined merely to trying the facts involved, and therefore the last clause shows the purpose to confer upon the alderman two different and distinct powers—first, to try the facts sitting as a jury; and, second, to reverse, affirm, or modify the law as ruled by the mayor. *City Council of Anderson v. O'Donnell*, 7 S. E. 523, 527, 29 S. C. 355, 1 L. R. A. 632, 13 Am. St. Rep. 728.

The word "also" in a claim of a patent which, after stating one of the claims, said, "I also provide means for certain other purposes," indicated that the inventor had on his mind not only the combination of the first claim, but also an additional contrivance that could be embodied in the second claim as auxiliary and healthful, although not necessary to the efficiency of the first. *Stockton v. Maddock* (U. S.) 10 Fed. 132, 134.

"Also" means "too," "further," or "in addition to," and sometimes has the meaning "in like manner." It will be held to mean "in addition to" when used in a will devising certain property absolutely, and "also" I give and devise certain other property. *Kinkele v. Wilson*, 29 N. Y. Supp. 27, 29, 9 Misc. Rep. 139.

"Also," as used in a will in which the testator devised a certain tract of land, and also certain goods and chattels to K., his heirs and assigns, in trust for the sole and separate use of E., and "also" a sum of \$1,000 to K. in trust for the use of her, the said E., serves to point out the beginning of a new devise or a new bequest, and imports no more than the word "item," and has the same signification as "moreover," and cannot be construed as meaning "in like manner." The word was obviously used as a mere copulative, and hence the bequest of \$1,000 was not for the sole and separate use of E., but went to K. *Evans v. Knorr* (Pa.) 4 Rawle, 66, 68.

As used in a will bequeathing and devising specific articles of personal property to his wife for life, and in the same clause "also" giving and bequeathing to her a cer-

tain sum of money, "also" should be construed in the sense of "in addition" or "besides," and not "in like manner." While it is true that one meaning of the word "also" is "in like manner," another and quite as common a meaning is "in addition," "besides." *Loring v. Hayes*, 29 Atl. 1093, 1094, 86 Me. 351, 356.

"Also," as used in a will giving to testator's wife and son his homestead, with the buildings thereon, "also" all farming tools and utensils, carts, carriages, etc., should be given one of its most ordinary and usual meanings, that of "in addition thereto." *Mace v. Mace*, 49 Atl. 1088, 1089, 95 Me. 283.

"Also," as used in a will, means only some other subject of gift beside that which has been already mentioned, and can include only what is specified by name or description. *Williamson v. Williamson*, 57 N. C. 281, 286.

A deed recited that the party of the first part should "sell and convey to the party of the second part \* \* \* one bay horse, \* \* \* to have and to hold to the party of the second part and his heirs, forever; also a lien upon each and every one of said crops to be cultivated during the said year;" and it thus proceeded to give the mortgagee the right to take possession of the crops and sell them in certain specified contingencies. Held, that the word "also" as employed in the deed was a copulative conjunction, and implied "likewise; in like manner; in addition to; besides." *Rawlings v. Hunt*, 90 N. C. 270, 273.

#### As in like manner.

"Also" imports in like manner. *State v. Parler*, 29 S. E. 651, 654, 52 S. C. 207.

Where by the will testator made a general gift to his wife of everything, real and personal, during her life or widowhood, and at the decease of his wife gave to two sons certain slaves, "also" to another son all his land, and also two certain slaves, such sons could not take until the decease, or at all events the marriage, of the wife. The grammatical construction establishes that position. The future gift in the first part of the clause of two slaves to the two sons, limited expressly to commence "at the decease of my wife," came in the same clause with the two gifts of the last son. The one of land begins with "also," that is, "in like manner"; the other, of negroes, begins with the words, "and also," that is, again "in like manner," which clearly connects these gifts to this son with those of the two others as all having the same beginning, namely, at the death of the wife. *Sherrill v. Echard*, 29 N. C. 161, 164.

"Also," as used in a will, means in the same manner; and where a negro woman

was given by testator to his wife for life, and "also" a choice of any one of the other negroes, the wife took a life estate only in the negro selected by her. *Hyman v. Williams*, 34 N. C. 92, 94.

"Also," as used in Act April 2, 1861, as amended March 25, 1866 (Swan & S. Rev. St. 389, 391) §§ 1, 2, 3, providing that all the real and personal property of the wife at marriage remains her separate estate, and in any action against the husband and wife upon any cause existing against her at their marriage, or upon any tort committed by her during coverture, or upon any contract made by her concerning her separate property, the separate property of the wife shall be "also" liable to be taken for any judgment rendered therein, does not mean that liability of the husband or of his property is implied, no such liability having been declared in the preceding part of the statute, but the word "also" must be understood as referring to the ownership of the wife declared in the preceding sections. The Legislature intended to say, not that the husband should be liable and the property of the wife should be "also" liable, but that the property of the wife should be separately owned by her, and should be "also" liable for the judgments levied in the cases named. *Westerman v. Westerman*, 25 Ohio St. 500, 503.

"Also" means likewise, or in the same manner; and where it was used in a will relating to a devise of slaves its effect was to connect those who followed with those who preceded its use, and to give to all the same destiny. *Allison v. Bates*, 45 Ky. (6 B. Mon.) 78, 80.

In a will giving a testator's wife during her widowhood all his lands, tenements, and hereditaments, all his interest in real estate, mortgages, and notes, "also" all his money accounts, bonds, and evidences of indebtedness, and personal property and personal estate, "also" means in like manner. *Kratz v. Kratz*, 59 N. E. 519, 520, 189 Ill. 276.

In a will providing that testator's widow should have all his household goods and furniture, and "also" one-third of all the income of his estate during her widowhood, in lieu of dower, "also" means the same as "in like manner," and hence the widow was entitled only to a life estate. *Morgan v. Morgan*, 3 Atl. 63, 64, 41 N. J. Eq. 235.

The word "also," when used as an adverb, means in the same manner, or in like manner, or likewise; it is also used with the meaning of "too," "further," and "in addition to"; but in devise "and also I give" will be construed to give the property in the same manner as the previous bequest. *Kinkele v. Wilson*, 45 N. E. 869, 871, 151 N. Y. 289; *Anonymous*, 3 N. C. 161; *Du Pont v. Du Bos*, 29 S. E. 665, 670, 52 S. C. 244; *Noble v. Ayers*, 56 N. E. 199, 61 Ohio St. 491.

An ordinance requiring an officer to give a bond, and "also take and subscribe an oath," means that he shall give the bond and likewise take the oath; and as the oath is to be taken before entering the office, and is to be in the same manner, the bond must be given before he enters the office; the definitions of "also" being in the same manner; likewise; too; in addition. *Howell v. Commonwealth*, 97 Pa. 332, 335.

In a will devising to testator's wife certain lots for and during her natural life, "also" all the rents, incomes, and profits arising from my real estate for a certain time, after which she should receive one-third of the net income, the word "also" means in like manner, and not in addition to, and thus gave the wife only a life interest in the one-third of the net rents and income of the real estate. *Morrison v. Schorr*, 64 N. E. 545, 549, 197 Ill. 554.

## ALTER—ALTERATION.

See "Material Alteration."

Deface distinguished, see "Deface."

The word "alter" has been defined to make a change; to modify; to vary in some degree. It means to make a thing different from what it was; to vary in some degree without making the entire change; and, again, to make otherwise; to change in some respect, either partially or wholly. *Sessions v. State*, 41 S. E. 259, 260, 115 Ga. 18.

To alter a thing is to change its form or nature, without a destruction of the existence of the thing altered or changed, or a loss of its identity. *Haynes v. State*, 15 Ohio St. 455, 458; *Davenport v. Magoon*, 4 Pac. 299, 301, 13 Or. 8, 57 Am. Rep. 1; *Heiple v. Clackamas County*, 25 Pac. 291, 292, 20 Or. 147; *City of Hannibal v. Winchell*, 54 Mo. 172, 177; *Black River Imp. Co. v. Holway*, 59 N. W. 126, 128, 87 Wis. 584.

"Alter" means to change or modify the form or character of a thing, without absolute change of its identity, as where a power to alter a wharf authorizes an extension or diminishing of it. *City of Hannibal v. Winchell*, 54 Mo. 172, 177.

### Act.

The word "alter," as used in an act entitled "An act to alter or amend the several acts incorporating the town of S.," is capable of two meanings. If the word as used in the title be construed to mean a change in the acts incorporating the town of such a kind as to entirely change the character of the municipality, then that part of the act which creates a city from a town would not be different from that expressed in the title. *Sessions v. State*, 41 S. E. 259, 260, 115 Ga. 18.

### Bank bill or note.

*Swan's St.* 233, 234, providing a punishment for uttering "altered bank bills," means an authentic and genuine bill legitimately printed from the genuine plate and truly signed by the officers of the bank, but altered in its denomination or in some other material part. An altered bank bill can neither be a counterfeit and forged, nor a spurious bill. *Kirby v. State*, 1 Ohio St. 185, 189.

"Alter," as used in statute forbidding an alteration of bills, means such an alteration as will increase the apparent value of the bill. *Commonwealth v. Hayward*, 10 Mass. 34, 35.

"Alter," as used in *Crimes Act*, § 22, *Starr & C. Ann. St.* 409, making it a forgery to "alter any bank note," means a change in form or nature, without a destruction of the existence of the thing altered or changed, or loss of its identity, and hence cutting out the words "one dollar" from the body of a bank note and artfully fitting blank paper in the space so made, and substituting the figure five for the figure one where it appears in the corners of the bill, is an alteration of the note. *Haynes v. State*, 15 Ohio St. 455, 458.

### Building.

As construction, see "Construct—Construction."

"Alterations," as used in a building contract providing that no "alterations" could be made in the work shown or described by the drawings and specifications except upon a written order of the architect, should be construed to include changes in substituting mountain surface stone for mountain quarried stone, and lap binders for headers in the foundation walls. *Gibbs v. School Dist. of Girardville*, 46 Atl. 91, 94, 195 Pa. 396.

Where the taking down and rebuilding of area walls was rendered necessary by the facts that, through carelessness or negligence of others than the person erecting them or his servants, an excavation near the area was left exposed to the elements during the winter, and the excavation became filled with water, which overflowed the area walls and entered them, where it froze and caused the walls to crack and split and become defective, the damage did not result from the "alterations in the plan of construction," which the contractor had agreed to make without extra charge. *Fay v. Muhler*, 20 N. Y. Supp. 671, 673, 1 Misc. Rep. 321.

"Alterations, deviations, or additions," within the meaning of a building contract expressly providing for "alterations, deviations, or additions, and the payment for them," includes extra work on the building, and therefore an order payable out of the amount due on the builder's contract includes the sum due for such extra work. *Dunn v.*

Stokern, 8 Atl. 349, 350, 43 N. J. Eq. (16 Stew.) 401.

A building contract requiring additional payments for changes, additions, and alterations will be construed to mean such changes as are incidental to the complete execution of the work as described in the plans and specifications, and therefore of only minor or trifling importance; if otherwise, some different mode of determining what prices should be paid for them would also have been prescribed by the writer. We think any material departure from the plans and specifications with reference to which the contract was made, which resulted in a new and substantially different undertaking, cannot be regarded as within the meaning of this language. *Cook County v. Harms*, 108 Ill. 151, 159.

The true construction of a clause in a deed giving to the grantee certain privileges in the alley between the message conveyed and the message on the adjoining lot, providing that "so long as the said two messages stand and remain as they now are, or until the owners of both lots mutually agree to alter the buildings, only certain alterations are to take place in the alley," is not that the grantee shall not repair, but that he shall not rebuild; and the alteration of the message of the grantee by the addition of a story and a new roof, without affecting the state of things previously existing in relation to the alley, is not repugnant to the provision of the deed. *Burkelow v. Maurer* (Pa.) 3 Rawle, 482, 483.

"Alter," as used in a clause of a lease which provided that the tenant might make "alterations in the buildings so as to adapt it to other business than that of a livery stable," meant that the tenant might change the nature or form of the building, but did not authorize him to tear it down and erect or rebuild a new and different structure on the building. To alter any building or thing is to change its form or nature without destroying its identity. *Davenport v. Magoon*, 4 Pac. 299, 301, 13 Or. 3, 57 Am. Rep. 1.

Altering, repairing, or ornamenting (as used in the Illinois mechanic's lien law) does not include putting a lightning rod on a house. *Drew v. Mason*, 81 Ill. 498, 499, 25 Am. Rep. 288.

"Alteration of a building" is an addition to its height or to its depth or to the extent of its interior accommodations. It is distinguished from the word "addition" as that term is used within the meaning of the mechanic's lien law, in that the latter must be a lateral addition and occupy grounds without the limits of the building to which it constitutes an addition. *Updike v. Skillman*, 27 N. J. Law (3 Dutch.) 131, 133.

An insurance policy on a building providing that the insured has permission to make

"alterations and repairs incidental to the business," means such alterations in relation to the carrying on of the business as would not essentially and materially increase the liability of the property's being destroyed by fire, and cannot be intended to embrace all alterations which the insured might desire to make in connection with his business. *Crane v. City Ins. Co.* (U. S.) 3 Fed. 558, 561.

"Alteration," as used in a lease prohibiting the "alteration" of the buildings without the consent of the lessors, includes the erection of a wooden structure on the back part of the lot included in the lease. It is difficult to see what could be an alteration to the premises if a new building of such a description was not one. *Whitwell v. Harris*, 106 Mass. 532, 537.

The words "erection," "alteration," or "repair" of buildings and structures, within the meaning of the mechanic's lien law, giving a lien for labor or materials furnished in the erection, alteration, or repair of buildings or structures, seem to be quite plain in their signification, and insusceptible of any interpretation but the common one of building, altering, or repairing a house. Words in a statute are to be taken in their usual sense in which they are understood by people generally, unless there be some technical sense in which they must be considered in order to give the intended effect to the law, or the circumstances under which they are employed warrant applying a different sense to them. It has been held in *France v. Woolston* (Del.) 4 *Houst.* 557, that glazing and painting were within the terms of the statute; but in *Capelle v. Baker* (Del.) 3 *Houst.* 344, the terms were held not to include an architect's bill for a plan of a building. The terms do not include upholstering a hall. *McCartney v. Buck*, 12 Atl. 717, 719, 8 *Houst.* 34.

#### Cattle brand.

To "alter" is to make a thing different from what it was. The erasing any letter or the addition to the brand mark is an alteration. *Smith v. Brown*, 1 *Wend.* 231, 236.

To "alter any brand," as used in Rev. St. Crim. Code, art. 760, providing that any one who shall "alter the brand" on an animal which is the property of some other person into a different brand shall be punished, includes clipping some of the hair from the brand of the animal, whereby it was changed, and it is not necessary that the scar made by the original branding iron should be altered in order to constitute the offense. *Slaughter v. State*, 7 *Tex. App.* 123, 124.

"Altering" and "defacing" are not synonymous terms as applied to a brand on cattle. The putting of an additional brand to one already on is an alteration of the brand, though it may not interfere with or change

the figure of the first brand. *Linney v. State*, 6 Tex. 1, 2, 55 Am. Rep. 756.

#### Corporate charters or by-laws.

An "alteration" in a by-law of a corporation is a pro tanto repeal. *Parish v. New York Produce Exchange*, 61 N. E. 977, 981, 169 N. Y. 34.

*Nix Dig.* 152, § 6, providing that corporate charters should be subject to "alteration," suspension, and repeal in the discretion of the Legislature, means that the Legislature shall have the power to alter something contained in or granted by the act, which may be the franchises granted, or the right to take land by condemnation, or the right to take tolls or fare, or the amount to be taken, but does not confer on the Legislature the right to impose on a railway company any other duty or anything involving any other duty than that attending the building of a railroad, and the Legislature cannot require a railroad company to build a dam, or to construct a canal, or to extend its road. *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. (3 C. E. Green) 178, 193, 90 Am. Dec. 617.

"Alter or amend," as used in a charter of a theological institute reserving to the Legislature the power to "alter or amend" the charter incorporating the trustees of said theological institute, does not mean that the Legislature could increase the number of the trustees or corporators of such institute without the consent of the other trustees or corporators. The charter was a contract, and the right to "alter or amend" it does not include the right to add other parties and invest them with the same privileges and franchise conferred upon the original parties. The power to "alter or amend" a contract is to change it as between the original parties and such others only as have been permitted by their mutual consent to come into the enjoyment of its benefits and privileges, and not to compel one of the parties to operate in conjunction with others and share with them the privileges and benefits of the contract. *Sage v. Dillard*, 54 Ky. (15 B. Mon.) 340, 358.

"Alter," as used in Const. art. 11, § 1, relating to corporations, and providing that all general or special acts enacted under the provisions of the section may be altered or repealed by the Legislature at any time after their passage, the term "alter" should be construed to mean to make different without destroying the identity of the act; to vary without making an entire change. Thus, a corporate charter of one kind could not be altered to a charter of an entirely different kind, but a corporate charter may be altered so as to make it different in detail, so long as the general identity of the corporation remains, so that it is varied without an entire change. *Black River Imp. Co. v. Holway*, 59 N. W. 126, 128, 87 Wis. 584 (citing Attorney

General v. Chicago & N. W. Ry. Co., 35 Wis. 425, 427).

#### Distillery warehouse stamp.

"Change or alteration," as used in Rev. St. § 3326 [U. S. Comp. St. 1901, p. 2169], making it an offense to change or alter a distillery warehouse stamp, means to obliterate or render illegible a portion of it, or to erase part of it and substitute something else in lieu of the part erased. *United States v. Bardenheier* (U. S.) 49 Fed. 846, 847.

#### Estimate of assessment.

The word "alter" means to make otherwise, and a power given a city council to "alter" the engineer's estimate of the assessment for local improvements, which must be made under the front-foot rule, authorizes the council to depart from the front-foot rule in case of special benefit, and does not limit them to errors in the engineer's estimate. *Adams v. City of Shelbyville*, 57 N. E. 114, 121, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797.

#### Fume.

A contract relating to certain dams and passages for water, providing that a dam, pier, guard gates, and stone fume, and a general passage for the water into that fume, should remain situated as they were unless "altered" by mutual consent of the parties, could not be construed to apply to the making of openings in the dam or fume merely in order to take water for mill purposes. *Bardwell v. Ames*, 39 Mass. (22 Pick.) 333, 359.

"Alter," as used in a deed granting water from a pond providing that the grantee shall have the privilege to enter on the lands of the grantor along and adjoining the fume to alter, repair, or renew the same, relates to the aqueduct as a structure, and not to the easement in the land. The fume was made of boards, and liable to rot and become leaky, and to alter it means that the grantee might change its construction, shape, or the material of which it was composed, or might substitute another and different appliance for transmitting water, but it does not give the grantee the right to place the feeder on another part of the grantor's land, since the power to alter is very different and distinguishable from that of changing the place of the fume on the land. It might be totally altered and remain where it was placed in the grant, and it might be removed to another place without altering it. *Jaqui v. Johnson*, 27 N. J. Eq. (12 C. E. Green) 526, 531.

#### Instrument.

An alteration of an instrument is something by which its meaning or language is changed, either in a material or immaterial particular. If what is written upon or erased from the paper containing the instru-

ment has no tendency to produce this result or to mislead any person, it cannot be said to be an alteration. *Morrill v. Otis*, 12 N. H. 466, 472; *Moore v. Macon Sav. Bank*, 22 Mo. App. 684, 690; *Bridges v. Winters*, 42 Miss. 135, 143, 97 Am. Dec. 443, 2 Am. Rep. 598; *Oliver v. Hawley*, 5 Neb. 439, 444.

The term "alteration," when applied to instruments, is usually applied to the act of the party entitled under the deed or instrument, and imports some fraud or improper design on his part to change its legal effect. It is distinguished from a spoliation, which is the act of a stranger in altering or changing the instrument. *Medlin v. Platte County*, 8 Mo. 235, 239, 40 Am. Dec. 135; *Oliver v. Hawley*, 5 Neb. 439, 444; *Bridges v. Winters*, 42 Miss. 135, 143, 97 Am. Dec. 443, 2 Am. Rep. 598.

An "alteration" of an instrument is an act done upon the written instrument which, without destroying its identity, changes its language or meaning. *Davis v. Campbell*, 61 N. W. 1053, 1055, 93 Iowa, 524.

"Not every change in a bill or note amounts to an alteration; if the legal effect be not changed the instrument is not altered, although some change may have been made in its appearance, either by addition of words, which the law may imply, or by striking out words of no legal signification." *Reiley v. Springfield First Nat. Bank*, 35 N. E. 1120, 1121, 148 Ill. 849 (quoting 2 Daniel, Neg. Inst., p. 359).

The "alteration" of an instrument which avoids it upon the technical and strict grounds of alteration is generally made after the instrument has had a legal existence. *Bingham v. Reddy* (U. S.) 3 Fed. Cas. 402, 404.

A change in a material part of a note, made by an erasure and interlineation before execution, is not an "alteration" within Code, § 2852, but is an "alteration" if made afterwards without the consent of the other contracting parties. *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527.

Where the "alteration" of an instrument is shown to have been made by a stranger to the instrument, and is therefore a mere spoliation, the rights of the party under the instrument as it was before the alteration will not be affected thereby. *Cochran v. Nebeker*, 48 Ind. 459, 462.

Memoranda upon a plan of lots, stating that a certain person desires the offer of one lot and that a certain part of such lot had been sold to a certain person, and upon another lot the words indicating that a certain person desires the offer and sold to such person, being intended only to enable the person making them to remember who desired to purchase the lots, and to whom and when one of them was sold, did not constitute an "alteration" of the plan. They do not affect

its authenticity, nor vary in any way the courses and distances of the lines separating the lots, or the relative situations of the lots to each other. They may be said to disfigure the face of the plan, but that does not alter it; nor were they made with any intent to mislead or injure any person. *Morrill v. Otis*, 12 N. H. 466, 472.

An "alteration" in promissory notes by detaching therefrom the words "this note is given upon condition," which words stood alone, the nature of the condition nowhere appearing, was an immaterial one, and was no defense to an action on the notes. *Palmer v. Largent*, 5 Neb. 223, 224, 25 Am. Rep. 479.

The addition of a price of payment in a promissory note, after indorsement, by filling in a blank in a printed form which was preceded by the word "at," does not amount to such an alteration as will discharge an indorser. *Wessell v. Glenn*, 108 Pa. 104.

An alteration of a written contract such as to destroy it as a legal obligation is any change in its terms made by any party thereto, without the express or implied consent of all the parties, which varies its original legal effect and operation, whether in respect to the obligation it imparts or its force as matter of evidence. To erase the marginal figures "138<sup>01</sup>/<sub>100</sub>" in a note and write at the top of the instrument "118<sup>00</sup>/<sub>100</sub> correct amount," in order to correct a mutual mistake, is not such an alteration as will render the note void. *Chamberlain v. Wright* (Tex.) 35 S. W. 707.

The word "alter," in the definition of forgery, means to erase or obliterate any word, letter or figure; to extract the writing altogether, or to substitute other words, letters, or figures for those erased, obliterated, or extracted; to add any other word, letter, or figure to the original instrument; or to make any other change whatever which shall have the effect to create, increase, diminish, discharge, or defeat a pecuniary obligation or to transfer, or in any other way affect any property whatever. *Pen. Code Tex.* 1896, art. 534.

#### Judicial districts.

In Const. art. 6, § 5, providing that the state shall be divided into 14 judicial districts, subject to such "alteration" from time to time by a two-thirds vote of all the members elected to both houses of the Legislature as the public good may require, "alteration" means the increasing or diminishing of the number of such judicial districts, and is not confined to a change the size of such districts. "To alter means to change." While it might be more exact, when speaking of a number with a view to its change, to employ the words "increase" or "diminish," it cannot be affirmed that their places may not be efficiently filled by the words "to change" or "to alter." On the contrary, each of the two



latter are more comprehensive terms, and embrace both of the former. It is not a violation of usage, which is the law of language, to speak of the increase or diminishing of a given number as an alteration of the number, although less exact than the words "increase" and "diminish." *People v. Sassovich*, 29 Cal. 480, 483.

#### **Jurisdiction and proceedings.**

"Alter," as used in Const. art. 6, § 8, providing, except as herein otherwise provided, the Legislature shall have the same power to "alter and regulate" the jurisdiction and proceedings in law and equity that they have heretofore exercised, implies that the old jurisdiction shall in some degree continue in an altered or regulated form, and does not authorize the Legislature to entirely deprive a court of a part of its original jurisdiction. *People v. Coughtry*, 12 N. Y. Supp. 259, 58 Hun, 245.

#### **Street.**

"Alteration," as used in Rev. St. §§ 1265, 1269, authorizing the supervisors of the town to lay out, "alter," or discontinue any highway, means the change of course of an existing highway, leaving it substantially the same highway as before, but with its course in some respects changed. While an "alteration" will necessarily require the condemnation of additional lands, and will result in a vacation or discontinuance of that part of the former highway not included within the limits of the altered course, the proceeding to alter a highway does not thereby become a proceeding to lay out a new highway or to discontinue the old one, and hence a new and separate highway cannot be laid out on an application to alter an existing highway. *State v. Burgeson*, 84 N. W. 241, 242, 108 Wis. 174.

"An alteration of a highway generally refers to a change in the course thereof, and therefore necessarily involves to some extent the establishment of a new highway and the vacation of a part of the old highway for which the substitution is made." *Buchholz v. New York, L. E. & W. R. Co.*, 75 N. Y. Supp. 824, 826, 71 App. Div. 452; *Sprague v. Waite*, 34 Mass. (17 Pick.) 309, 315. Thus the change in the direction of a city street so that it crosses a railroad track at a different place was held an alteration of the highway. *Buchholz v. New York, L. E. & W. R. Co.*, 75 N. Y. Supp. 824, 826, 71 App. Div. 452.

Where an alteration and not a new way is prayed for, and is adjudged to be of common convenience, and is laid out accordingly, the laying out of a new section for the highway between two termini in the old way, pursuant to the petition, is an "alteration" and substitution of one for the other, and, of course, by legal implication, a discontinuance of that part of the old highway lying

between the same termini. *Sprague v. Waite*, 34 Mass. (17 Pick.) 309, 315.

"Alteration," as used in Rev. St. c. 24, § 13, authorizing a jury to make any alterations of a highway between the termini laid out by county commissioners, was technically to distinguish between the making of an entire new way and changing the location in one or more intermediate sections, and does not confer an authority to construct another new line of road from one terminus to the other. *Inhabitants of Gloucester v. Essex County Com'rs*, 44 Mass. (8 Metc.) 375, 379.

"Altering," as used in Laws 1827, p. 276, § 21, providing that it shall be lawful for the city trustees to order the paving of streets according to the map and survey, and the "altering" and cleansing of any street, vault, or sink, related to the old streets and roads which existed at the time of passing the act of incorporation, and not to new streets which might thereafter be laid out, opened, or graded in conformity to the map and survey and to the grade as first adopted by the trustees, and confers on the trustees no power or authority to change the grade or location of any new street after it has once been established by them in conformity to the map and survey first established, or of any of the old streets after they have been made to conform to such general plan. *Oakley v. Trustees of Williamsburgh*, 6 Paige, 262, 267.

"Altered," as used in St. 1871, c. 382, § 1, providing that, at any time within two years after any street, highway, or other way is laid out, altered, or graded, the board of the city must assess, etc., means when the order to lay out, alter, or grade is passed by the competent authority, and the date of the passage of such an order fixes the time from which the rights of the parties are to be determined, and from which the limitation of two years begins to run. *Hitchcock v. Board of Aldermen of Springfield*, 121 Mass. 382, 385 (cited in *Foster v. Board of Park Com'rs*, 133 Mass. 321, 327).

Acts Feb. 12, 1851, incorporating a railroad company, section 9, making it the duty of the company to erect and keep in repair good and sufficient bridges or passages over or under the railroad where any public or other roads then or thereafter laid out shall cross the same, and so to "alter" and grade the several public or other roads that the passage of carriages, etc., should not be impeded thereby, means to "alter" the road where the public had placed it, but the railroad cannot take it up and put it in a new place. "Alter" is not used in its most general sense to include the power of vacating a road, or a part of it, and laying a new one, as used in the acts concerning roads. It is not used in conferring a power respecting a highway, to be exercised or not in the discretion of the company, but is used in imposing a duty, which was to "alter" and grade

the existing road so that the railway in crossing shall not impede travelers. *State v. Warren R. Co.*, 29 N. J. Law (5 Dutch.) 353, 355.

Under a city charter authorizing the city council to close streets within said city, and to "lay out, adopt, alter, widen, and open" the same, and providing compensation to any person damaged by such closing or altering, "alter" includes a change in the grade of a street, and does not mean a change in the course or direction of a street, a widening thereof, or some act which involves a taking or damaging of the property of an adjoining owner. *Paris Mountain Water Co. v. City of Greenville*, 30 S. E. 699, 701, 58 S. C. 82.

#### Same—Change of grade.

"Alter" means to change or modify in form or structure without a change of identity, as, where power is conferred on a municipality to alter a street, the municipality has power to change the grade. *Waddell v. City of New York*, 8 Barb. 96, 98.

A technical "alteration" of a way is the substitution of one way for another, and hence the work of excavating earth forming a causeway across a great pond and substituting therefor a bridge at a different grade is not a technical alteration of a highway, but is in the nature of repairs. *Bigelow v. City Council of City of Worcester*, 48 N. E. 1, 2, 169 Mass. 390.

"Altering," as used in Const. art. 4, § 81, which prohibits the Legislature from enacting any special law for opening or altering highways, means an alteration of its course, and not a change of grade. *Harrison v. Board of Sup'rs of Milwaukee County*, 51 Wis. 645, 646, 8 N. W. 731, 736.

A change in the grade of a street is not "alteration" where it is made without an adjudication, within the meaning of a corporate charter giving a city council exclusive control of the construction, "alteration," and repair of streets, etc. *Simpson v. City of North Adams*, 54 N. E. 878, 879, 174 Mass. 450.

#### Same—Discontinuance.

Under a citation to "alter" a road, while it would not be competent to discontinue the road altogether, it is competent to discontinue that part of the old road which is rendered unnecessary by the alteration. *Ponder v. Shannon*, 54 Ga. 187, 189.

An "alteration" in a way is in law a discontinuance of the part altered. *Commonwealth v. Inhabitants of Westborough*, 3 Mass. 406, 407.

An alteration *ex vi termini* means a change or substitution, one thing for an-

other, and, where it appears that a highway has been altered, a discontinuance of the old highway will be implied. *Johnson v. Wyman*, 75 Mass. (9 Gray) 186, 189.

The power to open, "alter," or abolish a street does not give the right to grant a railway a right of way over the same. *Lackland v. North Missouri R. Co.*, 31 Mo. 180, 187.

#### Same—Widening.

The widening of a way is an "alteration in the location" of a highway, within Pub. St. c. 112, § 129, which provides a method for altering the location of a town way at a railroad crossing. *New England R. Co. v. Board of Railroad Com'rs*, 171 Mass. 135, 50 N. E. 549; *Boston & A. R. Co. v. Middlesex County Com'rs*, 177 Mass. 511, 59 N. E. 115. So that a petition for the widening of a street must be brought under an act providing a method for altering the location of highways. *Boston & A. R. Co. v. Middlesex County Com'rs*, 177 Mass. 511, 59 N. E. 115.

"Alter" means to change or modify; to change in form without destroying identity. As used in Hill's Code, § 4061, authorizing the county court to lay out, alter, or vacate a road, it gives the right or power to extend or diminish, so that the width is not beyond that established by statute. *Heiple v. Clackamas County*, 25 Pac. 291, 292, 20 Or. 147.

In Laws 1871, p. 210, chartering the city of Camden, and authorizing any street, highway, etc., to be vacated, opened, altered, widened, etc., by the city, "alter" is to be construed as relating "to the other changes contemplated in streets not included in the words 'laying out and widening.'" *State v. City of Camden*, 21 Atl. 565, 566, 58 N. J. Law, 322.

#### Will.

The difference between "revocation" and "alteration" of a will is this: If what is done simply takes away what was given before, or a part of what was given before, then it is revocation; but if it gives something in addition, or gives something else, then it is more than revocation, and cannot be done by mere obliteration. *Appeal of Miles*, 36 Atl. 39, 41, 68 Conn. 237.

## ALTERNATE.

In political conventions in the United States an "alternate" is one who is authorized to take the place of another in his absence; a substitute. An alternate of a member of the county committee of a political party has no authority to act while his principal is present and acting for himself. *State ex rel. Kelton v. Young*, 60 S. W. 1086, 1087, 160 Mo. 320.

**ALTERNATED CURRENT.**

An electric current which is periodically reversed by a commutator, which thus breaks the current between the changes in direction and takes off the current in sections, is known as a "reversed" or "alternated" current. This distinction between an "alternating" and an "alternated" current should be carefully noted. An "alternating" current continues to act in opposite directions as originally generated. An "alternated" current has been so reversed that the whole flows in one direction, and is then known as a "continuous" current. Every mechanically generated current is naturally and originally an "alternating" current. *Westinghouse Electric & Mfg. Co. v. New England Granite Co. (U. S.) 177 Fed. 951, 952.*

**ALTERNATING CURRENT.**

See "Alternated Current."

**ALTERNATIVE CONTRACT.**

Alternative contracts are such as by their terms may be performed by doing either of several acts at the election of the party from whom performance is due. *Crane v. Peer, 4 Atl. 72, 78, 43 N. J. Eq. 553 (citing 1 Suth. Dam. 471).*

**ALTERNATIVE OBLIGATION.**

Where the things which form the object of the contract are separated by a disjunctive, then the obligation is alternative. A promise to deliver a certain thing, or to pay a specified sum of money, is an example of this kind of obligation. *Civ. Code La. 1900, art. 2063.*

**ALTERNATIVE WRIT.**

The purpose of an "alternative writ of mandamus" is to compel persons charged with the performance of a public duty to perform that duty, or to show good and sufficient reasons why the same has not been performed. *Allee v. McCoy, 36 Atl. 355, 359, 2 Marv. 465.*

An "alternative writ of mandamus" is employed to elicit an answer showing cause why a peremptory writ should not issue. It is essential that the writ be served on the individuals who may be punished if the command is not obeyed. *Norwalk & S. N. Electric Light Co. v. Common Council, 42 Atl. 82, 85, 71 Conn. 381.*

An "alternative mandamus" is in the nature of an order to show cause. It does not affect a substantial right, because it determines nothing against the respondent or in favor of the relator. It cannot be quashed or set aside for any matter involving the

merits. See *Code Civ. Proc. § 2075. People ex rel. Ackerman v. Lumb, 6 App. Div. 23, 27, 39 N. Y. Supp. 514.*

**ALTHOUGH.**

The word "although" implies a doubt; a concession of something not positively determined. There is nothing in the negative terms, "although without any premeditated design to effect the death of any particular individual," which should exclude from the definition of murder in the second degree cases of constructive malice against a particular individual, but the definition should be construed in the same manner as if the words were, "although without premeditated design to effect the death of any person." *Hogan v. State, 36 Wis. 223, 244.*

**ALUMINA.**

"Alumina," as used in *Tariff Act Oct. 1, 1890, par. 9*, includes the fine powder known as "hydrate of alumina," and manufactured from the crude mineral known as "bauxite." *Irwin v. United States (U. S.) 67 Fed. 232, 233, 14 C. C. A. 381.*

**ALUMINOUS CAKE.**

"Aluminous cake" is the crude bauxite simply treated with acid. It contains all the undesirable ingredients of bauxite, namely, iron, silica, and titan acid. In *re Irwin (U. S.) 62 Fed. 150, 152.*

**ALWAYS.**

*Act 1857-58, c. 44, § 3*, requiring all railroad companies to keep the engineer, fireman, or some one else "always on the lookout" ahead when the train is in motion, does not require that the railroad company should keep somebody on the locomotive throughout the entire trip "always on the lookout," but it is sufficient if the precaution was being observed when the accident occurred. *Louisville & N. R. Co. v. Stone, 54 Tenn. (7 Heisk.) 468, 471.*

**AMALGAMATION.**

Of corporations, see, also, "Consolidation—Consolidation."

"Amalgamation" of corporations is used in the English cases in the sense of what is usually known as "merger" in this country, meaning the absorption of one corporation by another, so that the absorbing corporation continues in existence, and differs from consolidation, the meaning of which is limited to such a union of two or more corporations as necessarily result in the creation of a third new corporation. *Adams v. Yazoo & M. V. R. Co. (Miss.) 24 So. 200, 211.*

## AMBIGUITAS LATENS.

"An *ambiguitas latens* is that which seemeth certain and without ambiguity, for anything that appeareth on the deed or instrument, but there is some collateral matter out of the deed that breedeth ambiguity." *Carter v. Holman*, 60 Mo. 498, 504 (quoting *Bac. Max.* 25); *Aldrich v. Griffith*, 29 Atl. 376, 378, 66 Vt. 390; *Putnam v. Bond*, 100 Mass. 58, 60, 1 Am. Rep. 82.

## AMBIGUITAS PATENS.

An "*ambiguitas patens*" is that which appears to be ambiguous upon the deed or instrument. *Hastings' Estate*, 15 N. Y. St. Rep. 420, 427; *Carter v. Holman*, 60 Mo. 498, 504.

## AMBIGUITY.

See "Latent Ambiguity"; "Patent Ambiguity."

Ambiguity "is defined as duplicity, indistinctness, an uncertainty of meaning or expression used in a written instrument." *Nindle v. State Bank*, 18 N. W. 275, 13 Neb. 245 (quoting 1 *Bouv. Law Dict.* 117).

Ambiguity is the effect of words that have either no definite sense, or at most doubtful ones. *Ellmaker v. Ellmaker* (Pa.) 4 Watts, 89, 90.

"Ambiguity," as used in reference to the rule announced by Lord Bacon that a patent "ambiguity" cannot be explained by parol evidence, cannot be construed in its broad sense of doubtfulness, uncertainty, and double meaning. *Whalen v. Stephens*, 61 N. E. 921, 926, 193 Ill. 121 (citing *Fish v. Hubbard's Adm'rs*, 21 Wend. 651; *Doyle v. Teas*, 5 Ill. [4 Scam.] 202).

"Ambiguity" signifies the quality or state of being ambiguous; doubtfulness or uncertainty, particularly of signification. Webster so defines it. He defines "ambiguous" as "doubtful or uncertain," "particularly in respect to signification"; "equivocal"; "as, an ambiguous course, an ambiguous expression"; giving as synonyms "indeterminate," "doubtful," "uncertain," "unsettled," "indistinct," "equivocal"; and hence where a complaint is neither doubtful, uncertain, nor equivocal in its meaning, and enough appears to render it easy of apprehension and free from reasonable doubt, it is not demurrable on the ground of "ambiguity." *Kraner v. Halsey*, 22 Pac. 1137, 1138, 82 Cal. 209.

Ambiguity is an uncertainty of meaning in the terms of a written instrument. There are two kinds of ambiguity, to wit: A latent ambiguity, where the writing appears on the face of it certain and free from

ambiguity, but the ambiguity is introduced by evidence of the something extrinsic, or by some collateral matter out of the instrument; a patent ambiguity, which is the ambiguity apparent on the face of the instrument itself. *Brown v. Gulce*, 46 Miss. 299, 302.

An "ambiguity" in a will is not that which may be made doubtful by extrinsic proof tending to show an intention different from that manifested in the will, but it grows out of the difficulty of identifying the person whose name and description correspond with the terms of the will. Thus, if a testator make a devise to "William," but there are two persons of that name, there is an "ambiguity" that may be explained. *Ward v. Epsy*, 25 Tenn. (6 Humph.) 447.

## AMBIGUITY UPON THE FACTUM.

Ambiguity upon the factum "is an ambiguity as to the foundation itself of the instrument, or a particular part of it, as whether the testator meant a particular clause to be part of the instrument, or whether it was introduced with his knowledge; whether a codicil was meant to republish a former or subsequent will; or whether the residuary clause, or any other passage, was accidentally omitted. It does not mean an ambiguity upon the construction, as whether a particular clause shall have a particular effect." *Eatherly v. Eatherly*, 41 Tenn. (1 Cold.) 461, 465, 78 Am. Dec. 499.

## AMBIGUOUS.

In a demurrer to a complaint on the ground that the complaint was "ambiguous," uncertain, and unintelligible, the term "ambiguous" must be construed to mean "doubtful" or "uncertain," particularly in respect to signification, "equivocal," as an ambiguous course, an ambiguous expression; such being Webster's definition of it, being synonymous with indeterminate, indefinite, doubtful, uncertain, unsettled, indistinct, equivocal; and hence, if the complaint cannot be considered as either doubtful, uncertain, or equivocal in its meaning, it is not "ambiguous," and the demurrer on such ground cannot be sustained. *Kraner v. Halsey*, 22 Pac. 1137, 1138, 82 Cal. 209.

## AMBULANCE.

An ambulance is a wheeled vehicle, used for the purpose of conveying sick or wounded persons. *Kendall v. City of Duluth*, 66 N. W. 1150, 1151, 64 Minn. 295.

## AMBULATORY WILL.

A will is said to be ambulatory until the death of the testator, and speaks in reference to that time. This is true as to its le-

gal effect. It can only operate upon things as they then exist. *Hattersley v. Bissett*, 25 Atl. 332, 333, 50 N. J. Eq. (1 Dick.) 577.

## AMBUSH.

"The noun 'ambush' means (1) the act of taking an enemy unexpectedly from a concealed station; (2) a concealed station where troops or enemies lie in wait to attack by surprise; an ambuscade; (3) troops posted in a concealed place for attacking by surprise. The verb 'ambush' means to lie in wait, to surprise, to place in ambush, and hence a shooting from ambush will not justify a conviction under a statute relating to homicide by parties in disguise." *Dale County v. Gunter*, 46 Ala. 118, 142.

## AMENABLE.

"Amenable" is to be liable to answer, responsible, answerable, liable to be called to account. The word is of similar import to that of the word "obedient," and therefore a recognizance conditioned that the principal obligor render himself obedient to the orders and process of the court is a sufficient compliance with Crim. Code, § 77, requiring such bonds to be conditioned to answer such charge, and at all times render the obligor amenable to the orders and process of the court. *Miller v. Commonwealth*, 62 Ky. (1 Duv.) 14, 17.

## AMEND—AMENDMENT.

The word "amend" came into our language from the French "amender," the root or parent word being "menda," signifying a fault, and in its comprehensive sense meaning to better, and it is sometimes defined as meaning "to make better," or to change from bad for the better, and "amend" is defined by Webster as meaning to change in any way for the better by substituting something else in the place of what is being removed. As a law term it means the espousing out of some error in the proceedings and the correcting of it before judgment, and after if the error be not in the giving of the judgment. *Diamond v. Williamsburgh Ins. Co.*, 4 Daly, 494, 500.

To "amend" a thing, as defined by Webster, is to change it in any way for the better; to remove what is erroneous, superfluous, faulty, and the like; to supply deficiencies; to substitute something in place of what is removed. The word is synonymous with "correct," "reform," "rectify." An amendment, therefore, is a change or alteration for the better; a correction of faults or errors; an improvement, a reformation, an emendation. It necessarily implies something upon which the correction, alteration, improvement, or reformation can operate; some-

thing to be reformed, corrected, rectified, altered, or improved. In other words, that which is proposed as an amendment must be germane to or relate to the thing to be amended. In *re Pennsylvania Tel. Co. (Pa.)* 2 Chest. Co. Rep. 129, 131.

The term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purposes for which it was framed. *Livermore v. Waite*, 36 Pac. 424, 426, 102 Cal. 113, 25 L. R. A. 312.

### Bill or law.

It is said in *Cushing's Law of Legislative Assemblies*, § 1302, that the term "amendment" is used to denote any alteration which may be proposed or adopted; that according to the etymology of the word it might be supposed that nothing could be an "amendment" that did not improve the proposition; but this does not convey a correct idea of what is meant in legislation by this term. A proposition may be amended by an alteration which entirely defeats the purpose of the mover, or it may be turned into a motion of a different kind. The house is not obliged to consider a proposition which is moved and seconded, but it is within its power to substitute a different proposition, and this may be done by means of an amendment. This appears to have been the established law of parliamentary usage in England, and though it appears to have been modified at an early date in our legislative law, in some respects, we find that it has only been restricted to changes bringing in a subject different from the original. And where a bill was introduced in a state senate, and regularly passed, and referred to the house, where upon its second reading a substitute was introduced and regularly passed, and forwarded to the senate, it was but an amendment of the original bill. *Brake v. Callison* (U. S.) 122 Fed. 722, 724.

Amendments may be made so as to totally alter the nature of the proposition, and it is a way of getting rid of the proposition by making it bear a sense different from what it was intended by the movers, so that they vote against it themselves. 2 Hats, 79; 4, 82, 84. A new bill may be engrafted by way of amendment on the words "Be it enacted," etc. *De Hay v. Berkeley County Com'rs*, 44 S. E. 790, 795, 66 S. C. 229; 1 Grey, 190, 192.

In *State v. Wright*, 14 Or. 365, 370, 12 Pac. 708, it is said that in legislation an amendment means an alteration in the draft of a bill proposed or in a law already passed. Where, however, an act is complete and perfect in itself and not amendatory or revisory in its character, though such law by implication amends other statutes on the same subject, it is not an amendment. *Warren v. Crosby*, 34 Pac. 661, 662, 24 Or. 553.

"Amendment," as used in Const. art. 4, § 32, requiring that, when an act is amended, the act or section amended shall be set forth at full length, means a change in some of the provisions of an act, and does not include additional provisions not affecting existing ones. *Sheridan v. City of Salem*, 12 Pac. 925, 928, 14 Or. 323.

A law is "amended" when it is in whole or in part permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish the object or purpose for which it was made, or some other object or purpose. *Falconer v. Robinson*, 48 Ala. 340, 348.

#### Charter.

Under a charter of a theological institute reserving to the Legislature the power to alter or amend the charter, the Legislature cannot increase the number of trustees, nor add other parties and invest them with the same privileges and franchises conferred on the original parties. *Sage v. Dillard*, 54 Ky. (15 B. Mon.) 340, 358.

Const. art. 11, § 8, providing that a city charter can be "amended" only on the vote of electors of the city and the approval of the Legislature, does not apply to a change in the salary of the chief of police, under article 3, § 1, of the charter of the city of San Diego, providing that the common council in the month of January, 1891, and every four years thereafter, shall readjust and fix a new amount of all official salaries. *Coyne v. Renne*, 82 Pac. 578, 97 Cal. 590.

In respect to the amendment of a charter of a corporation, the amendment must relate to the charter as originally granted, and if it does not correct, improve, reform, rectify, or alter something in the original charter, it is not, properly speaking, an amendment to that charter. In *re Pennsylvania Tel. Co.* (Pa.) 2 Chest. Co. Rep. 129, 131.

#### Constitution.

Const. art. 14, § 1, provides that propositions for the amendment of the Constitution shall be submitted to the electors for their approval or rejection, and that, if a majority of the electors voting on said amendments at said election shall adopt the amendments, the same shall become a part of the Constitution. Held, that the use of the word "amendments" does not mean that no single amendment submitted with others can be adopted unless all are, but that every amendment submitted stands upon its own merits, and that, if a majority of those voting upon it vote in the affirmative, it becomes a part of the Constitution. *Prohibitory Amendment Cases*, 24 Kan. 700, 722.

#### Highway.

Under a city charter authorizing the council to alter and amend all streets, the council has the right to change the grade of a street. *Waddell v. City of New York*, 8 Barb. 95, 97.

"Amend," as used in St. 1786, c. 81, § 1, providing that all highways within any town shall be amended from time to time, so that the same may be safe, and convenient for travelers, with their horses, teams, carts, carriages, etc., means any alteration or improvement which would tend to make the road or highway better, and hence would include the cutting down of a sharp hill, and carrying the materials to the foot so as to reduce the grade. *Callender v. Marsh*, 18 Mass. (1 Pick.) 418, 429.

#### Pleading.

Amendment is the correction of any error in a pleading. *Hardin v. Boyd*, 5 Sup. Ct. 771, 773, 113 U. S. 756, 28 L. Ed. 1141; *Shroyer v. Pittenger*, 67 N. E. 475, 477, 31 Ind. App. 158 (citing *Anderson, Law Dict.*; *Black, Law Dict.*; *Burrill, Law Dict.*).

A pleading is "amended" when a correction of its faults has been made—when its defects have been cured—whether that change has been brought about by the action of the court in striking out and lopping off improper, irrelevant, and unnecessary matter contained therein, or whether a new frame of words has been filed embodying the good of the original with the improper, irrelevant, and unnecessary matter left out in obedience to the view of the court expressed in sustaining the motion to strike out. *Lennox v. Vandalia Coal Co.*, 59 S. W. 242, 248, 158 Mo. 473.

"Amendment" means to add something to or withdraw something from that which has been previously pleaded, so as to perfect that which might be deficient, or correct that which might have been incorrectly stated by the party making the amendment. *Supreme Tent Knights of Maccabees v. Cox*, 60 S. W. 971, 973, 25 Tex. Civ. App. 366.

"Amendment of a pleading implies an improvement of it, the making the pleading better as a pleading, the making good that which before was defective in its form of statement, or in making better the issues presented between the same parties. A change or alteration of parties in this sense does not amend the pleading. A mere alteration of names cannot make the pleading better; it may make it worse. The difference between an alteration of the parties and an amendment of the pleading is palpable, and, though both are included under the general term 'amendments,' the former is an amendment of process or of a proceeding, which is exclusively in the court. The power to per-

form the latter is permitted in certain cases to be exercised by a referee, and may also and in proper cases be exercised by the court." *Billings v. Baker*, 6 Abb. Prac. 213, 216.

To "amend" is, as the term implies, to free from error or deficiency; to cure an error; to supply a deficiency. Thus, where complainant sought injunctive relief, with damages as an incident thereof, and failed to allege that the injunction was sought for continuing trespass, an application to insert such allegation is simply to supply a deficiency, and constitutes an amendment. *Weill v. Metropolitan Ry. Co.*, 24 Civ. Proc. R. 85, 87, 30 N. Y. Supp. 833, 834.

An amendment is the correction of some error or mistake in a pleading already before the court, and there must therefore be something to amend by; whereas the insertion of facts constituting a new cause of action or defense would be a substituted pleading, and not an amendment of an existing pleading. *Woodruff v. Dickle*, 28 N. Y. Super. Ct. (5 Rob.) 619, 622.

An "amendment" is a correction of some error or mistake in a pleading or before the court, and there must therefore be something to amend. A plaintiff cannot abandon his original cause of action and substitute an entirely new cause of action in his complaint. A complaint for a breach of covenant of warranty contained in defendant's deed cannot be amended so as to state a cause of action in the nature of a fraud and deceit on the part of defendant. *Givens v. Wheeler*, 6 Colo. 149, 151.

Under the Code the verification is no part of a complaint, and, where an unverified complaint was served, a subsequent service, after answer, of the same complaint, with a verification attached thereto, was not an amendment of the complaint, and does not require an answer. *George v. McAvoy*, 6 How. Prac. 200.

The withdrawal of a pleading or answer because it does not set up a defense which the defendant has, and putting in its stead a pleading or answer which does set up such defense, is a change for the better, and therefore constituted an amendment as defined by the lexicographers. *Diamond v. Williamsburgh Ins. Co.*, 4 Daly, 494, 500.

An "amended complaint" supersedes the original complaint, but is not the beginning of a new action, and does not create a new jurisdiction; nor is an appearance necessary to an amended complaint. *Flanagan v. Reitemier*, 59 N. E. 389, 393, 26 Ind. App. 243.

As a general rule, the very purpose of an "amended declaration" is to state, in a more accurate and legal manner than had been previously stated, the cause of action

for which the suit was brought. Filing an amended declaration cannot be construed to be the commencement of the suit within the meaning of the limitation of the statutes. *Chicago City Ry. Co. v. Hackendahl*, 58 N. E. 930, 932, 188 Ill. 800.

An "amended demurrer" is one which adds to or supplements a demurrer already filed in the cause, but which does not add entirely new matter or arrest the progress of the case. *Lundbeck v. Pilmair*, 43 N. W. 271, 78 Iowa, 434.

A petition containing merely a statement of transactions constituting his cause of action arising before the bringing of the suit is technically an "amended petition," and it was incorrect to designate it as "supplemental petition," since it pleaded no new facts accruing after the filing of his original petition. *Scroggin v. Johnston*, 64 N. W. 236, 238, 45 Neb. 714.

#### AMENDATORY LAW.

An amendatory law is a statute for the amendment, not of what might have been enacted under the title of the original statute, but what was enacted; not of what the original law might have been, but what it was; and hence the sufficiency of the title of an act merely declared to be amendatory of a prior law, to justify the legislation which may be enacted under it, depends not alone on the fact that the title of the original statute was so comprehensive that the legislation in question might have been properly enacted in such law, but also upon the nature and extent of the prior enactment to amend which is the declared purpose or subject of the latter act. *State v. Smith*, 28 N. W. 241, 244, 35 Minn. 257.

#### AMENDMENT OF FORM.

An "amendment of form," as used in pleading, is one which is merely formal, as to correct a clerical error, the name of the court or party, and which does not consist of a material allegation necessary to the plaintiff's recovery. *Barber v. Briscoe*, 19 Pac. 589, 590, 8 Mont. 214.

#### AMENDMENT OF SUBSTANCE.

An "amendment of substance," in pleading, is one which consists of a material allegation which has been left out of the original complaint, or which sets forth an allegation of a material fact, proof of which is necessary to enable the plaintiff to recover. *Barber v. Briscoe*, 19 Pac. 589, 590, 8 Mont. 214.

#### AMENITY.

An "amenity" consists in restraining the owner from doing that with and on his

property which, but for the grant or covenant, he might lawfully have done, and is sometimes called a "negative easement," as distinguished from that class of easements which compels the owner to suffer something to be done on his property by another. *Equitable Life Assur. Soc. v. Brennan*, 24 N. Y. Supp. 784, 788.

## AMERCEMENT.

"Amercement" was the practice which obtained at the common law of compelling the plaintiff who made a false clamor, and either failed to try his case, or, trying it, failed to sustain it, to pay a fine which went to the King as a penalty for the groundless invasion of a court of justice. *Good-year v. Sawyer* (U. S.) 17 Fed. 2, 9.

"Amercement" is a pecuniary penalty, in the nature of a fine, imposed on a person for some fault or misconduct, he being "in mercy" for his offense. The term is generally used with reference to a penalty imposed on a sheriff or other executive officer for failure to comply with a duty of his office, and is assessed against the delinquent or imposed arbitrarily by the court at its discretion. The difference between "amercement" and "fines" is that the latter are certain and are created by statute, and can only be imposed by courts of record, while the former are arbitrarily imposed, and may be imposed by courts not of record. *Stansbury v. Patent Cloth Mfg. Co.*, 5 N. J. Law (2 Southard) 433, 441.

An "amercement" is a penalty, and is for a fixed sum, without regard to the little or much of the plaintiff's damage. *Thompson v. Berry*, 65 N. C. 484, 485.

An "amercement" is a penalty, and ought not to be enforced by a court of justice at the instance of a party who has not performed precedent duties required of him by the law. *Taylor v. Rhyne*, 65 N. C. 530, 532.

A judgment of amercement on due notice is when the officer is sued upon his bond, conclusive against the officer, but only prima facie against the sureties. *Fire Ass'n of Philadelphia v. Ruby*, 49 Neb. 584, 588, 68 N. W. 989 (citing *Graves v. Bulkley*, 25 Kan. 249, 37 Am. Rep. 249, where many authorities are cited).

## AMERICAN.

"American," as used in a devise to be used by trustees for the benefit of worthy, deserving, poor, white "American" Protestants, means all descendants of Europeans born in America, especially the inhabitants of the United States. *Beardsley v. Selectmen of Bridgeport*, 3 Atl. 557, 559, 53 Conn. 489, 55 Am. Rep. 152.

## AMERICAN CLAUSE.

The "American clause" in a marine insurance policy is a clause providing that, if the insured shall have made any other insurances on the premises aforesaid prior in date to this policy, then such company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the premises hereby assured, and that the company shall return the premium on so much of the sum by them assured as they shall by such prior assurance be exonerated from, and that, in case of any insurance on such premises subsequent in date to this policy, the company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without the right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent assurance had been made. *American Ins. Co. v. Griswold*, 14 Wend. 399, 499.

The term "American clause" in the law of insurance is used to designate a condition in the policy that, if the assured shall have made any other assurance upon the premises aforesaid prior in day of date to the policy in question, then the said assurer shall be answerable only for so much as the amount of such prior assurance may be deficient to fully cover the premises assured. *Corporation of London Assurance v. Patterson*, 32 S. E. 650, 655, 106 Ga. 588.

## AMERICAN DOCTRINE.

The "American doctrine," as commonly called, or the trust-fund doctrine, is that the capital of a corporation is a trust fund for the payment of its debts. *Hospes v. Northwestern Mfg. & Car Co.*, 50 N. W. 1117, 1119, 48 Minn. 174, 192, 15 L. R. A. 470, 31 Am. St. Rep. 637.

## AMERICAN FISHERY.

A corporation consisting of American citizens fitted out a registered American vessel, which was manned with an American crew, and engaged in the business of catching turtles in Central American waters, and canning them aboard the vessel. Held, that this constituted an American fishery, within the meaning of Tariff Act Aug. 27, 1894, c. 349, § 2, Free List, par. 568, 28 Stat. 542, which exempts from duty "all fish and other products" of "American fisheries," and that the canned turtle meat is free of duty as the product of such fishery. *Downing v. United States* (U. S.) 124 Fed. 107, 108.

## AMERICAN HOP ALE.

American hop ale, as sold in Kansas, is an imitation of lager beer, made of malted



grain, hops, and water, slightly fermented, and contains a very slight percentage of alcohol. *City of Lincoln Center v. Linker*, 53 Pac. 787, 788, 7 Kan. App. 282.

### AMERICAN SHIP.

A ship engaged in a whaling voyage without having surrendered her register or taken out an enrollment and license is not an "American ship or vessel" within the purview of Act 1835, c. 40, providing that if any one or more of the crew of an American ship or vessel, etc., shall endeavor to make a revolt, etc., he and they shall, on conviction, be punished, etc. *United States v. Rogers* (U. S.) 27 Fed. Cas. 890.

### AMERICANS.

A treaty with a foreign nation provided that American consuls should have jurisdiction of offenses committed by Americans. The statute enacted to carry the treaty into effect provided that the consuls should have jurisdiction over crimes of the citizens of the United States. Held, that the term "Americans," when construed in connection with the term "citizens of the United States," included "all who are citizens, and all who, though not strictly citizens, are by their service equally entitled to the care and protection of the government." A citizen of a foreign country who enlists on an American vessel is included within the term. *Ross v. McIntyre*, 11 Sup. Ct. 897, 904, 140 U. S. 453, 35 L. Ed. 581.

### AMICABLE ACTION.

Amicable action, "in the sense in which these words are used in courts of justice, presuppose that there is a real dispute between the parties concerning some matter of right. And in a case of that kind it sometimes happens that, for the purpose of obtaining a decision of the controversy without incurring needless expense and trouble, they agree to conduct the suit in an amicable manner; that is to say, that they will not embarrass each other with unnecessary forms and technicalities, and will mutually admit facts which they know to be true without requiring proof, and will bring the point in dispute before the court for decision without subjecting each other to unnecessary expense or delay. But there must be an actual controversy and adverse interests. The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being opposed or censured, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties." *Lord v. Veazle*, 49 U. S. (8 How.) 251, 255, 12 L. Ed. 1067.

The words "arbitration" and "amicable law suit" are not convertible terms; the for-

mer carries with it the idea of settlement by disinterested third parties, and the latter by a friendly submission of the points in dispute to a judicial tribunal, to be determined in accordance with the terms of law. *Thompson v. Moulton*, 20 La. Ann. 535, 537.

### AMICUS CURIAE.

"Amicus curiae," in its ordinary use, implies the friendly intervention of counsel to remind the court of some matter of law which has escaped its notice, and in regard to which it appears to be in danger of going wrong. It is not ordinarily the function of the "amicus curiae" to take upon himself the management of a cause. *Taft v. Northern Transp. Co.*, 56 N. H. 414, 416.

An "amicus curiae" is a bystander who, when a judge is doubtful or mistaken in a matter of law, may inform the court. He is heard only by leave and for the assistance of the court on a case already before it. He has no control over the suit, and no right to institute proceedings thereon, or to bring the case from one court to another by appeal or writ of error. *Birmingham Loan & Auction Co. v. First National Bank*, 13 South. 945, 946, 100 Ala. 249, 46 Am. St. Rep. 45.

An amicus curiae is heard only by the leave and for the assistance of the court, and upon a case already before it. He has no control over the suit, and no right to institute any proceedings therein, or to bring the case from one court to another by exceptions, appeal, or writ of error. *In re Columbia Real Estate Co.* (U. S.) 101 Fed. 965, 970 (citing *Martin v. Tapley*, 119 Mass. 116, 120).

### AMITY.

The word "amity" is not a technical word. It is a word of common use, and when found in a statute must be given its ordinary meaning, unless there be something in the context which compels a narrower or different scope. Webster defines it as friendship, in a general sense, between individuals, societies, or nations. The question whether an Indian tribe, some of whose members have committed depredations upon the property of persons subject to the authority of the United States, was in amity with the United States, within the meaning of Act Cong. March 3, 1891, c. 538, 26 Stat. 851 [U. S. Comp. St. 1901, p. 758], so as to entitle the claimants to a judgment against the United States and the tribe for the value of the property, is a question of fact depending upon whether the tribe was in the relation of actual peace with the United States, and not upon whether there was a subsisting treaty between it and the United States which had never been formally abrogated by a declaration of war by either party. *Marks v. United*

States, 16 Sup. Ct. 476, 478, 161 U. S. 297, 40 L. Ed. 706.

## AMNESTY.

"An amnesty is an act of oblivion or forgetfulness. It is an act of sovereign mercy and grace, flowing from the appropriate organ of the government." *Ex parte Law*, 35 Ga. 285, 296.

"Amnesty" is a sovereign act of pardon and oblivion for past acts, granted by a government to a person who has been guilty of crime or political offenses, such as treason, sedition, and rebellion. The term properly belongs to international law, and is applied to rebellions which by their magnitude are brought within the rules of international law, and has no technical meaning in the common law, where it is merely the synonym of "oblivion" and "pardon." *Knote v. United States*, 10 Ct. Cl. 397, 407.

"Amnesty" is defined to be the act of the sovereign power granting oblivion or a general pardon for a past offense. It is rarely exercised in behalf of single individuals, but usually exerted in favor of certain classes of persons who are subject to trial but have not yet been convicted. *Brown v. Walker*, 16 Sup. Ct. 644, 648, 161 U. S. 591, 40 L. Ed. 819.

### Pardon distinguished.

The word "amnesty" is defined thus: An act of oblivion of past offenses, granted by the government to those who have been guilty of any neglect or crime, usually upon condition that they return to their duty within a certain period. A "pardon" relieves an offender from the consequences of an offense of which he has been convicted, while "amnesty" obliterates offense before conviction, and in such case he stands before the law precisely as though he had committed no offense; and while the word "pardon" was used by the President in the crime of amnesty to a person who had been guilty of polygamy, but had abandoned those practices, nevertheless the instrument has the effect of an amnesty. *United States v. Bassett*, 13 Pac. 237, 239, 5 Utah, 131.

"Amnesty" is included within the word "pardon," which is generic, and includes every character of pardon. *Davies v. McKeeby*, 5 Nev. 369, 373.

"Amnesty" and "pardon" are not precisely the same. Pardon is granted to one who is certainly guilty, sometimes before, but usually after, conviction. Courts take no notice of it unless pleaded or claimed by the person pardoned, and it is usually granted by the crown or by the executive; but "amnesty" is to those who may be guilty, and is usually granted by Parliament or the Legislature, and to whole classes before trial.

"Amnesty" is the abolition or oblivion of the offense; "pardon" is its forgiveness. *State v. Blalock*, 61 N. C. 242, 247. See, also, *Ex parte Law*, 35 Ga. 285, 296; *State ex rel. Anheuser-Busch Brewing Ass'n v. Eby*, 71 S. W. 52, 61, 170 Mo. 497.

"Amnesty," as used in the President's proclamation of December 25, 1868, extending unconditionally and without reservation a full pardon and "amnesty" for the offense of treason against the United States, or of giving aid and comfort to their enemies, to all persons who had directly or indirectly participated in the Rebellion, in consideration of all rights, privileges, and immunities under the Constitution, and the rights held in pursuance thereof, is synonymous with "pardon," and confers no greater benefits upon the persons included within the meaning of the proclamation than if the term "pardon" alone had been used. It is sometimes said that "amnesty" operates as an extinction of the offense of which it is the object, causing it to be forgotten so far as the public interests are concerned, while "pardon" only operates to remove the penalties for the offense. Such distinction is not recognized in the law, and, except that the term "amnesty" is generally employed in pardons extending to whole classes and communities instead of individuals, the distinction between "pardon" and "amnesty" is merely philological rather than legal. *Knote v. United States*, 95 U. S. 149, 152, 24 L. Ed. 442.

## AMONG.

The word "among" means "intermingled with." *Commonwealth v. Gloucester Ferry Co.*, 98 Pa. 105, 120.

In cases where construction is necessary to determine whether an instrument creates a joint tenancy or tenancy in common, the distributive words "among," "any," and "each" are used to distinguish estates in common from joint tenancies, and are given controlling effect in determining the estates to be tenancies in common. *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254, 257.

In the provision of the federal Constitution "that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes," the word "among" means "intermingled with." Commerce among the states cannot stop at the external boundary of each, but must be introduced into the interior. It means commerce which concerns more states than one, not mere internal regulation and traffic. Under a different construction one state might load another with imposts and taxes, on the passage of goods and persons, ruinous to the interior. *State v. Foreman*, 16 Tenn. (8 Yerg.) 256, 316.

A bequest of personalty to testatrix's son, to be held in trust by her daughter and her

husband for the support and maintenance of the son, with a direction that anything remaining at the latter's decease should be equally divided "among my three daughters," should be construed as equivalent to naming such daughters particularly, and not to indicate that such daughters were to be treated as a class, the survivors only of which should share in the distribution. *Bancroft v. Fitch*, 41 N. E. 661, 662, 164 Mass. 401.

#### Distribution to each required.

"Among," as used in a will directing that a certain amount should be divided "among" certain heirs, imports a division of the fund into many parts. The word "between" is even used as synonymous with "among," especially when employed to convey the idea of division or separate ownership of property held in common, it being quite as appropriate to say that property is to be divided "between" A., B., and C., as "among" A., B., and C. So Webster says, "We observe that 'between' is not restricted to two," and illustrates thus: "Twenty proprietors owned a tract of land between them." *Myres v. Myres* (N. Y.) 23 How. Prac. 410, 415.

"Among," as used in a will providing that the property of testator shall be divided "among" certain persons, is not properly executed by giving all to one, nor by excluding any, but requires each and every one of them to have a share therein. *Micheau v. Crawford*, 8 N. J. Law (3 Halst.) 90, 103.

"Among," as used in a will by which the testator empowered his widow to dispose of certain slaves "among his children" as she might think proper, contemplated that the slaves were to be divided according to the widow's discretion and the different portions given to the testator's children, and hence the widow could not give all of the slaves to one child, nor wholly exclude any, nor could she give any of them to the testator's grandchildren, and if she made an appointment violating this principle it would be avoided in equity, and the property divided among all the children and their representatives. *Hudson v. Hudson's Adm'r* (Va.) 6 Munf. 352.

Where a father transferred certain stocks to trustees in trust for his wife and children, the income and use to be for her benefit for life, with the power to distribute "among" such of her children as she should by her last will appoint, the power to distribute "among" includes the power to select from and direct any distribution among such children, and she may exclude one entirely, or give to one less than to the others. *Ingraham v. Meade* (U. S.) 13 Fed. Cas. 50, 53.

Act Feb. 1832, incorporated a bank, and named commissioners to receive subscriptions and to distribute the stock "among" the subscribers, providing that, in case there

should be subscriptions to more than the amount of stock, they should apportion the same "among" the subscribers as they deemed most advantageous to the bank. Held, that "among" in such provision did not require that every subscriber should receive some stock, such construction interfering with the power given the commissioners. *Clarke v. Brooklyn Bank*, 1 Edw. Ch. 361, 368.

Act March 26, 1813, incorporated a bank, and appointed commissioners to apportion an excess of shares "among" the several subscribers as they judged discreet and proper. It was held that shares should be assigned to each subscriber. *Haight v. Day* (N. Y.) 1 Johns. Ch. 18, 20.

Where a will gave a trustee power to sell, exchange, and invest property, and to "dispose of any or all of said property as he may choose, 'among' our children in such proportion as he may choose," he did not have the authority to exclude any child from the estate, and hence each child was not entitled to an equal portion, but was entitled to some substantial part. *Hatchett v. Hatchett*, 16 South. 550, 551, 103 Ala. 556.

The word "among" in a will, stating that it is my will that my said daughter shall in such case have power to distribute the same "among" her brothers and sisters and other children in such proportion as she may see fit, is inconsistent with an exclusive appointment, standing as the word does without any qualification of its own import and consequence, and each was entitled to a portion. *Lippincott v. Ridgway*, 10 N. J. Eq. (2 Stockt.) 164, 170.

#### Division in equal shares implied.

A will providing that a certain sum should be divided equally "among" certain persons named clearly indicates an intention that the persons named were to take in equal shares. In re *Holder*, 41 Atl. 576, 21 R. I. 48; In re *Hicks' Estate* (Pa.) 25 Wkly. Notes Cas. 499, 500.

The prepositions "among" and "between" are often capable of different meaning according to their collocation and connection, as the same are differently used and placed and intended to express different ideas. But when the prepositions "between" and "among" follow the verb "divide," their general signification is very similar, and in popular use are considered synonymous, though "among" denotes a collection, and is never followed by two of any sort, whilst "between" may be followed by any plural number, and seems to denote rather the individuals of the class than the class itself generically; but whatever importance may be attached to such philological refinements, it is certain that the general rule is that where a bequest is made to several persons, in general

terms, indicating that they are to take equally as tenants in common, each individual will take the same share, or, in other words, the legatees will take per capita. *Senger v. Senger's Ex'r*, 81 Va. 687, 698.

### AMONG THE FILES.

A clerk's certificate that certain papers were true and correct copies of original papers "among the files of tax papers now on file in my office," means that the papers among the files were filed. *State v. Board of Equalization of Washoe County*, 7 Nev. 83, 96.

### AMONGST.

A devise or bequest to several persons "amongst" them makes the objects tenants in common. *Stetson v. Eastman*, 24 Atl. 868, 870, 84 Me. 366.

The phrase "to and amongst," when used in a devise to testator's children, has a strict technical meaning, which requires that each child must have some share assigned to him. *Willmetts v. Alchin*, 2 Barn. & Ald. 122, 124.

Lord Alvanley, in construing a power to appoint "amongst children as the donee shall think proper," construed the word "amongst" to mean "all and every," and he held that the power did not authorize an exclusive appointment. *Thrasher v. Ballard*, 14 S. E. 232, 35 W. Va. 524.

### AMOTION.

"Amotion" is the right to remove an officer of a corporation, and it is a power inherent in every corporation, and may be exercised without interfering with the officer's franchise, as the officer, when removed, still continues a member. *White v. Brownell* (N. Y.) 4 Abb. Prac. (N. S.) 162, 192; *Richards v. Clarksburg*, 4 S. E. 774, 778, 30 W. Va. 491.

#### Disfranchisement distinguished.

In a corporation there is a distinction between what is called "amotion," or the right to remove an officer, and disfranchisement. The former may be exercised without interfering with the franchise, as the officer, when removed, still continues a member; but disfranchisement is an absolute expulsion of the member from the body, and the taking away of his franchise, which cannot be done unless the power is given by the charter creating the corporation, or the member has been guilty of crime a conviction of which would work a forfeiture of all civil rights, including the corporate franchise, or has committed acts which tend to the destruction of the corporation. *White v. Brownell* (N. Y.) 2 Daly, 329, 356, 357.

### AMOUNT.

Other amounts due, see "Other."

"Amount" means the effect, substance, or result; the sum. *Swartley v. McCracken*, 7 Montg. Co. Law Rep. 49, 50 (citing Webster Dict.).

#### Rate distinguished.

"Amount" means a sum or total, the aggregate, while "rate" means a fixed measure of estimation, so that Pol. Code Mont. § 1940, as amended by Act March 8, 1897, § 1940b, providing for the submission to the voters of the question whether school taxes should be levied, which requires a notice stating the "amount" to be raised, is inconsistent with section 1941, providing that, when the "rate" of taxation has been determined as provided in the preceding section, the trustees shall certify the same, etc., and hence the statute is inoperative. *Hilburn v. St. Paul, M. & M. Ry. Co.*, 58 Pac. 551, 555, 23 Mont. 229.

#### As value.

"Amount," when used in reference to money, is synonymous with "value," and hence a verdict of the jury that defendant embezzled a certain "amount" of money complies with the statute requiring the jury to ascertain and declare the value of the property stolen, embezzled, or falsely obtained. *Bartley v. State*, 73 N. W. 744, 761, 53 Neb. 310.

In cases of notes current as money, the words "amount" and "value" are ordinarily synonymous terms. *Commonwealth v. Warner*, 54 N. E. 353, 355, 173 Mass. 541 (citing *Commonwealth v. Hussey*, 111 Mass. 432).

St. 1881, c. 288, § 3, providing that no renewal or continuation of a limited partnership shall be made unless the capital contributed by the special partners is "equal in amount" or more than the aggregate capital the special partners originally contributed, means equal in value as a resource or asset of the partnership. *Durgin v. Colburn*, 57 N. E. 213, 214, 176 Mass. 110.

#### As the whole.

A statutory provision that a trust company shall be taxed upon the amount of its capital stock issued and outstanding may mean either the par value of such shares or the entire amount of such shares of stock, signifying that the whole number of its shares shall be subject to taxation, and not that the assessment shall be made at the arbitrary value, less than the true value of such shares. As the former meaning is unconstitutional, the latter should be adopted. *Fidelity Trust Co. v. Vogt*, 48 Atl. 580, 581, 66 N. J. Law, 86.

"Quantum," according to Webster, means quantity, amount; and "amount," the

sum total of two or more particular sums or quantities; the aggregate; the whole quantity; a totality. Where a telegraph company failed to deliver a message promptly, and the plaintiff proved his right to recover damages for the delay, the jury could consider mental anguish occasioned by such delay in fixing the quantum of damages. *Connelly v. Western Union Tel. Co.*, 40 S. E. 618, 622, 100 Va. 51, 56 L. R. A. 663, 93 Am. St. Rep. 919.

#### AMOUNT IN CONTROVERSY.

See, also, "Value in Controversy."

In Rev. St. arts. 1165, 1638, fixing the jurisdiction of a justice of the peace "when the amount in controversy" does not exceed a certain sum, the words "amount in controversy" mean and are synonymous with "matter in controversy," the word "amount" being used instead of the word "matter." *Smith v. Giles*, 65 Tex. 341, 343.

There can be no difference in the meaning of the words "amount in controversy" and "damages claimed" or "relief demanded," as used in the statute. *Howard Iron Works v. Buffalo Elevating Co.*, 81 N. Y. Supp. 452, 459, 81 App. Div. 386.

#### As amount claimed or sued for.

In the constitutional provision that no justice shall have jurisdiction in any civil action where the "amount in controversy" exceeds \$100, the phrase "amount in controversy" means the same thing as the words "sum claimed" in Gen. St. c. 65, § 5, providing that a justice shall have jurisdiction in actions arising on contract for the recovery of money, only if the "sum claimed" does not exceed \$100, and the latter expression is not broader and does not controvert the terms of the Constitution. *Barber v. Kennedy*, 18 Minn. 216, 226 (Gil. 196, 208).

The phrase, "the amount in controversy," in a statute making jurisdiction dependent upon the "amount in controversy," means the sum of money or value of the thing originally sued for. *Gulf, C. & S. F. Ry. Co. v. Cunnigan*, 67 S. W. 888, 890, 95 Tex. 439.

Where there has been no fraud practiced on the court in the allegation of the plaintiff's claim, in order to give the court jurisdiction, the amount in dispute or in controversy will be deemed to be that claimed by the plaintiff in his declaration. *Boyt v. Mitchell* (Ind. T.) 64 S. W. 610, 612.

Act 1789, c. 20, §§ 11, 20, providing that the Circuit Court shall have jurisdiction where the "amount in controversy" exceeds \$500 in value, means the amount named in the declaration. *Green v. Liter*, 12 U. S. (8 Cranch) 229, 242, 3 L. Ed. 545.

"Amount in controversy," as used in a statute relating to jurisdiction on appeal,

meant the entire amount as finally claimed by the plaintiff, and included an amount assigned by one of two plaintiffs pending the action. *Fink v. Denny*, 75 Va. 663, 666.

Within Laws 1883, c. 205, § 10, giving the Court of Appeals from the board of claims jurisdiction where the "amount in controversy" is \$500, the amount in controversy is the amount of the claim presented for the amount which the board of claims may legally award the claimant under the proofs, with interest, and hence an appeal from the board of claims will not be dismissed though a large part of the claims presented are barred by the statute of limitations, where it appears from their date that an award may be made exceeding \$500. *Folts v. State*, 23 N. E. 567, 568, 118 N. Y. 406.

Const. art. 4, § 4, providing that the jurisdiction of the Supreme Court shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy does not exceed the sum of \$200, "can mean nothing more or less than the amount originally in controversy, or, in other words, the amount sued for." *Bleecker v. Satsop R. Co.*, 27 Pac. 1073, 1074, 3 Wash. St. 77.

#### As difference between claim and recovery.

"Amount in controversy," within the meaning of the statutes giving an appellate court jurisdiction of actions for a money judgment where the "amount in controversy," inclusive of costs, does not exceed \$3,500, means the amount in controversy or actually in dispute in the court to which the appeal is taken, and not the amount in controversy in the trial court, where the amount in controversy in the two courts is different. It has been held by this court that where the plaintiff recovers in the trial court a judgment for a part only of his claim, and is dissatisfied therewith, and appeals to this court, the amount in controversy on such appeal is the amount of the difference between his judgment and his claim. *Johnson v. Board of Com'rs of Randolph County*, 39 N. E. 311, 140 Ind. 152.

#### Costs excluded.

"Amount in controversy," as used in a statute providing that justices of the peace shall have jurisdiction where the amount in controversy exceeds \$200, means the principal sum sued for, exclusive of costs. *Bradley v. Kent*, 22 Cal. 169, 172.

#### Counterclaim or intervention included

Where complainant brought suit for an amount insufficient to give the Supreme Court jurisdiction of an appeal in the cause, but in the progress of the case another creditor intervened, alleging his claim against the common debtor, and praying that it might be allowed and payment enforced

against the same property pursued by the complainant, who afterward took a bona fide assignment of such claim for value, the aggregate of the two claims constituted the amount in controversy, and the fact that the assignment was made pending suit was of no consequence. *Fink v. Denny*, 75 Va. 663, 666.

In determining the "amount in controversy" necessary to give this court jurisdiction under section 6, art. 5, Const., and Rev. St. 1895, art. 966, where there is a cross-action in the nature of a counterclaim or plea in reconviction, either the amount of the original demand or that of the counterclaim must reach the jurisdictional sum. *Crosby v. Crosby*, 49 S. W. 359, 360, 92 Tex. 441.

#### Interest included.

Code Prac. § 16, providing that the appellate court should not have jurisdiction where the "amount in controversy" did not exceed a certain value, should be construed to include the interest due on the debt at the time the action was commenced. *Orth v. Clutz's Adm'r*, 57 Ky. (18 B. Mon.) 223, 225.

The "amount in controversy," as used in a statute taking away the right of appeal except when the amount in controversy exceeds \$20, includes, not only the principal of a promissory note on which suit is brought, but also the interest thereon, and hence an appeal may be taken when the combined sum is over \$20, though the principal is less than that amount. *Smith v. Smith*, 15 Vt. 620, 621.

Gen. St. 1878, c. 64, § 82, limiting the jurisdiction of the municipal court of the city of St. Paul to civil actions where the "amount in controversy" does not exceed \$200, means the amount in controversy at the time of the rendition of the verdict, and hence an addition of interest accruing between such time and the rendition of the judgment does not divest the court of jurisdiction, though it makes the amount exceed \$200. "The interest accruing subsequent to the finding was never in controversy. It is allowed much the same as costs and disbursements, as an incident to the main recovery, and is not to be taken in the act in determining the jurisdiction of the court." *Conger v. Nesbitt*, 15 N. W. 875, 30 Minn. 436.

The amount in controversy necessary to give jurisdiction on appeal, whether it be in an action at law, a suit in chancery, or in libel, must appear on the face of the pleading by which the claim is made, and no computation of interest can be called in to give jurisdiction. *Udall v. The Ohio*, 58 U. S. (17 How.) 17, 18, 15 L. Ed. 42.

#### AMOUNT IN DISPUTE.

The term "amount in dispute" in Rev. St. § 691, giving the Supreme Court in the

United States appellate jurisdiction in certain cases when the amount or value in dispute equals a certain sum, was held by a divided court in 1798 to mean the amount in dispute as determined by the foundation of the original controversy, the amount in dispute when the action was instituted (*Willson v. Daniel*, 3 U. S. [3 Dall.] 401, 1 L. Ed. 655); but Justices Chase and Iredell dissented, the latter laying down the doctrine that the amount involved should be determined in the case as it appears in the Supreme Court, and not by the sum in controversy in the court below. The doctrine of the dissenting opinion was adopted by the court in *Gordon v. Ogden*, 28 U. S. (3 Pet.) 33, 7 L. Ed. 592, in 1830, which has been followed by a continuous and unbroken line of Supreme Court decisions ever since. *Decker v. Williams* (U. S.) 73 Fed. 308, 310.

The expression "amount in dispute," as used in a statute giving the jurisdiction to the Supreme Court when the "amount in dispute" exceeds a certain sum, does not depend upon the amount claimed, but upon the real amount in dispute. As has been said, the amount in dispute which brings a case within the jurisdiction of the court is the real amount in controversy. Thus, where a petition alleged that plaintiff borrowed of defendant \$2,500, and executed therefor his note secured by trust deed, and that defendant retained \$600 to satisfy a prior incumbrance, which it failed to do, and prayed that the amount due be ascertained, and on payment thereof the trust deed satisfied, the amount in dispute was only \$600, with interest. *May v. Jarvis-Conklin Mortg. Trust Co.*, 40 S. W. 122, 138 Mo. 447.

"Amount in dispute," as used in Const. Mo. art. 6, § 12, defining the "amount in dispute" necessary to bring the cause within the jurisdiction of the Supreme Court, construed to mean the amount in dispute at the time the appeal is taken, as shown by the record. *Reichenbach v. United Masonic Ben. Ass'n*, 20 S. W. 317, 318, 112 Mo. 22; *Addison Tinsley Tobacco Co. v. Rombauer*, 20 S. W. 1076, 113 Mo. 435.

Under the Constitution of California, providing that the Supreme Court shall have jurisdiction on appeal of cases where the "amount in dispute" exceeds \$200, where an appeal is by the plaintiff from a judgment in his favor, then the amount in dispute is the difference between the amount of the judgment and the sum claimed by the plaintiff; and where the appeal is taken by the defendant from a judgment rendered against him, the judgment is the amount in dispute. *Skillman v. Lachman*, 23 Cal. 198, 203, 83 Am. Dec. 96.

The phrase "amount in dispute," as used in Const. art. 6, § 4, providing that the Supreme Court shall have jurisdiction where the matter in dispute exceeds \$200,

includes interest on the amount in controversy. *Malson v. Vaughn*, 23 Cal. 61, 63; *Skillman v. Lachman*, 23 Cal. 198, 203, 83 Am. Dec. 96.

Jurisdiction, where the matter in controversy was an execution for a less sum than \$2,000, depends on the "amount in dispute" between the parties, and not the "amount" of any contingent loss or damage which one of them may sustain by a decision against him. *Ross v. Prentiss*, 44 U. S. (3 How.) 771, 772, 11 L. Ed. 824.

#### AMOUNT INVOLVED.

The term "amount involved," in 23 Stat. 24, which is part of the organic act of Alaska, and which provides that an appeal shall lie in any case, civil or criminal, from the judgment of the United States commissioners to the District Court, where the amount involved is \$200 or more, is equivalent to the phrase "amount in dispute" in Rev. St. § 691, authorizing appeals to the United States Supreme Court when the amount or value in dispute reaches a certain sum. The amount so in dispute is to be determined as the case appears in appellate court, and not by the sum in controversy in the court below. *Decker v. Williams* (U. S.) 73 Fed. 308, 309.

The "amount involved" is not the full amount of two executions, where plaintiff enjoins a judgment against him as security on two injunction bonds for 20 per cent. on the two executions enjoined, but is the amount of such 20 per cent. *Gayarre v. Hays*, 21 La. Ann. 307.

Where plaintiff's claim was \$127, of which the defendant conceded \$56 and the contest was entirely related to the \$71 difference, the amount of that difference was the amount involved in litigation. *Henk v. Baumann*, 75 N. W. 313, 314, 100 Wis. 28.

#### AMOUNT OF INSURANCE.

The phrase "the amount of insurance" as used in a life insurance policy, which by express provision was incontestable, and which provided that the amount of insurance should be paid immediately upon proof of death, has been held to mean the sum for which the life is insured; that is, the sum which under the contract is to be paid to the beneficiary as indemnity for the loss. "These words," said the court, "cannot, we think, be construed to mean the net value of the policy, the sum which by the terms of the original contract was to be paid under certain circumstances in lieu of the amount of insurance. This construction is consonant with the preceding provision that the policy should be incontestable. The quality of the incontestability could not with any

propriety be predicated of this contract of insurance if it were still allowed to the insurer to dispute its liability to the insured for the amount of the insurance upon the ground that the death was caused by the use of intoxicating liquor, etc., or any condition or agreement contained in this policy." *Simpson v. Life Ins. Co. of Virginia*, 20 S. E. 517, 115 N. C. 393.

#### AMOUNT OF JUDGMENT.

Under the head "amount of judgment" in a judgment docketed should be stated every fact which enters into the value or amount of the judgment, and thereby affects the extent of the lien which it is the sole object of the entry to create and observe. Of these facts in case of a money judgment, the most material are the number and denomination or kinds of money for which the judgment is given, and the rate of interest and kind of money in which it is payable. The direct and ultimate purpose of the entry is not to give notice of the judgment, but to produce a certain legal effect, to wit, a lien on the real property of the judgment debtor within the county. In *re Boyd* (U. S.) 8 Fed. Cas. 1091, 1093.

#### AMOUNT SOLD FOR.

"Amount sold for," as used in publication of list of tax sales heading the column as "amount sold for," will not be held equivalent to amount of tax due, and hence does not comply with Comp. Laws, § 1620, requiring notice of sales to state the amount of taxes due. *Mather v. Darst*, 82 N. W. 407, 408, 13 S. D. 75.

#### AMPLE SUM.

A direction in a will by which testator's executor was required to invest in a bank an "ample sum" of money, the income of which should be sufficient to keep the testator's burial lot in repair forever, requires the investment of a sum of money reasonably capable of accomplishing the testator's purpose. *Gafney v. Kenison*, 10 Atl. 706, 707, 64 N. H. 354.

#### AMUSEMENT.

See "Place of Amusement."

##### Circus and theater.

"Amusements" include the theater and circus, though they may differ from each other as one species differs from another under the same genus. It may often be difficult to trace the dividing line between the theater and circus from the character of their exhibitions. *Jacko v. State*, 22 Ala. 73, 75.

**Dancing.**

"Amusement," as used in St. 1849, c. 231, § 2, prohibiting the setting up or maintaining any public show or amusement, etc., without license, construed not to include a school for instruction in dancing. "Such a case is not within the language of the statute, nor probably one of the evils sought to be remedied by it." *Commonwealth v. Gee*, 60 Mass. (8 Cush.) 175, 179.

"Amusement" is synonymous with diversion, entertainment, recreation, pastime, and sport, so that a public dance is a public amusement within the meaning of paragraph 2 of an ordinance providing that every person who shall conduct any concert, show, or other public "amusement" within the city of Seattle without obtaining a license therefor will be guilty of misdemeanor. *Pearson v. City of Seattle*, 44 Pac. 884, 885, 14 Wash. 438.

A dance hall to which the public is admitted on payment of a small fee is a "public amusement" within Pub. St. c. 102, § 116, providing that whoever carries on any public show, amusement, or exhibition without a license shall be fined. *Commonwealth v. Quinn*, 40 N. E. 1043, 164 Mass. 11.

**Horse races.**

Horse races are included in the terms "shows" and "amusements" as used in Rev. St. 1893, c. 24, art. 5, § 1, subd. 41, authorizing city councils to license and tax theatricals and other exhibitions, "shows, and amusements." *Webber v. City of Chicago*, 36 N. E. 70, 72, 148 Ill. 313.

**AN.**

"An," as used in a claim for a patent for "an" artificial slate, fairly implies that the claim is for material having form and dimensions, and not to a new substance in mass. *Plastic Fireproof Const. Co. v. City & County of San Francisco* (U. S.) 97 Fed. 620, 623.

The article "an" is equivalent to "any," so that Code Civ. Proc. § 581, providing that "an" action may be dismissed on paying costs, etc., will be held to apply to an action in interpleader. *Kaufman v. Superior Court of City & County of San Francisco*, 46 Pac. 904, 905, 115 Cal. 152.

"An" originally meant "one," and is seldom used to denote plurality, so that Code Cr. Proc. § 840, providing that "an" overseer of the poor may bring an action to inquire into the facts of a bastard case, authorizes one overseer to bring such action. *People v. Ogden*, 40 N. Y. Supp. 827, 828, 8 App. Div. 464.

**ANACOLUTHON.**

An "anacoluthon" is an incomplete proposition, as, for instance, the following section of Act March 25, 1831 (an act assessing a tax on personal property), in which personal property made taxable by the provisions of the act is described as "all ground rents or moneys at interest, and all debts due from solvent debtors, whether by promissory notes, (except bank notes) penal or single bill, upon judgment, mortgage, stocks," etc., as the word "whether," as there used, requires some correlative. *Voegtly v. Third Ward School Directors of City of Alleghany*, 1 Pa. (1 Barr) 330, 331.

**ANÆSTHETIC.**

An "anæsthetic" is "that which produces insensibility to pain." *Webst. Dict.* It is a word in common use in the vernacular of the language, and has a well-settled meaning which is not local and cannot be regarded as technical or peculiar. It was therefore proper for the court to give such definition to the jury. *State v. Baldwin*, 12 Pac. 318, 328, 36 Kan. 1.

**ANALOGOUS FORMS.**

The expression "analogous forms" in Code 1876, § 4824, declaring that forms of indictment given in the Code are sufficient in all cases in which they are applicable, and providing that "analogous forms" may be used in other cases, was held to mean analogous to the forms given, which states the material facts of the offenses to which they are applicable, and not analogous to such forms given as do not include a statement of the material facts. *Smith v. State*, 63 Ala. 55, 58.

**ANALYSIS.**

An "analysis" is a scientific, accurate ascertainment of the elements and their proportion contained in a substance submitted for examination by chemical processes. *Shivers v. Newton*, 45 N. J. Law (16 Vroom) 469, 475.

**ANARCHIST.**

An "anarchist" is defined by Webster to be "an anarch," one who excites revolt or promotes discord in the state; hence to publish a false account of a person, describing him as an anarchist, is libel per se, since one who advocates anarchy is liable thereby to be brought into hatred or contempt. *Cervený v. Chicago Daily News Co.*, 28 N. E. 692, 693, 139 Ill. 345, 13 L. R. A. 864.



"Anarchy," as generally understood, is avowed hostility to all governments and open antagonism to all political parties, every one of which professes to support some form of government, and generally that which its members consider the best. It cannot be doubted that all law-abiding, right-thinking men regard with abhorrence the individual who justifies or approves of the bloody and atrocious means to which anarchists resort, the world over, in furtherance of their reckless and revolutionary designs against every form of government and against every right of property. It is equally apparent that to accuse another of being an anarchist in the sense in which the term is generally accepted is to accuse him of that which will inevitably injure his reputation and expose him to obloquy and ignominious reproach. *Lewis v. Daily News Co.*, 32 Atl. 246, 247, 81 Md. 466, 29 L. R. A. 59.

## ANARCHY.

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Anarchy is the absence of government. It is a state of society where there is no law or supreme power. If the conspiracy had for its object the destruction of the law and the government, and of the police and militia as representatives of the law and government, it had for its object the bringing about of practical anarchy. *Spies v. People (Anarchists' Case)*, 12 N. E. 865, 987, 122 Ill. 1, 3 Am. St. Rep. 320.

"The point and pith of the offense of anarchists is that they teach the doctrine that the pistol, the dagger, and dynamite may be used to destroy rulers. The teaching of such horrid methods of reaching an end is the offense. It is poor satisfaction, when one of their dupes has consummated the results of their teaching, to catch him and visit upon him the consequences of his acts. The evil is untouched if we stop there. In this class of cases the courts and the public have too long overlooked the fact that crimes and offenses are committed by written or spoken words. We have been punishing offenders in other lines for words spoken or written, without waiting for an overt act of injury to persons or property. The press is restrained by the law of libel from the too free use of words. Individuals can be punished for words spoken or written, even though no overt act of physical injury follow. It is the power of words that is the potent force to commit crimes and offenses in certain cases. No more striking illustration of the criminal

power of words could be given, if we are to believe the murderer of our late President, than that event presents. The assassin declared that he was instigated and stimulated to consummate his foul deed by the teachings of Emma Goldman. He is now awaiting execution for the crime, while she is still at large in fancied security. A person may advocate any change of our government by lawful and peaceful means, or may criticize the conduct of its affairs, and get as many people to agree with him as he can, so long as he does not advocate the commission of crime as the means through which he is to attain his end. If he advocates stealthy crime as the means of reaching his end, he, by that act, commits a crime for which he can be punished. The distinction we have tried to point out has been too long overlooked. If our conclusions are sound, it is the teachers of the doctrine who can and ought to be punished. It is not necessary to trace and establish the connection between the teaching of anarchy and a particular crime of an overt nature. The liberty of conscience, the freedom of speech, the freedom of the press, do not need such concessions to save to the fullest extent unimpaired those sacred rights of a free people." *People v. Most*, 73 N. Y. Supp. 220, 222, 86 Misc. Rep. 139.

## ANCESTOR.

See "Collateral Ancestors."

In its legal sense "ancestor" means the person from whom an estate passed, and not a progenitor, as in popular acceptance. *Bailey v. Bailey*, 25 Mich. 185, 188.

"In most of our English dictionaries the word 'ancestor' is defined to be one from whom a person descends, and some of the law dictionaries agree substantially in this definition. But this is its popular and not its legal meaning. In *Termes de la Ley* it is said that this word in a forensic sense is more properly applied to the prepossessor of an estate than to the ancestor of a family, and in this sense it is frequently, and, indeed, most generally, used in books which treat of descent, of real estate, and in statutes relating to that subject. Mr. Burrill in his *Law Dictionary* derives the word in question from 'antecedere,' 'to go before,' and defines it, when used in the law of descents, to be one who has gone before or preceded in the seisin or possession of real estate; a deceased person from whom an estate has passed to another by operation of law in consequence of his decease; the person last seized of an estate of inheritance, and from whom such estate is transmitted to the heir. Blackstone, in his chapter on 'Descents' (2 Comm. 201), uses the word 'heir' and 'ancestor' as correlative terms." *McCarthy v. Marsh*, 5 N. Y. (1 Seld.) 263, 275.

"Ancestor" is a term, in a forensic sense, more properly applied to the possessor of an estate than to an ancestor of the family, and is defined as one who has gone before or preceded in the seisin or possession of real estate, and such is its use in 1 Rev. St. p. 749, § 4, providing that, when any real estate subject to a mortgage executed by any ancestor shall descend to an heir, such heir shall satisfy and discharge the mortgage out of his own property, without resorting to the executor of his ancestor. In *re Kene's Estate*, 29 N. Y. Supp. 1078, 1079, 8 Misc. Rep. 102, 103.

Any one from whom an estate is derived by act of law and right of blood is in a proper legal sense an ancestor. *Springer v. Fortune* (Ohio) 2 Handy, 52, 56; *Prickett's Lessee v. Parker*, 3 Ohio St. 394, 395; *Brower v. Hunt*, 18 Ohio St. 311, 338; *Cliver v. Sanders*, 8 Ohio St. 501, 504.

"Ancestor," in common parlance, is one from whom a person may be descended; but the word must be taken in connection with the whole subject-matter of the act or instrument in which it is used. *Brewster v. Benedict*, 14 Ohio, 368, 385.

The word "ancestor" is an ambiguous one, broad enough to include, but not necessarily including, parents, grandparents, and all persons in the ascending line as far as relation can be traced. One of its antonyms is "descendant." An allegation that the ancestors of the plaintiffs are buried in a certain graveyard is not equivalent to an allegation that the plaintiffs' parents were buried there, or that the plaintiffs are the heirs of the persons there buried. No one is the heir of all his ancestors. *Mitchell v. Thorne*, 32 N. E. 10, 12, 134 N. Y. 536, 30 Am. St. Rep. 699.

No person can be an "ancestor" of an intestate, within the meaning of the statute of descent providing that when any person shall die intestate having title to land which has come to him from any ancestor it shall descend in a certain manner, unless he is of the blood of the intestate, and the decisions in the state enlarging the common-law definition of "ancestor" in its application to our statutes of descent are all consistent with this view, as they are without exception cases in which the person adjudged the ancestor was of the same blood as the person whose ancestor he was held to be. *Birney v. Wilson*, 11 Ohio St. 426, 431.

#### Child.

An "ancestor" is the person from whom the inheritance devolves upon the heir, and a child may be the "ancestor" of his parent. *Lavery v. Egan*, 9 N. E. 747, 749, 143 Mass. 389.

An "ancestor" primarily means one who goes before, a progenitor; but in the law re-

lating to the devolution of property the word "ancestor" is sometimes used in the sense that a son may be the "ancestor" of his father. *Rountree v. Pursell*, 39 N. E. 747, 749, 11 Ind. App. 522.

#### Collaterals.

The term "ancestor," as used in 1 Rev. St. p. 753, § 15, concerning descents, providing that in case an inheritance came to an intestate by devise or descent from one of his "ancestors," when used with reference to the descent of real property, embraces collaterals as well as lineals through whom an inheritance is derived. *Righter v. Ludwig*, 80 N. Y. Supp. 16, 19, 39 Misc. Rep. 416 (citing *Wheeler v. Clutterbuck*, 52 N. Y. 67).

"Ancestor" is an ambiguous word, broad enough to include, but not necessarily including, all persons in the ascending line as far as relationship can be traced." *Mitchell v. Thorne*, 32 N. E. 10, 12, 134 N. Y. 536, 30 Am. St. Rep. 699.

St. 1851, c. 211, provided that every illegitimate child should be considered as heir of his mother and of any maternal ancestor, and that his issue might take by descent from such ancestor. Held, that the word "ancestor" as there used was limited to progenitors or ancestors in the direct ascending line, according to the common meaning in which the word is used in the statutes of descent, and hence an illegitimate child was not entitled to take under such statutes from his mother's collateral kindred. *Pratt v. Atwood*, 108 Mass. 40, 42.

"Ancestor," as used in the statute of descents relating to a devise or deed or gift from any "ancestor," does not mean one from whom the estate, had it not been devised or given, would have come in the regular course of descents. It is not to be confined to its original meaning of one from whom a person lineally descended, but means of the same blood as a taker. Any one from whom an estate is derived by act of law and right of blood is in a legal sense an ancestor. "In the idea of the term 'ancestor' there are two things to be observed, the character of the estate and the personal relationship, or the act of law and the right of blood;" and it was in view of this personal relationship and right of blood that the words "any ancestor" were used in the statute. A capacity to inherit, kindred to common stock or inheritable blood, will suffice to constitute one an ancestor of another. *Springer v. Fortune* (Ohio) 2 Handy, 52, 55.

In a statute declaring that relatives of the half blood shall inherit equally with them of the whole blood in the same degree, unless the inheritance goes to the intestate by descent, devise, or gift of some one of his "ancestors," in which case all those not of the blood of such ancestor shall be excluded from such inheritance, it is held that the

word "ancestor" designates the ancestors of the intestate in the right line, as father and mother, grandfather and grandmother, and does not include collateral relatives as brothers and sisters. The term is not the equivalent of the expression "the parent or other kindred of the intestate." *Valentine v. Wetherill*, 31 Barb. 655, 659.

The word "ancestors" in its ordinary meaning includes those from whom the person spoken of is lineal descendant, either on the father's or mother's side; and whenever this word is intended to be used in a sense which is different from its ordinary import of lineal ascendants, or in the enlarged sense of "antecessors," so as to embrace all of the blood relatives of the person referred to who have preceded him, it is qualified or enlarged by some other term to show that it is not used in its natural sense merely. *Banks v. Walker*, 3 Barb. Ch. 438, 446, 447.

The inference is plain, says Judge Foot in *McCarty v. Marsh*, 5 N. Y. (1 Seld.) 263, that the word "ancestor" as used in the statutes is not limited in its meaning to lineal ancestors or progenitors. "Hence the inference is pretty plain that our revisers and Legislature used the term 'any ancestor,' without the qualifying words 'lineal' or 'collateral,' with the intent of embracing ancestors of both classes. If they had designed to include the one and exclude the other, it is almost, if not quite, certain, they would have used the appropriate qualifying words." In *re Reeve*, 77 N. Y. Supp. 936, 938, 38 Misc. Rep. 409.

#### As immediate ancestor.

"Ancestor," as used in Rev. St. 1866, p. 415, declaring that the real estate which came to an intestate from his parent or "ancestor" shall belong equally to the brothers and sisters of the intestate, signifies the one from whom the estate immediately descended, and not to a remote ancestor. *Buckingham v. Jacques*, 37 Conn. 402, 403; *Clark v. Shaller*, 46 Conn. 119, 121.

The expression "ancestor," as used in the statute regulating descent of personal estates, and providing that if an intestate had no children the estate should pass to the brothers and sisters of the intestate who may be of the blood of the "ancestor from whom the estate came," means the ancestor from whom the estate was immediately inherited. *Prickett's Lessee v. Parker*, 3 Ohio St. 394, 395; *Clayton v. Drake*, 17 Ohio St. 367, 373; *Oliver v. Sanders*, 8 Ohio St. 501, 504.

The word "ancestors," as last used in 1 Rev. St. p. 752, § 615, entitling an ancestor to inherit from an intestate unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such "ancestor" shall be excluded from

such inheritance, is to be construed as meaning the immediate ancestor from whom the intestate received the inheritance, devise, or gift. *Wheeler v. Clutterbuck*, 52 N. Y. 67, 70.

#### Infant brother.

"'Ancestor,' as used in a statute of descent, means any one from whom the estate is inherited. In this sense an infant brother may be an 'ancestor' of an adult brother, the former having died, and his estate having come to the latter as his heir." *Murphy v. Henry*, 35 Ind. 442, 450.

#### Living parent.

"Ancestor," according to its accurate and legal meaning, designates one's forefathers, etc., in a direct line, who are dead, the word not applying to a living parent. *Hillen v. Iselin*, 39 N. E. 368, 371, 144 N. Y. 865.

#### ANCESTRAL PROPERTY.

"Ancestral property" is realty which comes to one by descent or devise from a now dead ancestor, or by deed of actual gift from a living one, there being no other consideration than that of blood, as distinguished from "nonancestral property," which is realty which comes to one in any other way. *Brown v. Whaley*, 49 N. E. 479, 480, 58 Ohio St. 654, 65 Am. St. Rep. 793.

#### ANCESTRY.

The term "ancestry," within the rule that questions of ancestry and pedigree may be proven by general reputation, is not limited to the ancestry or pedigree of the human race, but is equally applicable whether the question concerns horses, cattle, dogs, or men. *Citizens' Rapid Transit Co. v. Dew*, 45 S. W. 790, 791, 100 Tenn. 317, 40 L. R. A. 518, 66 Am. St. Rep. 754.

#### ANCHOR.

Lying at anchor, see "Lying."

#### ANCHOR WATCH.

"Mr. Dana, in his *Dictionary of Sea Terms*, p. 129, describes an 'anchor watch' as a 'small watch of one or two men kept while in port.' Capt. Totten, in the *Naval Text-Book and Dictionary*, p. 443, defines it as 'watch of three or four men kept constantly on deck and stationed at one of the anchors while riding at single anchor, to see that the stoppers, painters, cables, and buoy ropes are ready for immediate use.' It is the duty of the anchor watch to do whatever may be needful or possible to prevent a collision, but it is not bound to take active measures to get the vessel out of the way of a vessel under command approaching in broad daylight, nor to hail such vessel unless its vessel is discov-

ered to be unseen." *The Lady Franklin* (U. S.) 14 Fed. Cas. 934, 935.

## ANCIENT.

The word "ancient," as applied to lights, ways, foundations, etc., means such lights, ways, etc., as have been used as such more than 20 years with acquiescence. *Eno v. Del Vechio*, 11 N. Y. Super. Ct. (4 Duer) 53, 63.

The word "ancient," as used in Const. art. 2, § 2, which recognizes the state's "ancient" right of eminent domain and of taxation, means old, "that existed in former times, and is not used rhetorically for the purpose of conveying the information that such rights always existed here and in the governments whence ours is derived." It is limiting and qualifying, and alludes to those powers of imposing and modes of collecting, based upon necessity and immemorial usage, or, rather, common usage which had been theretofore employed. It justifies them and such analogous modes of collection as might rest upon the same principle with the other, and merely means the power to impose and collect taxes by the ordinary methods. *Bagley v. Castile*, 42 Ark. 77, 87.

## ANCIENT DEED.

A deed 30 years old, and proven to have come from a proper place of custody, is known as an "ancient deed," and may be admitted in evidence without proof of its execution. *Havens v. Seashore Land Co.*, 20 Atl. 497, 501, 47 N. J. Eq. (2 Dick.) 365.

An "ancient deed" is one more than 30 years old, and having nothing suspicious about it, which is presumed to be genuine without express proof. *Davis v. Wood*, 61 S. W. 695, 698, 161 Mo. 17.

## ANCIENT DEMESNE.

"Ancient demesne" is a title to land terra regis recorded in the Domesday Book, and no other. In other words, it is a recorded title derived from the King. Tenants holding such land under the English tenures were free as to their persons, but not as to their estates. *Hunt v. Burn*, 1 Salk. 57.

"Ancient demesnes" were manors which, during the period of William the Conqueror, were held by the Crown, each of which was so recorded in the Domesday Book. Tenure in ancient demesne might be pleaded in abatement to an action of ejectment. *Rust v. Roe*, 2 Burrows, 1046; *Baker v. Wich*, 1 Salk. 56, 57.

## ANCIENT DOCUMENTS.

The term "ancient documents" is used to designate a class of documents which are admitted in evidence without proof of execu-

tion, their admissibility as ancient documents being based on the presumption and theory that the attesting witnesses are dead. The term includes a deed more than 30 years old received by the owner of land from his grantor, its proper custodian. *White v. Farris*, 27 South. 259, 261, 124 Ala. 461.

## ANCIENT LIGHTS.

"Ancient lights" is the right to the enjoyment of lights or windows which have existed for 20 years with the acquiescence of the owner of the adjoining ground, it being a decisive presumption of a right to maintain such lights unobstructed by grant or otherwise, unless contradicted or explained. *Wright v. Freeman* (Md.) 5 Har. & J. 467, 477.

"Ancient lights" is a doctrine of the common law protecting the windows and openings of a man's house which have remained open for a time sufficient to authorize a presumption of a grant to keep them open by the adjoining owner which will prevent the erection of a building on the adjoining lot in such a manner as to shut off light and air. Thus, where one sells a messuage, having doors or openings into a vacant lot adjoining belonging to the vendor, without reserving a right to build on such lot or to stop the windows and doors, neither such vendor nor his grantee of such lot can lawfully stop them. No lapse of time is necessary to confirm the plaintiff's rights. He may maintain his action for such a nuisance immediately after his purchase, as well as after the lapse of 20 or 40 years. *Story v. Odin*, 12 Mass. 157, 160, 7 Am. Dec. 46. See, also, to the same effect, *Swansborough v. Coventry*, 9 Bing. 305.

The English doctrine sustaining the right to ancient lights and windows based on 20 years' user is not generally applicable in the United States, since to adopt it would greatly interfere with and impede the rapid changes and improvements constantly going on in towns and cities. *Cherry v. Stein*, 11 Md. 1, 7. See, also, 3 Kent, Comm. 448; *Mahan v. Brown* (N. Y.) 13 Wend. 261, 28 Am. Dec. 461; *Myers v. Gemmel* (N. Y.) 10 Barb. 537; *Pierre v. Fernald*, 26 Me. (13 Shep.) 436, 46 Am. Dec. 573; *Ingraham v. Hutchinson*, 2 Conn. 584, 597; *Napier v. Bulwinkle* (S. C.) 5 Rich. Law, 311; *Hoy v. Sterrett* (Pa.) 2 Watts, 331, 27 Am. Dec. 313.

## ANCIENT RENTS.

"Ancient rents" is rent which has previously been reserved for the messuage if the building was not under lease. *Orby v. Mohun*, 2 Vern. 542, 544. See, also, *Payne v. Whale*, 7 East, 274, 279.

## ANCIENT WATER COURSE.

"A water course is ancient if the channel through which it naturally runs has existed

from time immemorial. Whether it is entitled to be called an 'ancient water course,' and, as such, legal rights acquired and lost in it, does not depend upon the quantity of water it discharges. Many ancient streams which, if dammed up, would inundate a large region of country, are dry a great portion of the year. If the face of the country is such that it necessarily collects in one body so large a quantity of water after rains and melting snows so as to require an outlet to some common reservoir, and if such water is regularly discharged through a well-defined channel which the force of the water has made for itself—an accustomed channel through which it flows and has flowed from time immemorial—such a channel is an ancient natural water course." *Earl v. De Hart*, 12 N. J. Eq. (1 Beasl.) 280, 283, 284, 72 Am. Dec. 395.

## ANCILLARY.

"Ancillary" means "subordinate" or "auxiliary" to the principal. *Steele v. Connecticut General Life Ins. Co.*, 52 N. Y. Supp. 373, 379, 81 App. Div. 389.

## ANCILLARY ADMINISTRATION.

Administration taken out in another state is ancillary to the administration in the forum of the domicile. *Pisano v. B. M. & J. F. Shanley Co.*, 48 Atl. 618, 620, 66 N. J. Law, 1.

"Ancillary administration" is an administration in a state other than that in which the principal administration is granted, and is subservient and subordinate to the latter. *In re Gable's Estate*, 44 N. W. 352, 353, 79 Iowa, 178, 9 L. R. A. 218.

## ANCILLARY ADMINISTRATOR.

An "ancillary administrator" is one who is subordinate or auxiliary to the principal or domiciliary administrator. An "ancillary administrator" is appointed in a foreign jurisdiction to enforce the rights of the estate in that jurisdiction, because a domiciliary administrator is not recognized by the courts of a foreign state. *Steele v. Connecticut General Life Ins. Co.*, 52 N. Y. Supp. 373, 379, 81 App. Div. 389.

## ANCILLARY ATTACHMENT.

An ancillary attachment is sued out in aid of a suit already brought, and its only office is to hold the property attached under it for the satisfaction of the plaintiff's demand. It does not bring the parties into court, its office being different from a summons, in that the one brings the person, and the other the property, before the court. *Templeton v. Mason*, 65 S. W. 25, 26, 107 Tenn. 625.

An ancillary attachment is a proceeding in aid of the personal action when the debtor has been served or has appeared in court so as to be liable to a personal judgment. The remedy thus employed is usually an adjunct to the main suit. It often happens that after a suit at law has been instituted for the recovery of a debt or damages, and where personal service is or may be had, a ground of attachment arises, and an attachment becomes necessary that the property may be seized and held to respond to any judgment that may be recovered. The attachment proceeding in such case is designated as "ancillary." A proceeding in attachment brought against a nonresident debtor against whom there was no expectation of securing personal service or of obtaining a personal judgment, but sale made to subject the property of the defendant within the jurisdiction of the court, that sale is not an ancillary attachment. *Southern California Fruit Exch. v. Stamm*, 54 Pac. 345, 347, 9 N. M. 361.

## ANCILLARY BILL.

The term "ancillary bill" is applicable to proceedings growing out of the original proceedings in the same court, and dependent on such proceedings, and instituted for the purpose of enforcing a judgment or rendering complete justice among all the parties in interest. *Coltrane v. Templeton* (U. S.) 106 Fed. 370, 374, 45 C. C. A. 328.

If one have an action at law pending, he may file a bill of discovery in equity or a bill for some other equitable relief in aid of his action at law, and this bill is auxiliary to his action at law, and in a certain sense ancillary. So if one have a judgment at law, and his execution thereof be obstructed or hindered, he may file a bill in equity to remove the obstruction or to subject assets which the execution otherwise will not reach, and this and similar proceedings are "auxiliary," and in a certain sense "ancillary"; and, in the peculiar relation of the jurisdiction of the federal courts to the citizenship of parties, this principle of ancillary jurisdiction is sometimes resorted to for sustaining supplemental litigation involving a jurisdiction which otherwise a federal court could not maintain, as where the judgment is between a plaintiff and defendant of adverse citizenship, but the subsequent bill in equity involves a controversy between citizens of the same state of whom the federal courts could have no jurisdiction, the proceeding is treated as a continuation of a suit at law and "ancillary" to it. *In re Williams* (U. S.) 123 Fed. 321, 322.

## ANCILLARY SUIT.

Actions by a judgment creditor to set aside fraudulent transfer of personal property by a judgment debtor after the return

of an execution are ancillary to the original suit, and are in effect a continuance of the suit at law to obtain the fruit of a judgment, or to remove obstacles to its enforcement. Therefore it would seem that they cannot be maintained in any court which does not exercise auxiliary jurisdiction over the court in which the original suit was brought. *Tabell v. Griggs* (N. Y.) 3 Paige, 207, 23 Am. Dec. 790; *Davis v. Bruns* (N. Y.) 23 Hun, 648. Therefore such an action cannot be maintained in the federal court where the original judgment was recovered in another state, and especially where the fraudulent transfer is to be set aside there also. *Clafin v. McDermott* (U. S.) 12 Fed. 375.

## AND.

Pub. St. c. 157, § 104, provides that debts due to and taxes assessed by the state or any county or town shall be preferred debts in the declaration of dividends on an insolvent estate. Held that, the words "debts due to and taxes assessed by" being connected conjunctively in the statute, the intention was that each should be a preferred debt. *Bent v. Inhabitants of Hubbardston*, 138 Mass. 99, 100.

"And," as used in an instruction that the burden of proof rests on the defendant to establish the defense that plaintiff's injury resulted from his intoxication "and" negligence, does not mean that the defendant must establish both intoxication and contributory negligence, but requires him only to prove such intoxication as culminated in negligence. *Loewer v. City of Sedalia*, 77 Mo. 431, 447.

"And," as used in a claim for a patent for a firecracker, which claimed, "first, in a firecracker, the match, B, and fuse, C, in combination with a solid plug and body," should not be construed to mean that the match and fuse constituted but one element, so as to render such a contrivance an infringement of a patent for continuous fuse. *Masten v. Hunt* (U. S.) 5 Fed. 216, 218, 5 C. C. A. 42.

The charge in an information was that the defendant, knowing the bank in which he was cashier to be insolvent, received therein money "on deposit and for safe-keeping." Held, that the words "for safe-keeping" clearly qualify the word "deposit," and that there was but one action charged—a receiving of money on deposit for safe-keeping. *Koetting v. State*, 60 N. W. 822, 88 Wis. 502.

The expression "writing and affidavit," standing alone, in an indictment alleging the sending of a false "writing and affidavit" to the Pension Office, might be ambiguous. It might mean two documents or it might mean one, but when accompanied by a recital of the writing or affidavit it is clearly shown to be one instrument, and the pleading is not

double. *United States v. Corbin* (U. S.) 11 Fed. 238, 239.

The use of the word "and," in an instruction that defendant had no right to do a certain thing in the performance of his contract after he had notice of a certain arrangement "and" had consented thereto, does not render the instruction erroneous on the ground that such use of the word constituted an assumption that defendant had consented to the arrangement. *Wreggitt v. Barnett*, 58 N. W. 467, 99 Mich. 477.

Under Const. art. 4, § 17, providing that property shall be assessed for taxes under general laws "and" by uniform rules, property must be taxed both under general laws and by uniform rules. The constituent parts of the sentence, "general laws and uniform rules," are essential to a valid act of taxation. *State Board of Assessors v. State*, 4 Atl. 578, 602, 48 N. J. Law, 146.

The use of the word "and" to unite the words "assessments and taxes" in Comp. St. c. 12a, § 91, providing for the listing of "assessments and taxes" by the proper city officer and the subsequent sale of the land affected thereby, shows that the words were not synonymous. *State v. Irey*, 60 N. W. 601, 606, 42 Neb. 186.

The word "and," as used in Act Feb. 18, 1891, declaring that the office of commissioner of agriculture shall be elective, and at the general election in 1892 and every two years thereafter there shall be elected a commissioner of agriculture, does not have the effect that the first part of the act should go into immediate effect, and that the last should be suspended until the time of holding the election. There is but one sentence, and what is deemed a second clause is only the concluding member of the sentence. The first member makes the office elective, and the second declares when the election shall be held. *Lane v. Kolb*, 92 Ala. 636, 665, 9 South. 873.

"And," as used in a will giving and devising unto the children of testator's brother W., sister M., sister S., sister M., brother J., "and" brother Henry, indicates the closing of the class of persons whose children are to take. *Lippincott v. Bechtold*, 34 Atl. 1079, 1080, 54 N. J. Eq. 407.

## As well as.

In an act of the Legislature providing that all executors shall be liable on their bonds for the trusts of the will "and" all duties devolving upon them as executors, "and" expresses the relation of addition, and means "as well as." *Porter v. Moores*, 51 Tenn. (4 Helsk.) 16, 19.

## As in addition to.

"And" is an article which expresses the relation of addition. It may connect words

merely or full sentences. *Hyatt v. Allen*, 54 Cal. 353, 367.

Where a lease provided that the lessee, for and in consideration of the renting, was to pay as rent for the premises a yearly money rent of \$680, and in addition thereto, as part rent, was to board the lessor "and" his family, consisting of two adult persons, during said year, the lease should be construed as obligating the lessee to board not only the lessor but two adult persons in addition, and should be construed as if it read, "and board the lessor, and and, or in addition thereto, two adult persons," since, if the lessee agreed to board only two persons, then what follows "and" in the sentence includes a part of what preceded it, and the word "and" does not mean something added or in addition to what has gone before, which would be contrary to the plain use of the term. *O'Brien v. Carson*, 42 Iowa, 553, 554.

The conjunction "and" is a co-ordinate conjunction. It is not explanatory, but signifies and expresses the relation of addition. As used in a declaration alleging that a city disregarded its duty by failing to keep the earth, sand, and other substances of the walls or sides of a sewer firmly in place by suffering the earth, sand, and other substances to remain in a loose, water-soaked, "and" dangerous condition, it means that the earth, sand, and other substances of the walls or sides of the ditch were in a condition beyond or in addition to that of a loose and water-soaked condition. *City of La Salle v. Kostka*, 60 N. E. 72, 74, 190 Ill. 130.

In an assignment of a patent, together with all other letters patent and applications therefor connected with the manufacture of pig iron, blooms, and billets, "and" the conversion or treatment of iron or steel into rails, blooms, or billets, "and" is used in the cumulative sense, and imports an additional and not a vastly restricted class of cases in which an assignment of these applications was to be made, and does not embrace such patents or applications as combine both of the features. *Appeal of Reese*, 15 Atl. 807, 810, 122 Pa. 302.

The word "and" commonly means "in addition to," and should be so construed in Rev. St. 1893, c. 43, § 16, making it a criminal offense to sell intoxicating liquors outside of cities, towns, and villages "in any less quantity than five gallons, and in the original package as put up by the manufacturer," so that sales of less than five gallons are prohibited except when contained in an original package. *Tipton v. People*, 40 N. E. 838, 839, 156 Ill. 241.

Pub. Laws, c. 596, § 1, declares that no person shall manufacture or sell or suffer to be manufactured or sold, or suffer to be kept on his premises or in his possession, or under his charge, for the purpose "of sale and delivery within the state," any liquors,

etc. Defendant was indicted under the statute for keeping intoxicating liquors for sale, and it was contended by the Attorney General that the words "and delivery," as used in the statute, added nothing to the meaning, and might be treated as pure pleonasm, but the court held that, while generally and almost invariably a sale imports delivery or is completed only by delivery, occasionally the sale is completed without delivery, as where the article bought is specific and is retained for the purchaser by the seller, in which case the title passes, and if the article is lost by fire before delivery the loss falls on the purchaser. "Therefore the words 'and delivery' must be construed to have been inserted by way of limitation, so as to make the keeping of the prohibited liquors for sale within the state, to be used as a beverage, inimical to the statute only when the keeper intends not only to sell, but also to deliver as well as to sell, such liquors within the state." *State v. Murphy*, 10 Atl. 585, 587, 15 R. I. 543.

#### Construed as or.

The popular use of "or" and "and" is so loose and so frequently inaccurate that while they are not treated as interchangeable, and their strict meaning should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one may be read in place of the other in deference to the meaning of the context. *Witherspoon v. Jernigan* (Tex.) 76 S. W. 445-447.

"Where sense requires it, there are many cases to show that we may construe the word 'or' into 'and,' and 'and' into 'or,' in order to effectuate the intention of the parties. I would say, with Lord Hardwicke, that there is no magic in particular words further than they show the intention of the parties." *Burrill v. Kemp*, 3 Term R. 470, 473.

To give effect to the intention of the parties to an instrument, a word will be excluded or disregarded altogether, if necessary. Thus "and" is often construed to mean "or." *Chicago, B. & Q. R. Co. v. Bartlett*, 11 N. E. 867, 869, 120 Ill. 603.

In a resolution of a corporation authorizing its secretary and treasurer to secure any "and" all other creditors of the corporation by mortgages subject to and subsequent to a mortgage to another person, "and" should be construed as having the meaning of "or," giving the right to secure any other creditors, and not requiring a mortgage which should secure all other creditors. *Brown v. Grand Rapids Parlor Fur. Co.* (U. S.) 58 Fed. 286, 291, 7 C. C. A. 225, 22 L. R. A. 817.

A policy insured a vessel in the sum of \$3,000 and \$1,000 on her cargo, and provided that should the vessel and cargo be insured in England in time to attach, this policy is

to be canceled on the assured's paying one-half per cent. The vessel was insured in England, but the cargo was not. It is not uncommon, in papers written without much attention to technical and grammatical rules, to find "and" used for "or," and "or" for "and." In this case neither word alone would have clearly expressed the intent of the parties. They intended that if vessel and cargo, or either of them, should be insured in England, this policy should attach only on what should remain uninsured by such policy effected in England. *Davis v. Boardman*, 12 Mass. 80, 83.

"And," as used in an order requiring that a bond be given by the petitioners indemnifying one whose property had been taken under a warrant of seizure in a bankrupt proceeding for all damage he might sustain, providing that if on the final hearing of the creditor's petition to have the defendant adjudged a bankrupt the defendant shall prove he is not a bankrupt, "and" the proceeding against him by the petitioning creditors shall be dismissed, must be read as "or," so that defendant would have the indemnity in case he proved that he was not a bankrupt or the proceedings were dismissed, and hence when judgment was rendered for defendant in the bankrupt proceedings the event had happened upon which the liability of defendant was conditioned, and the indemnity became operative to defendant. *Sonneborn v. Libbey*, 7 N. E. 813, 818, 102 N. Y. 539.

#### Same—In bonds, deeds, or mortgages.

As used in a forthcoming bond, the obligation of which is to satisfy the judgment "and" deliver the property, "and" is to be construed as meaning "or." *Hayman v. Hallam*, 79 Ky. 389, 392.

"And," as used in a bond reciting a levy of execution upon the property claimed by a person other than the judgment debtor, which was conditioned that the officer making the levy be kept harmless "and" that the obligors should pay all damages in case the execution be levied on the wrong property, means "or," the intention being to indemnify the officer both for levying on the wrong property and for its sale. *Finckh v. Evers*, 25 Ohio St. 82, 83.

"And" is not confined to its grammatical sense, but may be read "or" where the plain intent of the grantor was that it should be so construed. A similar rule is to be observed in the construction of statutes. *Long Island R. Co. v. Conklin* (N. Y.) 32 Barb. 381, 385.

"And," as used in a deed conveying all the right, title, and interest of the grantor in and to all the real estate of which A. "and" B. died seised or possessed, will be construed to mean "or," in order to carry out the manifest intention of the grantor. "It is not uncommon to construe 'and' to mean 'or,'

and 'or' to mean 'and,' when necessary to carry into effect the intention of the parties." *Litchfield v. Cudworth*, 32 Mass. (15 Pick.) 23, 27.

"And," as used in a deed giving a right of re-entry to the grantor in case the grantee neglects to pay certain debts of the testator "and" suffers the grantor to be put to costs, trouble, or expense, is to be construed as meaning "or." "It is well settled at the present day, although for a long time vexata questio in England, that the grammatical sense is not to be adhered to either in a will or deed where the contrary intent is apparent. Lord Kenyon observed that in deeds certain legal phrases must be used to create certain estates, but beyond that he would say with Lord Hardwicke that there is no magic in words further than as they show the intention of the parties." *Jackson v. Topping* (N. Y.) 1 Wend. 388, 396, 19 Am. Dec. 515.

The phrase "claims due said C. and P.," in a mortgage securing all legal claims due said C. and P., was held capable of being construed to include individual debts of C., the courts saying that the words are fairly susceptible of more than one interpretation. They may mean claims due to the parties jointly, or they may mean claims due to them severally, or they may mean claims due to them jointly and severally. *Snow v. Pressey*, 27 Atl. 272, 276, 85 Me. 408.

#### Same—In charter or ordinances.

In an ordinance "or" will not be substituted for "and" on mere conjecture as to the motives which induced the repeal of the former enactment. Such a change cannot properly be made in any case unless necessary to give effect to the intent of the Legislature as disclosed by the context. *City of Frankford v. Arrott* (Pa.) 8 Phila. 41, 42.

The word "and," in an ordinance requiring commission merchants "and" produce dealers to obtain a license, may be construed to mean "or," there being no such general and prevailing custom of uniting produce dealers and commission merchants to one person, firm, or corporation as to lead to the conclusion that the ordinance was one intended to apply to the combination of both businesses. *Kansas City v. Grush*, 52 S. W. 286, 287, 151 Mo. 128.

"And," as used in a city charter authorizing the common council to suppress "and" restrain tenpin alleys, is used disjunctively for "or." *Smith v. City of Madison*, 7 Ind. 86, 90.

#### Same—In civil statutes.

"Or" and "and" are not treated as interchangeable in a statute unless the intention requires, and in deference to the context. The most latitudinarian construction would not



sanction the interchange of "or" for "and" in an article of the Code of Practice, in the construction of which strict meaning should not be departed from. *Merchants' & Farmers' Bank v. McKellar*, 11 South. 592, 595, 44 La. Ann. 940.

The words "and" and "or" when used in a statute are convertible, as the sense may require. A substitution of one for the other is frequently resorted to in the interpretation of statutes, when the evident intention of the lawmaker requires it. *People v. Rice*, 33 N. E. 846, 847, 138 N. Y. 151; *Eisfield v. Kenworth*, 50 Iowa, 389, 391; *Collins Granite Co. v. Devereux*, 72 Me. 422, 425; *Williams v. Poor*, 21 N. W. 753, 755, 65 Iowa, 410; *Price v. Forrest*, 35 Atl. 1075, 1080, 54 N. J. Eq. 669.

"And" may be read "or" if the sense requires it. *Bates' Ann. St. Ohio* 1904, §§ 6794, 23, 4947; *Rev. St. (Wyo.)* 1899, § 2724.

In the General Highway Act (5 & 6 Wm. IV, c. 50, § 111), providing that, if the inhabitants of any parish shall agree to defend any indictment found against any such parish, the surveyor of such parish may charge in his account the reasonable expenses incurred in defending such prosecution, after the same shall have been agreed to by such inhabitants at a vestry or public meeting "and" allowed by two justices of the peace" within the division where such highway shall be, "and" should be construed as "or." *Townsend v. Read*, 10 J. Scott (N. S.) 308, 321.

In Code 1873, § 1063, providing that a failure of a corporation to comply with certain requirements to organization "and" publicly renders the individual property of the stockholders liable for the corporate debts, "and" will be construed "or." *Seaton v. Grimm*, 81 N. W. 225, 228, 110 Iowa, 145.

In Laws 1899, c. 25, § 4, creating the city court of Atchinson City, and providing that the Governor shall appoint a marshal, who shall hold office for two years "and" until his successor is elected and qualified, "and" will be construed to mean "or." *Starr v. Flynn*, 62 Pac. 659, 660, 62 Kan. 845.

"And," as used in the resolve of March, 1804, accepting the report of a commissioner appointed to survey a town and report the number of proprietors and settlers of a certain class, their heirs and assigns, and the quantity which ought to be confirmed to them, and affirming and granting the quantity of land assigned in such report and survey to the original proprietors to the settlers "and" to the heirs and assigns of settlers as respectively set against their several names therein, must be construed as meaning "or," so as to give it the intended operation; that is, if the deceased settler had neither conveyed nor devised his equitable assets to any one, then the grant operated, and a deed

should have been given to the heirs. *Sargent v. Simpson*, 8 Me. (8 Greenl.) 148, 153.

In Sp. Laws 1887, c. 3, subc. 4, § 5, subsec. 5, authorizing a city to provide for the health, comfort, "and" convenience of the inhabitants, "and" should be read "or," in accordance with the rule that "or" may be read for "and" in a statute, and conversely, as the clear intent of the statute may require. *City of Red Wing v. Guptil*, 75 N. W. 234, 235, 72 Minn. 259, 41 L. R. A. 321, 71 Am. St. Rep. 485.

In St. April 8, 1801 (1 K. & R. 562), declaring that the people will not sue for lands by reason of any right or title of the people to the same which shall not have accrued within 40 years before suit, unless the people or those under whom they claim shall have received the rents "and" profits or some part thereof within 40 years, "and" is synonymous with "or." *People v. Van Rensselaer* (N. Y.) 8 Barb. 189, 199.

The word "and" is often used interchangeably with the word "or," the meaning being determined by the context, and will be given the meaning of "or" in a statute authorizing a canal company to charge tolls upon all boats, vessels, steamboats, "and" other craft used for the transportation of freight or passengers along its canal. *Sturgeon Bay & L. M. Ship Canal & Harbor Co. v. Leatham*, 45 N. E. 422, 423, 164 Ill. 239.

In Laws 1861, c. 311, decreeing that every public highway "and" private road already laid out and dedicated to the use of the public that shall not have been opened and worked within six years from the time of its being so laid out shall cease to be a public road for any purpose whatever, "and" is construed to mean "or." *Ludlow v. City of Oswego* (N. Y.) 25 Hun, 260, 261.

Rev. Code, c. 119, § 1, authorizes the probate of a script as a holograph will, provided the script be found among the valuable papers "and" effects of the testator. As the statute appeared in the Revised Statutes, the disjunctive conjunction "or" was used in the place of "and," and was changed for the conjunction "and" in the Revised Code. Held, that the change did not affect the construction of the statute, since, if the word "and" was used in its strict conjunctive sense, the statute would be virtually repealed or its benefits greatly diminished, as but few persons who manage their business with order and system keep their valuable papers and effects together, notes, bonds, etc., being usually kept together in proper files, and currency, coin, jewels, etc., deposited in a more secret place; and hence the statute would be construed as if the disjunctive conjunction was retained. *Hughes v. Smith*, 64 N. C. 493, 495.

It is within common knowledge that the words "or" and "and" are frequently used

interchangeably, not only by those unskilled in the use of language, but by those who are acquainted with the shades of difference in the two conjunctions, for oftentimes the idea of the user is as correctly expressed by the use of one as the other. So it is held that under an act concerning distributions and descents, and providing that the wife shall not be entitled to any interest, under the provisions of the section, in any land to which the husband has made a conveyance, when the wife at the time of the conveyance is not "or" never has been a resident of this state, the word "or" should be read "and," with the effect that a wife who had ever been a resident of this state is entitled to the benefits of the act. *Kennedy v. Haskell* (Kan.) 73 Pac. 913, 914.

In the act of 1872 giving to the widow dower in the land of which the husband was seised "and" possessed, the word "and" substituted for the word "or" in the former act does not affect the meaning of the enactment. *Barnes v. Raper*, 90 N. C. 189, 191.

In Rev. Laws, c. 135, subd. 4, providing that any person of age who resides in any town and who holds ratable estate in his own right of a certain value shall gain a settlement in such town, "and" is to be construed conjunctively, and not meaning "or." *Town of Washington v. Town of Corinth*, 35 Vt. 468, 470.

In St. 1885, p. 147, § 80, as amended by St. 1889, p. 157, providing that before ordering any work done or improvements made on streets, as authorized by section 2 of the act, the city council should pass a resolution of intention, which should be published "and" posted, "and" is to be construed as meaning "or." *Washburn v. Lyons*, 32 Pac. 310, 97 Cal. 314.

In Ballinger's Ann. Codes & St. § 5248, subd. 6, exempting from execution a mechanic's tools and instruments used to carry on his trade for the support of himself and family, "and" should be read "himself or family." *Geiger v. Kobilka*, 66 Pac. 423, 424, 26 Wash. 171, 90 Am. St. Rep. 733.

The provision in the Constitution of West Virginia that no person shall be deprived of life, liberty, or property without due process of law "and the judgment of his peers," did not mean that no person should be deprived of his life, liberty, or property without a trial by jury, for there never has been a time in this state, or in any other state, or in England, in which it was held indispensable that to deprive a man of his life, liberty, or property he should in all cases have a trial by jury, and the word "and" should be read "or." *Jelly v. Dils*, 27 W. Va. 267, 274.

An act providing that cities of the third class may tax all property, matters, and things within said cities "taxable for state and county purposes" authorizes cities of a

third class to levy a tax upon any species of property which is taxable for either state or county purposes. *Appeal of Banger*, 109 Pa. 79, 90.

#### Same—In criminal statutes.

"And," when used in the statute, is construed as "or" when the spirit and reason of the law require and justify it. While the words are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of any other words, and one read in the place of the other in deference to the meaning of the context. *People v. Lytle*, 40 N. Y. Supp. 153, 161, 7 App. Div. 553 (citing *Boyles v. McMurphy*, 55 Ill. 236; *Simpson v. Morris* [Pa.] 3 Yeates, 104).

In the construction of statutes, "and" must be regarded as a convertible term with "or," if the sense so requires, even in a criminal statute, where a strict construction usually prevails. *Williams v. Poor*, 21 N. W. 753, 755, 65 Iowa, 410; *City of Indianapolis v. Huegele*, 18 N. E. 172, 176, 115 Ind. 581; *Miller v. State*, 8 Ohio St. 475, 479; *People v. Sweetser*, 46 N. W. 452, 454, 1 Dak. 308; *State v. Myers*, 10 Iowa, 448, 449.

As used in that part of the statutes relating to crimes and criminal procedure "and" may be read "or." Rev. St. (Wyo.) 1899, § 5190.

The word "and," in Rev. St. § 5467 [U. S. Comp. St. 1901, p. 3691], making criminal the secret stealing or destroying a letter "and" stealing the contents of such letter, should be construed to mean "or," and the statute operates to create two separate and distinct offenses. *United States v. Wight* (U. S.) 38 Fed. 106, 107.

St. 1863, p. 540, authorizing a city to prohibit and suppress "houses of prostitution and gaming," is not limited to houses devoted to the purpose of both prostitution and gaming, but includes houses used for either purpose. *Ex parte Chin Yan*, 60 Cal. 78, 84.

*Burns' Rev. St. 1894, § 2179* (Horner's Rev. St. 1897, § 2084), provides that any person who shall keep any room or building or occupy any place, etc., for the purpose of recording or registering bets or wagers or of selling pools, "and" any person who shall record or register bets or wagers or sell pools upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, etc., shall be guilty of a misdemeanor, held, that "and" should be construed to mean "or," thus making the statute describe two different offenses. *Douglass v. State*, 48 N. E. 9, 10, 18 Ind. App. 289.

The word "and," in Act March 11, 1895, § 10, declaring that its provisions shall apply to sales of spirituous, vinous, malt, "and" other intoxicating liquors, will be construed

as "or"; the word "or" being used in such expression in each of the preceding sections, and such construction being necessary to harmonize section 10 with the other sections. *State v. Myers*, 44 N. E. 801, 802, 146 Ind. 36.

"And," in Act 1872, § 6, relating to intoxicating liquors, providing that every person guilty of violating the first "and" second sections of the act shall forfeit, etc., should be construed as equivalent to "or," and hence penalties therein provided may be imposed for a violation of either section, and does not require that he be guilty of a violation of both before he can be subjected to such penalties. *Streeter v. People*, 69 Ill. 595, 597.

In Code 1873, § 3870, declaring that if the father and mother of any child under the age of six years exposed the same with intent to abandon it, etc., "and" should be construed to mean "or" so that the offense charged therein may be committed by either parent alone. *State v. Smith*, 46 Iowa, 670, 673.

In Code 1873, § 2634, providing punishment for making counterfeit coin and having such counterfeit coin with intent to pass the same, "and" should be construed as meaning "or," since it would be absurd and against the obvious intent of the law to construe it so that a man could not be convicted of having counterfeit money in his possession without also showing that he counterfeited the coin. When necessary to give effect to a statute, "and" will be construed as a disjunctive or copulative, according to the sense which the law most clearly requires. *State v. Myers*, 10 Iowa, 448, 449.

When necessary to harmonize the provisions of a statute or give effect to all of its provisions, the word "and" may be read as "or," and conversely. *State v. Brandt*, 41 Iowa, 593.

"And" is frequently construed "or," and "or" is frequently construed "and," to further the intents of the parties in legacies, devises, deeds, bonds, and writings; and the rules of construction of a statute are in most respects the same as the rules of construction of deeds and wills. Thus, where a statute in one section prohibited the sale of liquor without a license, in the second section prohibited use of screens, frosted windows, etc., in the third section prohibited the sale of liquor to minors, etc., and in seventh section provided that for every violation of the provisions of first, second, "and" third sections a certain penalty should be inflicted, it was held that the word "and" in the seventh section would be construed "or," since it could not have been intended that a person must violate all three sections before he could be punished. *State v. Cain*, 9 W. Va. 559, 569.

Act May 5, 1868 (65 Ohio Laws, 146), declares that it shall be unlawful for any person within the limits of the state who has not

attended two full courses of instruction and graduated at some school of medicine, or who cannot produce a certificate of qualification from some state or county medical society, "and" is not a person of good moral character, to practice medicine in the state. Held, that the word "and" as last used in the section should be construed as "or," a contention that one having good moral character was excluded from the operation of the statute being without merit. *Wert v. Clutter*, 37 Ohio St. 347, 349.

In a statute giving a police court jurisdiction of the offense of keeping a liquor nuisance, with the provision that the fine imposed by them shall not exceed \$100 "and" an imprisonment not exceeding one year, the offense having previously been punishable by the superior court by a fine not exceeding \$1,000 or imprisonment not exceeding one year, the word "and" should not be construed as authorizing the police court to add the imprisonment to the fine, but rather as fixing a limit to the fine which may be imposed by that court, and also to limit the imprisonment which that court could impose. *Commonwealth v. Griffin*, 105 Mass. 186, 186.

In Code 1876, § 954, subd. 15, requiring dealers in pistols, bowie knives, "and" dirk knives to be licensed, "and" should be construed to mean "or." Throughout the whole section it is clear the intention of the Legislature was to subject single particular occupations of pursuit, and not a combination of them, to a license. *Porter v. State*, 53 Ala. 66, 68.

The word "and," in a statute giving villages the right to license, regulate, "and" prohibit the sale of intoxicating liquors in a village, cannot be construed to mean "or" for the purpose of limiting the village to the alternative of either licensing or prohibiting the traffic, but the traffic may be licensed in one part of the village and prohibited in another. *People v. Cregler*, 28 N. E. 812, 815, 138 Ill. 401.

Rev. St. § 841, provides a punishment for a willful or maliciously burning in the nighttime, etc. Held, that in an indictment for arson the indictment was not defective because the word "willfully" was connected with the word "maliciously" by "and," instead of the disjunctive "or" having been employed. *State v. Price*, 37 La. Ann. 215, 219.

#### Same—In wills in general.

When obviously necessary to carry out the intentions of the testator, the word "and" in a will will be construed to mean "or," or conversely. *Abrahams v. English*, 17 N. J. Law (2 Har.) 280, 288; *Stubbs v. Sargon*, 2 Keen, 255; *In re Wells*, 21 N. E. 137, 139, 113 N. Y. 396, 10 Am. St. Rep. 457; *In re Gilmer's Estate*, 26 Atl. 614, 616, 154 Pa. 523, 35 Am. St. Rep. 855; *Janney v. Sprigg* (Md.) 7

Gill, 197, 202, 48 Am. Dec. 557; Beall v. Deale (Md.) 7 Gill & J. 216, 222, 224.

The word "and" as used in a will, may be construed to mean "or," when necessary to give effect to all the words of the will. *Bell v. Phyn*, 7 Ves. 453, 458.

The word "and," as used in a will, will be construed to mean "or," when it gives a more rational construction to the will or comes nearer to the intention of the testator. *Harris v. Taylor*, 5 N. J. Law (2 Southard) 413, 420.

When used in a will, "and" will only be construed to mean "or" for the purpose of carrying out the "evident intention" of the testator, and not to gratify the desires or wishes of a legatee or effect what might indeed seem more just or reasonable. *Ely v. Ely's Ex'rs*, 20 N. J. Eq. (5 C. E. Green) 43, 48.

"Courts sometimes, in attempting to give effect to testator's intention, displace 'or,' and substitute 'and,' and also put 'or,' where the testator has written 'and,' but such departures from the words of the will are never made except it is clear that they are necessary to give effect to the purpose of the testator." *Courter v. Stagg*, 27 N. J. Eq. (12 C. E. Green) 305.

Where a testator bequeathed and devised all the rest, residue, and remainder of his estate, both real and personal, to his son and daughter, subject to the dower "and" thirds of his wife, the word "thirds" should be construed to mean the same thing as "dower," and the word "and" to mean "or." *O'Hara v. Dever*, \*41 N. Y. (2 Keyes) 558, 561; *O'Hara v. Dever* (N. Y.) 2 Abb. Prac. (N. S.) 418, 428.

Testator devised one-sixth part of the residue of his estate to each of his three children, provided that they, their children or grandchildren, shall transmit proofs to the executors within six years after testator's death of their being alive, and after the said six years no proof to be admitted, but the said residue shall be equally divided among such of his children and grandchildren as can make proof, "and" shall have made it within the aforesaid space of time. Held that the word "and" as last used should be construed as "or" in order to effectuate the testator's intention, and hence, where a devisee made proof within the required time, but it was unavoidably prevented from being forwarded, the devise did not lapse. *Engelfried v. Woelpart* (Pa.) 1 Yeates, 41, 45.

#### Same—In wills with limitations over.

The words "or" and "and" in deeds and wills are not to be always held to a strict grammatical sense, but "or" is to be taken for "and," and "and" is to be taken for "or," as may best comport with the meaning of the

grant or devise; hence, in the provision in a will that certain property devised shall go to another if the devisee "will not pay the above annuity and what he owes me," the word "and" must be construed as the disjunctive "or." *East v. Garrett*, 9 S. E. 1112, 1117, 84 Va. 523.

The courts will transpose the clauses of a will and construe "or" to be "and," and "and" to be "or," only in such cases when it is absolutely necessary to do so to support the evident meaning of the testator, but they cannot arbitrarily expunge or alter words without such apparent necessity. *Denn v. Woodward* (Pa.) 1 Yeates, 316, 319.

In a will leaving property to children, but providing that, in case of their death without being married "and" having children, the share of such child shall be divided among the surviving children, the word "and" will be construed to read "or." *Bell v. Phyn*, 7 Ves. 453, 458; *Maberly v. Strode*, 3 Ves. Jr. 450, 454; *Roome v. Phillips*, 24 N. Y. 463, 470; *Janney v. Sprigg* (Md.) 7 Gill, 197, 202, 48 Am. Dec. 557.

In a will by which testator gave real estate to his son, provided and on condition that he lives to the age of 21 years and has issue of his body lawfully begotten, but in case such son dies under the age of 21 years "and" without issue as aforesaid, "and" should be construed to mean "or," for if not so construed, if the son had died under age leaving issue, they could have derived no benefit from the devise to the father, although the devise over never did nor could take effect, and thus the whole devise would be completely frustrated. "Or" is to be taken for "and," and "and" is to be taken for "or," as may best comport with the intent and meaning of a devise or grant. *Sayward v. Sayward*, 7 Me. (7 Greenl.) 210, 216, 22 Am. Dec. 191.

In a will by which testator gave property to his son subject to the conditions and limitations that the executors should invest his share safely, and that he receive the income thereof during his natural life, and in case of his death without issue his share to go in equal shares to his surviving brothers and sisters, and, in case the son should leave a child or children, said child or children to receive said income only until the youngest of them arrive at 21 years "and" as long as one or either of them shall live, "and" should be construed to mean "or," for by reading the sentence conjunctively the first member, which gives the income during minority, is reduced to silence by the second, which gives it for life, and the right of a child to the income ceased when she attained majority. *Shimer v. Shimer's Ex'rs*, 24 Atl. 385, 386, 50 N. J. Eq. (5 Dick.) 300.

In a will devising testator's realty to his two sons for life as tenants in common, and

providing that, in case either of the sons should depart this life "under age and without leaving any child or children" living at his death, then his part should go to the testator's daughter, "and" must be construed to mean under age "or" without issue, and hence, on the death of one of the sons without issue, after becoming of age, the limitation to the daughter was effectual. *Seabrook v. Mikell* (S. C.) Cheves, Eq. 80, 90.

The word "and" in a will giving the income of testator's estate to his grandson and his granddaughter, and the survivor of them, neither to receive more than one-half thereof, and directing that on the death of the grandson "and" the granddaughter, if either have children, the trustee shall turn over one-half the estate to the children of the grandson and one-half to the children of the granddaughter, and providing that, in case of the death of the grandson "or" the granddaughter without leaving children, the property be divided among testator's heirs, was construed to mean "or," on the ground that it was used in such sense by the testator. "Attention need not be called to the numerous authorities to sustain this. Uncertainty is sometimes the result of the improper use of 'or' for 'and,' or vice versa. The general rule in such cases is that the one word will be construed to have been used for the other where the plain intent of the testator will be defeated without such substitution, but such construction is not admissible unless it be necessary to carry out the manifest design of the will. That the testator used these words indiscriminately is still more apparent further on, in the fifth clause, where he says, 'so that the said child or children of my said grandson and granddaughter shall have and enjoy all of my estate then remaining in the hands of my trustees.' The word 'and' read literally in this latter part of the clause would make the distribution of his estate per capita among all his great grandchildren, though it cannot be questioned that he intended the distribution to be to the children of his grandchildren per stirpes; and in the sixth clause, unless 'or' is read 'and,' the proceeds of the entire estate of the decedent are to be divided among his heirs at law upon the death of either grandchild, leaving no child to survive him or her, whereas the manifest intention was that only upon the death of both of them, leaving no children surviving, his estate was to be distributed among his heirs at law." *In re Tripp's Estate*, 51 Atl. 983, 985, 202 Pa. 260.

In a will giving the rents and arrears and other annual profits due at the time of testator's death from a certain estate to the person or persons who should be entitled to the freehold "and" inheritance of the home estate, the word "and" should be construed to read "or" in order to effectuate testator's intention. *Stapleton v. Stapleton*, 2 Sim. (N. S.) 212, 221.

Where the condition of a devise was that a former devisee "should not marry and have lawful issue of his own body," the devise would be good if either event should happen. *Downing v. Wherrin*, 19 N. H. 9, 86, 87, 49 Am. Dec. 139.

#### Same—In wills naming devisees.

The word "and," in a devise to a beneficiary "and" his heirs, may be construed to mean "or," in order to prevent a lapse of the legacy by reason of the death of the first beneficiary prior to the death of testator, if such meaning is plainly indicated as that intended to be given by the testator. The practical effect of the consideration is great, as, if the word "and" is construed in its natural meaning, the word "heirs" is a word of limitation, and not of substitution, and the legacy lapses; but, in case it is construed to mean "or," the word "heirs" is used as a word of substitution, and they take as beneficiaries. In most of the cases which draw the distinction between the force of the word "and" and the force of the word "or," the legacy, according to the strict grammatical form of the phraseology employed, is given not only to the legatee named, but to other persons who are designated as his heirs. The rule of construction, however, founded largely upon technical usage, is settled, as we have seen, that a gift in form to A. and his heirs is a gift to one donee, not two. It is only necessary, however, to substitute the word "or" for the word "and" in order to give the terms which in form import a gift to heirs their ordinary meaning and effect. *Zabriske v. Huyler*, 51 Atl. 197, 198, 62 N. J. Eq. 697.

In a will leaving property in trust to pay the produce to the children of testator's sister Ann, to be divided among them "and" such of them as shall be then living, share and share alike, the word "and" should be construed as "or." *Hetherington v. Oakman* (Eng.) 2 Younge & C. Ch. 299, 301.

In a will providing that when all testator's children were dead his estate should be equally divided between his wife "and" her heirs, "and" should be construed to mean "or." *Maguire v. Moore*, 18 S. W. 897, 899, 108 Mo. 267.

"And," as used in a will devising property to a person and his heirs, may be construed to mean "or," where the context requires such construction to effectuate the testator's intention. *Keniston v. Adams*, 14 Atl. 203, 205, 80 Me. 290.

In a will providing that testator's wife should have his property for life, and that after her decease it should go to the testator's daughter "and" her heirs forever, "and" must be construed "or," since a living person cannot have heirs. *Ray v. Enslin*, 2 Mass. 554, 556.

In a will, authorizing the remainder to be paid in equal portions to testatrix's niece and nephew named "and" the survivors of them, "and" should be construed in the sense of "or." *Hall v. Blodgett*, 48 Atl. 1085, 70 N. H. 437.

In a codicil to a will providing that a legacy should go to the legatee "and" her executors and administrators absolutely, "and" should be read with the same effect as if it were "or." *Kerrigan v. Tabb* (N. J.) 39 Atl. 701, 702.

In a will directing the executors, as testatrix's grandchildren shall respectively attain the age of 21 years "and" her youngest grandchild and her son-in-law may still be living, to pay over to each grandchild as they arrive at the age of 21 years a proportionate share of the rents, issues, and profits of her estate during the lives of the grandchildren and son-in-law, "and" should be construed to mean "or." *Roe v. Vingut*, 22 N. E. 933, 934, 117 N. Y. 204.

In a will bequeathing money to testator's daughter "and" her bodily issue, "and" should be construed to mean "or." *Duncan v. Harper*, 4 S. C. (4 Rich.) 76, 84.

#### Not construed as or.

When it appears from the context of a statute that the intention of the lawmaking power can only be given effect by treating "and" as "or," courts will do so, but ordinarily they are in no sense interchangeable terms, but, on the contrary, are used in the structure of language for purposes entirely variant. *Robinson v. Southern Pac. Co.*, 38 Pac. 94, 95, 105 Cal. 526, 28 L. R. A. 773 (citing *State v. Beauchleigh*, 92 Mo. 490, 4 S. W. 666).

The rule which allows "and" to be read "or" cannot be applied to sustain an affidavit to obtain a discharge in insolvency, which declares that the debtor has not disposed of any property for the future benefit of himself "and" family, when the statute under which the discharge is sought requires an affidavit that he has not disposed of any for the benefit of himself "or" family. Such affidavit only negatives a disposal for the joint benefit of the debtor and his family, whereas the object of the statute is to secure proof that none has been made for the benefit of either. *Hale v. Sweet*, 40 N. Y. 97, 100.

#### Same—In contracts or deeds.

While courts have construed "and" as "or," and vice versa, such construction has been sanctioned only for strong reason, and only to carry out the manifest intention of the parties (*Roome v. Phillips*, 24 N. Y. 463; *Hale v. Sweet*, 40 N. Y. 97), so that "and," as used in a guaranty to pay all bills of goods bought by B. and M., will not be used in the sense of "or," but will render the guarantor

liable only for joint sales. *Mayer v. Cook*, 57 N. Y. Supp. 94, 95, 26 Misc. Rep. 774.

The use of the word "and" in a contract whereby one party agreed to pay in sawing "and" lumber meant that the payment would be made in both sawing and lumber, "and" not being employed disjunctively or as synonymous with "or." *Fredenburg v. Turner*, 37 Mich. 402, 405.

In a deed of all the real estate "lying in," etc., "where-of H. was seized on July 4, 1876, or at any time since, and where-of the said P. is now seized," construed to include not only all the lands of which the said H. was seized at the specified time, but also the lands of which P. was seized at the time of the execution of the instrument. The word "and" is not to be construed as a disjunctive, or as merely affirming that P. has the title formerly held by H. *Thomas v. Perry* (U. S.) 23 Fed. Cas. 964, 968.

#### Same—In civil statutes.

"And" will not be construed to mean "or" in Civ. Code, § 490, empowering the purchaser of a railroad ticket to ride from the station at which the ticket is bought to destination "and" from any intermediate station to destination. *Robinson v. Southern Pac. Co.*, 38 Pac. 94, 95, 105 Cal. 526, 28 L. R. A. 773.

In St. 1876, c. 90, giving to him who labors in quarrying or cutting and dressing granite in any quarry a lien for his labor for 30 days after the granite is cut and dressed, "and" as much longer as the stone remains unsold and not shipped on board a vessel, "and" is used conjunctively, and not as synonymous with "or." *Collins Granite Co. v. Devereux*, 72 Me. 422, 424.

"And," as used in the twenty-sixth section of the schedule of the Constitution, providing that all persons in office at the time of the adoption of the Constitution "and" at the first election under it shall hold their offices until their term expires and their successors are qualified, should not be read "or," as no necessary intent on the part of the makers of the Constitution requires it. *Commonwealth v. Kilgore*, 82 Pa. 396, 398.

In Code, c. 73, § 64, requiring the examination of a married woman on the acknowledgment of a deed and certificate to declare that she acknowledged "that she had willingly executed the same 'and' does not wish to retract it," the word "and" does not mean "or," so as to render the two phrases connected by it equivalent expressions, so that the presence of one might be construed as dispensing with that of the other. *Leftwich v. Neal*, 7 W. Va. 569, 575.

"And," as used in Tariff Act 1890, Schedule J, par. 373, placing a certain duty on em-

broidered and hemstitched handkerchiefs, is not employed disjunctively or as synonymous with "or," but means handkerchiefs which are both hemstitched and embroidered. *Rice v. United States* (U. S.) 53 Fed. 910, 912, 4 C. C. A. 104.

"And" and "or" may be convertible when required by the sense of the statute, otherwise they will be taken as ordinarily used and understood; but in a statute providing that, whenever 50 or more resident householders "and" freeholders of a county ask for an election as to sale of liquor, an election shall be ordered, "and" will not be construed "or," as it is apparent that the statute intended to guard against precipitate action in such matters, and therefore required both qualifications. *Miller v. Jones*, 80 Ala. 89, 95.

Laws 1901, p. 581, c. 466, and Code Civ. Proc. § 3216, provide that defendant in the Municipal Court may, without issue joined, "and" before adjournment on his application, apply for an order removing an action to the City Court of New York. Held, that the word "and" is a word of addition, and signifies that something is to follow in addition to that which precedes. "And" in this case does not mean "or," and the statute means that, after issue joined, defendant must not indicate an intention to go to trial, but must at once take steps necessary to remove. *Duke v. Caluwaert*, 83 N. Y. Supp. 10, 12, 40 Misc. Rep. 623.

#### Same—In penal statutes.

"And," as used in penal statutes, can never be construed to mean "or." *Buck v. Danzenbacker*, 37 N. J. Law (8 Vroom) 350, 361; *Fagan v. State*, 47 N. J. Law (18 Vroom) 175, 178.

The word "and" in a criminal statute cannot be construed to mean "or," and therefore such a construction is not permissible in a statute providing for a forfeiture of goods attempted to be imported on the concurrence of certain facts "and" certain other facts. *United States v. Ten Cases Shawls* (U. S.) 28 Fed. Cas. 35, 37.

In Act July 14, 1832, § 4 (4 Stat. 593), declaring that whenever, on the opening of any imported packages of goods composed wholly or in part of wool or cotton, they shall be found not to correspond with the entry at the custom house, "and" if any package shall be found to contain any article not entered such article shall be forfeited, "and" is not used disjunctively. *United States v. Ten Cases Shawls* (U. S.) 28 Fed. Cas. 35, 37.

"And," as used in the statute providing for punishment by fine "and" imprisonment, requires the court to inflict both if the party is found guilty. *United States v. Vickery* (Md.) 1 Har. & J. 427.

#### Same—In wills.

In a will directing that testator's daughter should be supported out of his estate, when she should be sick and unable to support herself, "and" should be construed in its strict sense conjunctively, and she is not entitled to such support, though she is old and very infirm and unable to support herself, but not sick. *Reynolds v. Denman*, 20 N. J. Eq. (5 C. E. Green) 218, 219.

Though the courts are authorized to construe a disjunctive word into a conjunctive word, and vice versa, where it is necessary to give effect to the true meaning of the testator, unless there be something in the will or the subject from which it may be fairly collected that the testator did not use such words in their grammatical sense, the grammatical sense must prevail. A court cannot from arbitrary conjecture, though founded upon the highest degree of probability, add to a will or supply the omission. *Holmes v. Holmes' Lessee*, 5 Bin. 252, 258.

In a will bequeathing all testator's personal estate, after several legacies, to his brother James and his children and the child of his sister, to be equally divided between them "and" their heirs and assigns, "and" cannot be construed to mean "or," so as to change the expression "and their heirs" into "or their heirs." "And" is never read "or" unless the context of the will favors it and the general intention is thereby elucidated or promoted. "These words are certainly not ordinarily convertible, and to change one into the other at will to suit the mood of the reader would work wonderful mischief with legal instruments, to say nothing of its singular effects upon any English author one may chance to take down from the shelf." *Armstrong v. Moran*, 1 Bradf. Sur. 314, 315.

#### AND ALSO.

Where a testator devised 208 acres of land, definitely described, to his daughter, "and also" 83 acres on which "she now lives," for life, the use of the copulative words "and also" will be construed to indicate his intention to have been to apply the limitations to the first as well as to the second tract, the words "and also" being equivalent to "in like manner." *Noble v. Ayers*, 56 N. E. 199, 61 Ohio St. 491.

"Also," as defined by Webster, means "in like manner; likewise"; and is defined to mean "in like manner; further; in addition to; too." As used by a testator in devising a house and lot to his daughter and "the heirs of her body, 'and also' an equal share of any other lands, negroes, etc.," the copulative "and" connected the words that followed it with the words that preceded it, and the words "and also" thus used were copulatives, carrying with them the sense of the

preceding words, and being equivalent to "in like manner," and denoted the intention of the testator that the devise of the house and lot and "other lands" should be considered as governed by "lawful heirs of her body," thus creating a fee conditional in said house and lot and other lands. *Du Pont v. Du Bos*, 29 S. E. 665, 670, 52 S. C. 244.

In a devise of a negro "and also lands for life," the words "and also" continue the clause, and the words "for life" refer to all that precedes, and make a devise of the negro for life as well as the lands synonymous. *Anonymous*, 3 N. C. 161.

#### **AND OR**

A charter party to load a full and complete cargo of sugar, molasses, "and" other lawful produce, is to be construed <sup>or</sup> to mean either a full cargo of sugar and molasses, or a full cargo of other lawful produce, or a full cargo of sugar and molasses and other lawful produce. *Cuthbert v. Cumming*, 10 Exch. 809, 814.

#### **AND SO.**

An allegation in an information charged the offense of being present where gaming implements are found, "and so the said D. doth say that the said room, in the manner and form aforesaid, was unlawfully used as and for a gaming house." Held, that the words "and so" did not have the effect of limiting the following allegation to the legal conclusion from what precedes, but the allegation is of a distinct substantive fact. *Commonwealth v. Smith*, 44 N. E. 503, 504, 168 Mass. 370.

#### **AND SO FORTH.**

A demise was of one whole building and the three upper floors of the adjoining building, with the privilege of using the stairway of the whole building for the carrying in and out of ashes, coal, "and so forth." Held, that "and so forth" meant of a like kind, and hence the lessee had no right to use the stairway of the whole building as the principal entrance to the floors above, but for the purposes named, and those of like kind. *Agate v. Lowenbein*, 4 Daly, 62, 68.

The term "and so forth," in a will devising property, is a patent ambiguity, not explainable by parol evidence. *Taylor v. Maria*, 90 N. C. 619, 624.

#### **AND SO ON.**

"And so on," as used in a deed providing that a certain slave should remain in the grantor's possession or in his wife's possession until their death, and then go to one of the grantor's daughters and to the future

heirs of her body, and that if any of the grantor's daughters should die without leaving any lawful heirs of her body the property should go to the grantor's surviving children, "and so on," means that on the death of the first daughter without leaving any lawful heirs of her body her share should survive to the others, and so on in like manner on the death of the second daughter her share should go to the surviving daughter, and the words were intended to apply to the succession of the grantor's daughters to each other by survivorship, as the word "so" must be construed to mean "in a like manner," and "on" to mean "forward," "in progression," "successively." *Nix v. Ray*, 5 Rich. Law, 423, 424, 426.

#### **ANEW.**

See "Locate Anew"; "Trial Anew."

#### **ANGER.**

The word "anger" has no technical meaning peculiar to law, and hence it is not error for the court to fail to define anger as used in instructions in a homicide case. *Robinson v. State (Tex.)* 63 S. W. 869, 870.

"Anger" is a strong passion or emotion of the mind, caused by real or supposed injury to or intent to injure one's self or others, and the term "malice" includes all that anger does, and more. *Chandler v. State*, 39 N. E. 444, 447, 141 Ind. 106.

"Anger" is a short madness, and when provoked by a reasonable cause excuses from the punishment of murder. *Pennsylvania v. Bell (Pa.)* 1 Add. 156, 160, 1 Am. Dec. 298.

#### **As heat of passion.**

While anger may amount to heat of passion, it is not a synonym for heat of passion, and hence, as used in an instruction that if defendant was "angered" at deceased and then killed him it was murder in the third degree, is not equivalent to saying that killing in a heat of passion constitutes murder in the third degree. *Hoffman v. State*, 73 N. W. 51, 52, 97 Wis. 571.

#### **Rage or resentment distinguished.**

Pen. Code, art. 594, subd. 3, provides that, if the killing of a person who has used insulting words or conduct toward a female relative of the party guilty of the homicide takes place on the first meeting after the party learned of such words or conduct, it is necessary, in order to reduce the offense to manslaughter, that an adequate cause exist to produce "anger," rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection at the time of the commission of the offense. Held, that anger means a violent passion of the mind excited by real or



supposed injury offered to a relative or friend, and is not synonymous with "rage or sudden resentment." It is not necessarily rage, nor transport of passion, nor delirium, though it may be inflamed into such conditions. These are but higher and more demonstrative and uncontrollable types of its existence. It often happens that the uneducated mind will confound the cause with the higher degrees, and require that the same external exhibitions shall indicate its presence. Such is not the fact; "anger" may exist without any violent ebullition of passion or even outward expression, and yet to such an extent as to render the mind incapable of cool reflection. It may present all "the torrent's smoothness ere it dash below," and its indicia are as varied as are the varied faces and dispositions of men. *Eanes v. State*, 10 Tex. App. 421, 446.

### ANGINA PECTORIS.

"Angina pectoris is a disease of the heart, so named from a sense of suffocating contraction or tightening of the chest over the sternum, and causes an anxious feeling and fear of death. The disease is marked by sudden attacks of severe pain and fainting sensations. The paroxysms come on unexpectedly, with irregular intervals. As the disease continues, the respiration in the intervals between the paroxysms becomes labored, and the patient seeks temporary relief, not only in stimulants, but also in various, and at times, ridiculous, postures of the body. In *re Lee's Will*, 18 Atl. 525, 528, 46 N. J. Eq. (1 Dick.) 193.

### ANGLING.

The term "angling," as used in the chapter relating to the preservation of fish, game, birds, etc., means taking fish with hook and line, or not exceeding two rods or lines with hooks attached, held in hand, and not including set lines. *V. S.* 1894, 4562.

### ANGOSTURA.

The word "angostura" has long been used in medical and scientific works to designate the bark of a South American tree, having well-known properties. *Siebert v. Abbott*, 25 N. Y. Supp. 590, 593, 72 Hun, 243 (quoting *Murray's New Eng. Dict.*).

It is alleged that the word "angostura" is not the subject of a trade-mark or a trade-name. We cannot sustain the contention. For upwards of half a century no town has existed by that name, and, even if the old town of Angostura were still known by that name, a person would not be permitted by fraudulent imitation to deceive the public and wrong the manufacturers of the Angostura Bitters by palming off its goods as their

goods, and such a person cannot be permitted to usurp that name and dress its goods like those of the original proprietors, and thereby defraud the public. *A. Bauer & Co. v. Siebert (U. S.)* 120 Fed. 81, 84, 56 C. C. A. 487.

### ANGRY.

"Angry" means touched with anger; feeling resentment; provoked; and anger is a strong passion or emotion of the mind, caused by real or supposed injury to or intent to injure one's self or others; so that an indictment for assault and battery, charging that the act was done unlawfully, feloniously, purposely, and with premeditated malice, is sufficient under an act making an act done in an "angry" manner an assault, the word "malice" comprehending all that "angry" does, and more. *Chandler v. State*, 39 N. E. 444, 447, 141 Ind. 106.

### ANGUISH.

The word "anguish" certainly applies, *inter alia*, to an operation of and upon the mind. Webster defines it: "Extreme pain, either of body or mind;" and as "synonymous with agony, distress, pang, torment, etc." Mental suffering is so allied to and inseparable from physical injury of the character in question, that it follows as effect does cause. We may conceive of a child so young that it could hardly be affirmed of it that it suffered in mind—felt anguish and like emotions—but in the instance of a person of the age of this plaintiff (11 years), if of ordinary intelligence, which his testimony indicated he possessed, the jury may infer the mental pain from the inevitable physical pain, on the known and experienced connection subsisting between collateral facts, or circumstances proved, and the fact in controversy. *Cook v. Missouri Pac. Ry. Co.*, 19 Mo. App. 329, 334 (citing 1 Greenl. Ev.; *Randolph v. Hannibal & St. J. Ry. Co.*, 18 Mo. App. 609).

### ANGUS.

Where an indictment charges Angus M. Cannon with unlawful cohabiting with more than one woman, naming them, it charges that the defendant is a "male person" within Rev. St. § 5352, in reference to bigamy, providing that, if any "male person" in a territory shall hereafter cohabit with more than one woman, he shall be deemed guilty of a misdemeanor. The name "Angus" is in the community recognized as that of a male person, the defendant himself, however, being the most public character bearing the name. Outside of the community it is well recognized as a male appellative. The word "person" embraces all mankind, and mankind is divided into two classes, one male

and the other female. The statute says that this crime can be committed only by the members of one class, the male, upon and with members of the other class, the female. When, therefore, the specific crime is charged to have been committed by some person upon and with those of the female class, the natural and inevitable conclusion would seem to be that the same person committing the offense belonged to the other, the male class. *United States v. Cannon*, 7 Pac. 369, 4 Utah, 122.

## ANHYDROUS.

"Anhydrous" signifies absence of water and the quality of taking it. It is the opposite of "hydrous," which is the scientific term indicating the presence of water. The use of the word "anhydrous," in speaking of an article known as "anhydrous lanoline," indicates that the lanoline is without water, in the first instance, though it may be capable of absorbing water. The term may be applied to lanoline after the water it contains is driven off. *Joffe v. Evans*, 75 N. Y. Supp. 257, 259, 70 App. Div. 186.

## ANIMAL.

See "Dead Animals"; "Domestic Animal"; "Dumb Animal"; "Live Animals"; "Vicious Animal."  
Any animals, see "Any."  
Like animals, see "Like."  
Other animals, see "Other."

"The common law divides animals having the power of locomotion, exclusive of man, into three classes, viz., such as are *domitæ naturæ* (tame animals) such as are *feræ naturæ* (wild animals), and such as, whether wild or tame, are of so base a nature as not to be the subject of larceny. This latter class is composed out of the two former. In the first class a man may have as absolute property as in any inanimate beings, because these continue perpetually in his occupation, and will not stray from his house or person unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property. But in the second class a man can have no absolute property." *State v. Summer*, 2 Ind. (2 Cart.) 377, 378 (quoting 2 Bl. Comm. 390).

"Animals," as used in Sess. Acts 1874, p. 112, entitled "An act for the prevention of cruelty to animals," should be construed to cover all creatures except human beings. *State v. Bogardus*, 4 Mo. App. 215, 216.

Pub. St. c. 207, § 53, provides that every owner, possessor, or person having charge of any animal, who cruelly drives or works it when unfit for labor, or cruelly abandons it, or knowingly authorizes or permits it to be subjected to unnecessary torture or suffering

of any kind, shall be punished, etc. Held, that the word "animal" as so used included all wild and noxious animals, and is sufficiently broad to include all brute creatures; and the word in its common acceptation includes all irrational beings. *Commonwealth v. Turner*, 14 N. E. 130, 131, 133, 145 Mass. 296.

The use of the word "animal" as designating the subject of a legacy is so uncertain in meaning as to render the legacy void. *Succession of Trouard*, 5 La. Ann. 390.

In statutes relating to or affecting animals, the words "animal" or "dumb animal" shall be held to include every living creature. Ann. St. Ind. T. 1899, § 1298; Code N. C. 1883, § 2490.

The word "animal," as used in the chapter of the Penal Code relating to cruelty to animals, does not include the human race, but includes every other living creature. Pen. Code N. Y. 1903, § 669.

In the chapter relating to cruelty to animals, the word "animal" shall be held to include every living dumb creature. Rev. St. Wyo. 1899, § 2287. In the act relating to the prevention of cruelty to animals, the word "animal" shall be held to include every living dumb creature. Mills' Ann. St. Colo. 1891, § 117. As used in the chapter relating to the prevention of cruelty to animals, the word "animal" shall be held to include every living dumb creature. Bates' Ann. St. Ohio 1904, § 3721.

The word "animal," as used in the chapter relating to cruelty to animals, shall be held to include all brute creatures. V. S. 1894, 5000; Rev. St. Utah 1898, § 4459; Crim. Code, S. C. 1902, § 630; Comp. Laws Mich. 1897, § 11,748.

In the chapter relating to offenses against chastity, morality and decency the word "animal" includes every living brute creature. Rev. St. Me. 1883, p. 911, c. 124, § 48.

### Dead animals.

An animal is an organized living being, endowed with sensation, power, and voluntary motion, and also characterized by taking its food into an internal cavity or stomach, by giving off carbonic acid to the air, and taking oxygen into the process of respiration by a motive power or aggressive force, with progress to maturity. The term is properly applied, however, only so long as an animal is alive, and after its death it ceases to be an animal, but is an inanimate mass or carcass. *Reed v. State*, 16 Fla. 564, 565.

Where an animal is known by the same name after it has been slaughtered as before, an indictment charging the larceny of the animal will be construed to mean the live animal, and is not sufficient to describe

the dead animal. *Commonwealth v. Beauman*, 74 Mass. (8 Gray) 497, 499.

"Animals," as used in Rev. Code, § 3706, declaring a person who steals any animals therein designated guilty of grand larceny, should be construed to mean live animals, and not the carcasses or bodies of those that have been killed. *Hunt v. State*, 55 A.2. 138, 140.

#### Fowls.

"Animals," as used in a will devising animals belonging to testator, should be construed to include fowls. *Huber v. Mohn*, 37 N. J. Eq. (10 Stew.) 432, 433.

Under Pen. Code, § 665, punishing the keeper of a house used for fighting any birds or animals, the animals include gamecocks. *People v. Klock*, 48 Hun, 275, 277.

Within the meaning of Rev. St. § 2101, declaring cruelty to animals to be a misdemeanor, a domestic fowl, i. e., a goose, is an animal. *State v. Bruner*, 12 N. E. 103, 104, 111 Ind. 98.

Revenue Act 1861, c. 68, § 23, provides that animals of all kinds, birds, singing and other, and land and water fowls, shall be exempt from duty. By Act March 16, 1866 (14 Stat. 48), a duty of 20 per cent. was levied on all horses and mules, cattle, sheep, "and other live animals." Held, that the words "other live animals" did not include birds, since the second statute must be read in the light of the first. The court said: "The act of 1866 is in its terms comprehensive enough to include birds and all other living things endowed with sensation and the power of voluntary motion, and if there had not been previous legislation on the subject it might be possible that Congress did not intend to narrow the meaning of the word 'animals,' but, inasmuch as birds and fowls were not embraced in the term 'animals' in the act of 1861, it was manifest that Congress adopted the popular signification of the word 'animals,' which is applied only to quadrupeds, and placed birds and fowls in a different signification, and, having so defined the word in one act, it must be treated as meaning the same thing in a subsequent act in pari materia therewith." *Reiche v. Smythe*, 80 U. S. (13 Wall.) 162, 164, 20 L. Ed. 566.

Within the law of sodomy, a duck will be held to be an animal. *Reg. v. Brown*, 24 Q. B. Div. 357, 358.

The word "animals," as used in the act relating to the preservation of game, shall not be construed to include any variety of birds. Gen. St. Minn. 1894, § 2187.

The term "animals" and "animal," as used in the chapter relating to the humane society, or in the sections concerning ani-

mals, shall include all brute creatures and birds. Gen. St. Conn. 1902, § 2315.

#### Horses.

"Animals," as used in Laws 1880, p. 322 (Act March 12, 1880), making animals with contagious or infectious diseases common nuisances, and authorizing their destruction, has a signification sufficiently broad to include horses, and therefore include horses affected by glanders. *Newark & S. O. H. R. Co. v. Hunt*, 12 Atl. 697, 699, 50 N. J. Law (21 Vroom) 308.

#### Snakes.

Trained snakes, imported by a professional snake charmer, to be used in exhibition of skill in that profession, and which were not for sale, are not dutiable as live "animals," under Tariff Act Oct. 1, 1890, par. 251. *Magnon v. U. S.* (U. S.) 66 Fed. 151, 152.

#### ANIMALS FERÆ NATURÆ.

See "Feræ Naturæ."

#### ANIMO FURANDI.

"Animo furandi," means a fraudulent intent to appropriate goods to the taker's own use or wholly to deprive the owner of them. *Gardner v. State*, 26 Atl. 30, 33, 55 N. J. Law (26 Vroom) 17.

Eyre, C. D., says: "Larceny is the wrongful taking of the goods with the intent to spoil the owner of them *lucri causa*;" but Blackstone says the taking must be felonious; that is, done *animo furandi*, or, as the civil law expresses it, *lucri causa*. The point arrived at by these two expressions "*animo furandi*" and "*lucri causa*," the meaning of which has been much discussed, seems to be this: that the goods must be taken into possession of the thief with the intention of depriving the owner of his property in them. *State v. Slingerland*, 7 Pac. 280, 282, 19 Nev. 135.

#### ANIMUS DERELINQUENDI.

"Animus derelinquendi" is that simple affection of the mind by which a person wills that a thing previously his property should no longer remain so, without reference to any particular transference. *Rhodes v. Whitehead*, 27 Tex. 304, 313, 84 Am. Dec. 631.

#### ANIMUS TESTANDI.

To make a valid will the testator must have had the "*animus testandi*"; that is, his own free conclusion and wish to adopt the particular last will offered for probate. Bacon calls it "a mind or serious intention

to make such a will." *Farr v. Thompson* (S. C.) 1 Speers, 93, 105.

## ANNÉE.

The constitution and by-laws of an association allowed a member a sick benefit of a certain sum per week during 13 weeks only of the same "année," the original by-law being in the French language. It was held that année means a period of a year, and not a calendar year. *Thibeault v. Association of St. Jean Baptist*, 42 Atl. 513, 519, 21 R. I. 157.

## ANNEX—ANNEXATION.

The word "annexed" is defined by lexicographers to mean joined at the end; connected with; affixed. It has a different and less extensive meaning than the word "appurtenant," which signifies belonging to, or pertaining to of right. Thus the terms "annexed grounds" in a statute exempting all churches, meeting houses, or other regular places of stated religious worship, with the grounds thereto annexed, for the occupancy and better enjoyment of the same, from taxation, does not include a parsonage belonging to the church, but separated and distinct therefrom. *Treasurer of Dauphin County v. Rector, etc., of St. Stephen's Church*, 3 Phila. 189, 190.

The term "annexation" means to add or unite to something already existing; to subjoin; to affix, as to unite a province to a kingdom, a codicil to a will, a condition to a grant. In *Black's Law Dictionary* the word "annexation" is thus defined: The act of attaching, adding, joining, or uniting one thing to another, generally spoken of the connection of a smaller or subordinate thing to the larger or principal thing. *Maumee School Tp. v. School Town of Shirley City*, 65 N. E. 285, 286, 159 Ind. 423.

In Act March 17, 1842, by which a portion of one town was set off therefrom and "annexed" to and made a part of another town, and repealing the act of incorporation of the first town annexed, means to unite one thing to another. There is no reference made to any effect which would thereby be produced upon that with which the thing united might have been before connected, but the word "annexation" is used in the legal sense and in decided cases to designate the act of separating a part of a town from it and uniting it with another town, and has always been used where the town from which the part annexed was taken was left as an existing corporation, and where there was no corporation left from which a part of a town was taken and united to another it was not "annexed" in the sense in which the term has been used, so as to give the same effect as the incorporation of a new town upon the

settlement of paupers who previously had a settlement in the town or person of a town united to another. *Inhabitants of Livermore v. Inhabitants of Phillips*, 35 Me. 184, 187.

Where an agreement referred to a clause in a prior agreement, and provided that it should extend to the new agreement, it was not annexed to the new agreement, so as to make an additional stamp necessary as based on the number of words in both agreements. *Atwood v. Small*, 7 Barn. & C. 390, 391.

### Attached.

The word "annexed" has been legally construed to mean physically joined. *Hamilton County Com'rs v. Mannix*, 9 Ohio Dec. 189, 191.

In Rev. St. c. 120, § 136, providing that the tax collector's warrant shall be "annexed" to his collection book, "annexed" means attached or fastened to the book in any manner whatsoever; it might be annexed by muilage or fastened by eyelets; tied or fastened by a cord or by a wire. *Loehr v. People*, 24 N. E. 68, 70, 132 Ill. 504.

Code, § 3971, requires that on foreclosure of a chattel mortgage an affidavit to foreclose shall be "annexed" to the mortgage, and be returned therewith to the clerk's office. Held, that the requirement that the affidavit should be annexed was prima facie complied with by statement that the affidavit and mortgage were "attached" together, the term "attached" being practically synonymous with the term "annexed." *Bosworth v. Matthews*, 74 Ga. 822.

By the expression "annexed to the freehold," used in defining a fixture, is meant fastened to or connected with it. Mere juxtaposition or the laying of an object, however heavy, on the freehold, does not amount to annexation. *Merritt v. Judd*, 14 Cal. 59, 64.

The writing and signing a process on a separate paper from that on which the original petition is extended, and then placing the paper containing the process loosely within the folds of the petition, is not a compliance with that provision of the judiciary act of 1799 which requires the process to be "annexed" to the petition. The process must be extended on the same paper, or, if on a different paper, must be firmly united by wax or tape. *Ballard v. Bancroft*, 31 Ga. 503, 506.

### Inclosure in same wrapper.

"Annexed," as used in Gen. St. c. 131, § 26, requiring a magistrate's certificate to be annexed to the deposition, does not necessarily mean literally annexed in case of ponderous exhibits, but it is sufficient if they are sealed up by the magistrate and transmitted to the clerk in the same wrapper with his certificate. *Shaw v. McGregory*, 105 Mass. 96, 100.

"Annexed," as used in Rev. St. c. 70, § 62, relating to composition with creditors, and providing that the debtor shall present an affidavit containing a schedule of his accounts and liabilities "thereunto annexed," does not necessarily mean in contact with, but one paper may be regarded as annexed to another if inclosed in the same envelope, or if placed on file together." *Cabbosee Nat. Bank v. Rich*, 16 Atl. 506, 509, 81 Me. 164.

#### Indorsement on back of paper.

In the statute requiring an affidavit for the foreclosure of a chattel mortgage to be annexed to the mortgage, and the two filed for record, "annexed" is used in the sense of "attach," and hence where the affidavit was written on the back of the mortgage it was annexed thereto, within the meaning of the statute. *Lilly v. Willis*, 73 Ga. 139.

Where a statute provides that before the sale of land under an execution appraisers shall be appointed and sworn, and a certificate of their oath shall be made on the back of the execution, the term "on the back" is not the same as "annexed," and a certificate written upon a separate piece of paper, and merely attached to the execution at a corner, though annexed, would not be on the back of the execution. *Hall v. Staples*, 74 Me. 178, 180.

### ANNO DOMINI.

The words "Anno Domini," in the caption of an indictment, are not objectionable as not a part of the "English language." These words have become literally English by adoption. The same is true of a very considerable number of terms in the language. Most of these adopted terms have changed their costume, while others have not. "Phenomenon" and "memorandum" are as strictly English as any terms of the most purely Saxon derivation. Others are not the less so because they still retain their foreign dress. *State v. Gilbert*, 13 Vt. 647, 651.

A declaration containing the words "Anno Domini" is not demurrable on the ground that they are not in the English language, as they may be rejected as surplusage. *Hale v. Vesper* (N. H.) *Smith*, 283, 286.

The latin words "Anno Domini" mean, when translated, "in the year of our Lord." It is not necessary to add them, or their abbreviation "A. D." to the date specified in an indictment charging the commission of an offense on such day. *Commonwealth v. Traylor*, 20 Ky. Law Rep. 97, 98, 45 S. W. 356.

### ANNOUNCE.

Rev. St. 1876, p. 184, § 363, permits plaintiff to dismiss his action before the jury re-

tires, or, when the trial is by the court, at any time before the findings of the court are announced. Held, that the term "announced," as defined by Worcester, means (a) to give public notice of; to publish; (b) to pronounce: to declare by judicial sentence; and hence it was not necessary, in order that the finding of the court trying the case should be "announced" within the act, that the finding should be orally stated by the judge from the bench, but that an entry of the finding in the proper order-book, by direction of the court finding in favor of one defendant generally, and for the plaintiff against the other defendants in the sum of ——— dollars, was an announcement, within the statute. *Walker v. Heller*, 56 Ind. 298, 300.

### ANNOUNCEMENT.

An "announcement" is the act of announcing or giving public notice; proclamation; publication; hence where a petition in an election contest alleged that the clerks and judges canvassed the votes, and by their canvass, announcement, and return declared a person elected, and such allegation was admitted by the answer, it was error to find that no proclamation had been made as required by law. *Dooley v. Van Hohenstein*, 49 N. E. 193, 195, 170 Ill. 630.

### ANNOYANCE.

Blackstone defines a nuisance as being anything to the hurt or annoyance of another. By hurt or "annoyance" here is meant, not a physical injury necessarily, but an injury to the owner or possessor of premises as respects his dealings with or his mode of enjoying them. *Rowland v. Miller*, 15 N. Y. Supp. 701, 702.

### ANNUAL.

Annual, from the Latin "annus," usually means annually, or every twelve months. Whenever used in contracts, it is construed to mean every twelve calendar months. *State v. McCullough*, 3 Nev. 202, 224.

### ANNUAL CROP.

The term "annual crops," in 2 Rev. St. 1876, p. 505, § 34, which requires administrators to take possession of and to inventory the emblements and "annual crops," whether severed or not from the land, raised by labor, etc., does not include uncut grass growing in a field, but such grass descends with the land to the heir. The distinction between annual crops, merely vegetable productions of the soil, raised by labor bestowed during the year, and trees, fruits, and grass, which are to a greater or less extent of spontaneous growth, may be said to be well recognized

and firmly established by the authorities. *Evans v. Hardy*, 76 Ind. 527, 531.

### ANNUAL ELECTION.

"Annual," as used in Const. art. 10, § 5, providing that in case of elective offices no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the next political year next succeeding the first "annual" election after the happening of the vacancy, is not synonymous with "municipal," as used in Buffalo City charter (Laws 1891, c. 106, § 271, as amended by Laws 1895, c. 805), providing that a vacancy in the office of an elected commissioner of public works shall be filled by appointment by the mayor, and the term of the appointee shall last until the first day of January after the next "municipal" election. *People v. Scheu*, 60 N. E. 650, 653, 166 N. Y. 292.

"Annual election," as used in Const. art. 10, § 5, providing that no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first "annual election" after the happening of the vacancy, "is to be understood in a general sense, so as to embrace town meetings as well as state elections." *People v. Keeler*, 17 N. Y. 370, 375.

The words "annual election," as used in Oklahoma St. § 541, providing that the officers elected at the first election in any city of the first class shall hold only until the next annual election, mean yearly election. *Wright v. Jacobs*, 70 Pac. 193, 196, 12 Okl. 138.

### ANNUAL EXPENSE.

Pamph. Laws 1886, p. 389, gives to the common council of any city power to order any public street to be lighted, and to make and enter into contracts therefor with any other parties, "and to cause the annual expense thereof to be certified." Held, that the phrase, "and to cause the annual expense thereof to be certified," should be construed to limit such contracts to the period of one year, and therefore the council had no power to contract for such lighting for a longer period of time. *Taylor v. Lambertville*, 10 Atl. 809, 814, 43 N. J. Eq. (16 Stew.) 107.

### ANNUAL FRUIT.

A lease reserving under the lessor all timber trees, and other trees, but not the "annual fruit thereof," may apply either to the produce of an orchard or to that of timber trees, and the words may therefore be satisfied without holding them to apply to the produce of orchard trees. *Bullen v. Denning*, 5 Barn. & C. 842, 847.

### ANNUAL INCOME.

Under the charter of a corporation which restricts it from holding property exceeding a specified "annual income," such term is not synonymous with "actual value." Property may have actual value without any income. Gradual depreciation in the value of lands of a corporation is not annual income. *Betts v. Betts*, 4 Abb. N. O. 317, 400.

"Annual income," as used in Act Dec. 31, 1838, § 13, providing that the railroad thereby incorporated and its property should not be subject to a higher tax than one-half of 1 per centum on its annual income, means gross income. *People v. Niagara County Sup'rs*, 4 Hill, 23; *Niagara County Sup'rs v. People*, 7 Hill, 504. The gross income is what passage money and freights the road makes each year, and not the annual rental derived from its lease to another company. *Goldsmith v. Augusta & S. R. Co.*, 62 Ga. 468, 471.

"Annual value or income," as used in Act April 24, 1846, authorizing trusts for the benefit of the owners and occupants of mill privileges on the Wyanntskill, and authorizing the formation of an association for holding these trusts, and providing that the annual value or income of the property to be held in trust is not to exceed the sum of \$2,000, refers to the association formed under the act above referred to, and not to its members individually. It does not mean the benefits which each member of the association derives from his mill privilege or business, but means the collective value or income received by the association as such under the statute. *Troy Iron & Nail Factory v. Winslow*, 45 Barb. 231, 247.

### ANNUAL INTEREST.

A note provided that the maker would pay the sum stated therein in ten years from date, "with annual interest," and it was contended that the word "annual," used as an adjective, was intended to and did modify interest, and meant only the computation of the interest by annual rests, but that the whole amount, principal and interest, did not become due until the expiration of ten years from date; but it was held that the contract would not be so construed, but that "annual interest," in legal contemplation, was the same as if written "interest annually," and that the interest on the note was therefore due and payable at the expiration of each year. *Catlin v. Lyman*, 16 Vt. 44, 46.

Annual interest, within the meaning of a guaranty by a surety of "annual interest," indorsed on an instrument, in which the maker obligates himself to insure 10 per cent. profit upon the amount of capital invested by another person in the certain business, evidently means the present profit which the

other side of the paper calls for, and is not an obligation to pay 10 per cent. annually on the capital, irrespective of the conditions which its terms import; and thus, the business being a partnership business, the liability of the guarantor is contingent and conditional upon the profits accruing falling below 10 per cent. upon the amount invested by *B. McPike v. Kerr's Ex'r*, 29 Mo. 79, 83.

### ANNUAL MEETING.

The words "annual meeting," applied to towns, mean the annual meeting required by law for choice of town officers. *Rev. St. Me. 1883*, p. 59, c. 1, § 6, subd. 4.

The words "annual meeting," as used in a statute, when applied to townships shall be construed to mean the annual meeting required by law to be held in the month of April. *Comp. Laws Mich. 1897*, § 50, subd. 4.

The words "annual meeting," when applied to towns, shall mean annual meetings required by law to be held in the month of February, March, or April. *Rev. Laws Mass. 1902*, p. 88, c. 8, § 5, subd. 1.

The words "annual meeting," when applied to towns, shall mean the annual town meeting in March or the adjournment thereof. *V. S. 1894*, 4.

Laws 1867, c. 75, § 1, which provides that at the "annual meeting in November" in every year thereafter the county board of supervisors for the several counties shall fix and determine the annual salary that shall be received by each and every county officer, etc., means merely the meeting which commences in November; therefore the board of supervisors may fix the salary of a county officer at an adjourned session of such meeting, though such adjourned session is not held until the following March. *Hull v. Winnebago County*, 11 N. W. 486, 487, 54 Wis. 291.

### ANNUAL OFFICE.

An annual office is one which runs for a year, and thus where by a statute commissioners were required to meet yearly, and appoint assessors for a year, the assessors were annual officers, and their bondsmen were only liable, under their statutory bonds, for their acts during the term of their office. *Pepin v. Cooper*, 2 Barn. & Ald. 431, 439.

Under the statutes of various states, public officers are elected pursuant to statutory provisions which fix their term of office, but in many cases they are elected annually. That is the case in all New England states. In New England towns there is an annual meeting, where the citizens assemble and elect their town officers in a government of pure democracy. They are elected annually at these meetings. A great many years ago

in Massachusetts a question arose whether under such a provision the sureties of an officer elected for a year, and where his default occurred after the year, but before his successor had qualified, were liable for such default, in *Chelmsford County v. Demarest*, 73 Mass. (7 Gray) 1, when Chief Justice Shaw was on the bench, and a thorough examination of it was made. The court held that the office was annual, so that, where the condition of the bond was that the officer should hold until his successor was elected, such condition did not cease to make it an annual office, so far, at all events, as the sureties were concerned. Such view of the question has been adopted in most of the states, although North Carolina, Indiana, perhaps Maryland, and possibly Mississippi, have decided the other way. *Harris v. Babbitt* (U. S.) 11 Fed. Cas. 612, 614.

### ANNUAL PROFITS.

Other annual profits. see "Other."

Laws 1853, c. 654, providing that any incorporated company named in an assessment roll, upon proof made to the board of supervisors that it had not been, during the preceding year, in receipt of net "annual" profits or clear income equal to 5 per cent. on the capital stock, should be entitled to a commutation on taxes, contemplated that the corporation would have been in business during the whole year, as it is in such cases that "annual" profits or income can accrue. *Park Bank v. Wood*, 24 N. Y. 93, 96.

### ANNUAL SALARY.

1 Acts 1865, p. 124, increasing the "annual salary" of the attorney general, should not be construed to operate retrospectively, so as to make the increased salary commence at the beginning of the quarter, the word "annual" having reference only to the rate at which the salary was to be computed and paid, and not to the time when such rates should be commenced. *State v. Thompson*, 36 Mo. 66, 69.

"Annual salary," as used in *Ky. St. § 1072*, providing that the county judge shall receive an "annual salary," necessarily means a continuing rate of payment—something that will apply for each succeeding year—and is not the fixing of a compensation for a specific time. *Marion County Fiscal Court v. Kelly*, 56 S. W. 815, 816, 22 Ky. Law Rep. 174.

### ANNUAL TAXES.

A direction in a will to pay annual taxes is not a direction to pay special assessments. A special assessment, imposed for a special purpose, has none of the distinctive features of the ordinary annual taxes which are pro-

posed for some general or public object. *Warren v. Warren*, 36 N. E. 611, 614, 148 Ill. 341 (citing Illinois Cent. R. Co. v. City of Decatur, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613; *Id.*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. Ed. 182).

### ANNUAL TOWN MEETING.

"Annual town meeting," as used in Const. 1846, art. 6, § 18, providing that the electors of the several towns at their annual town meeting shall elect justices of the peace, means the annual meeting of the electors, as distinguished from all other public assemblages and elections; and the words "annual town meeting" are the antithesis of those indicating a general or special election, and must have been used with reference to their well-understood character; and it is reasonable to suppose that the intention of the formulators of the Constitution was to provide for the selection of these officers at a time and place when the attention of the electors should not be disturbed or affected by the consideration of subjects of state or national importance. The distinction of the annual town meeting as a time when justices were to be chosen was equivalent to an express prohibition against choosing them at a general or special election or at a special town meeting. *People v. Schiellein*, 95 N. Y. 124, 128.

### ANNUAL VALUE.

See "Annual Income"; "Clear Annual or Yearly Value."

### ANNUALLY.

See also, "Yearly."

In a promissory note by which the maker agreed to pay a certain sum three years from date, "with interest annually" at 10 per cent., such words are not used merely for the purpose of determining the rate of interest, but for the purpose of fixing the time when the interest should be payable, meaning that the interest should be payable annually. *Walker v. Kimball*, 22 Ill. (12 Peck) 537, 538; *Winchell v. Coney*, 5 Atl. 354, 355, 54 Conn. 24; *Patterson v. McNeeley*, 18 Ohio St. 348, 352.

"Annually," as used in a note, whereby the maker bound himself to pay a certain sum in a year, with interest from date, payable annually, makes the payee entitled to interest upon interest, as well upon that which accrued annually after the expiration of the first year as upon that which then fell due. *O'Neill v. Bookman*, 9 Rich. Law, 80, 82.

A contract to pay interest "annually" is the same thing as if the party at the end of each year promised as much money as would

be equal to the interest which might then be due. In such a contract there can be no doubt interest must be computed on the sums thus annually set down as due. *Wright v. Eaves*, 10 Rich. Eq. 582, 594.

"The ordinary and natural meaning of a direction by one person to pay to another a specified sum 'annually,' or each year, is that the specified sum is to be paid in an annual or yearly payment. The word or phrase, naturally interpreted, would be regarded as fixing both the measure and time of payment." *Kearney v. Cruikshank*, 22 N. E. 580, 582, 117 N. Y. 95; *Henry v. Henderson*, 33 South. 960, 964, 81 Miss. 743, 63 L. R. A. 616.

Laws 1901, p. 316, c. 132, § 187a, enacts that every trust company shall pay "annually," for the privilege of exercising its corporate franchise, a certain annual tax. Held, that the word "annually" did not show that the Legislature did not intend that a trust company should pay for any period of existence less than a year, and hence a trust company was liable for the tax, though it had only been in business six days when the tax was assessed. *People v. Miller*, 83 N. Y. Supp. 185, 187, 85 App. Div. 211.

#### As fixing time of year.

"Annually," as used in an insurance policy providing that the premium shall be paid "annually," signifies once in a year, but does not signify at what time in the year, and it is by no means inconsistent with a stipulation in the same instrument which fixes that time. *McMaster v. New York Life Ins. Co.* (U. S.) 99 Fed. 856, 858, 869, 40 C. C. A. 119.

Under statutes requiring the directors of certain corporations to "annually" make and file a certificate of its condition on the first day of the month then next pending, and in case of failure making them liable personally for all debts contracted by the corporation while such default continued, the first such certificate could be filed during any month of the year, and a similar certificate at any time during the corresponding month of the next ensuing year. *Bond v. Clark*, 88 Mass. (8 Allen) 361.

#### As per annum or yearly.

The word "annually" means yearly or once in each year. *Continental Nat. Bank v. Buford* (U. S.) 107 Fed. 188, 189.

"Annually," as used in the limited partnership act (1 Rev. St. p. 763, § 15), authorizing a special partner to draw interest on his capital stock "annually," means the same as "per annum" or by the year, and it was not a violation of the statute to permit a special partner to draw his interest monthly, since the statute does not prohibit the payment of proportionate parts of the annual interest at stated periods of less than a year.



*Metropolitan Nat. Bank v. Sirret*, 97 N. Y. 320, 331.

Laws 1870, c. 519, § 2, declared that the board of health of the city of Buffalo should "annually" appoint a health physician, and prescribe his duties. Held, that a resolution making such appointment, duly adopted, was an appointment of the officer for a year, which deprived the board of power to rescind the same at a subsequent meeting, the word "annually" as there used importing that the physician was to hold the office for the term of one year from his appointment. *City of Buffalo v. Mackay*, 15 Hun, 204, 208.

#### As year by year.

The use of the word "annually" in the articles of incorporation of a church, providing that the members of the church who shall contribute as much as 10 shillings "annually" towards its support shall meet to elect trustees, was intended to fence out intruders, and to guard against those abuses to which all religious corporations are exposed in time of excitement. Hence the requirement not merely of money, but the payment of money "annually," which would exclude individuals who offered to vote in virtue of payment made less than a year before the election, and the word as used means year by year, a series of payments, and not one single payment at the time of the election. *Juker v. Commonwealth*, 20 Pa. (8 Harris) 484, 494.

In Act May 22, 1867, § 13, providing that every company incorporated under such act should "annually," within 20 days from the 1st day of January, make and publish a report, "annually" means every year, and that whenever a January comes after the company has been incorporated it must make and publish the report in question. *Union Iron Co. v. Pierce* (U. S.) 24 Fed. Cas. 583, 584.

The word "annually," as used in the city charter of San Francisco, providing that the first general election for city officers shall be held in April, 1851, and thereafter "annually," at the general election for state officers, does not mean a measure of time, but a succession of calendar years, and, as the general elections are held in September, the first officers elected in April only hold to such time, as the word "annually" has no relation to the first election held in April, so as to make it one of the annual elections contemplated. *People v. Brenham*, 3 Cal. 477, 488.

"Annual," from the Latin "annus," usually means annually, or every 12 months. Whenever used in contracts it is construed to mean every 12 calendar months. Annual interest is interest payable every 12 months. Annual rent is considered in the same manner, but the term "annually elected," as used in the incorporation law of California, would not perhaps admit of this strict construction. In requiring an annual election of trustees the evident purpose of the Legislature was to

limit the term of office to 12 months, or as near to that period as is practicable, and that the uniform rule should be adopted so that trustees should hold office for one year, and that the election for such trustees should take place substantially every 12 months. *Curtis v. McCullough*, 8 Nev. 202, 224.

"Annually," as used in a note payable one day after date, with interest at 12 per cent. per annum, interest to be paid "annually," amounts to a stipulation for payment of such interest after maturity. *Sharpe v. Lee*, 14 S. C. 341, 343.

"Annually," as used in a promissory note in which the maker promises to pay a sum of money in, at, or within 12 months after its date, with interest payable "annually," means that the interest is to be paid annually until the note is fully paid; but where the promise is to pay more than 12 months after date, with interest from date payable "annually," the interest does not continue to be payable after maturity. *Westfield v. Westfield*, 19 S. C. 85, 89.

#### ANNUITY.

See "Clear Annuity"; "Voluntary Annuity."

An annuity is a yearly payment of a certain sum of money, granted to another in fee, or for life, or for a term of years. *Bartlett v. Slater*, 22 Atl. 678, 679, 53 Conn. 102, 55 Am. Rep. 73; *Kearney v. Cruikshank*, 22 N. E. 580, 582, 117 N. Y. 95; *Pearson v. Chase*, 10 R. I. 455, 456; *Henry v. Henderson* (Miss.) 33 South. 960, 964, 63 L. R. A. 616; *Goodyear Shoe Machinery Co. v. Dancel* (U. S.) 119 Fed. 692, 693, 56 C. C. A. 300. Charging the person of the grantor only. *Bartlett v. Slater*, 22 Atl. 678, 679, 53 Conn. 102, 55 Am. Rep. 73; *Horton v. Cook* (Pa.) 10 Watts, 124, 127, 36 Am. Dec. 151; *Wagstaff v. Lowerre*, 23 Barb. 209, 216; *Turrentine v. Perkins*, 46 Ala. 631, 633; *Nehls v. Sauer*, 93 N. W. 346, 119 Iowa, 440.

A charge upon land devised cannot properly be considered as an "annuity," because by an annuity the person alone is charged. No land is incumbered with it. *In re Owings* (Md.) 1 Bland, 290, 296.

An annuity is a grant of a certain sum of money, to be paid by the representatives of the grantor at the expiration of fixed, consecutive periods for life of the grantee. *In re Williams*, 12 N. Y. Leg. Obs. 179, 182.

An annuity "is a sum one is entitled to per year during his whole life." *Atlanta & W. P. R. R. v. Johnson*, 66 Ga. 259, 262.

An annuity "is an annual payment for the support of the recipient," and terminates with his life. *Wagstaff v. Lawerre*, 23 Barb. 209, 216.

The contract of annuity is that by which one party delivers to another a sum of money, and agrees not to reclaim it so long as the receiver pays the rent agreed upon. Civ. Code La. 1900, art. 2793.

An annuity arises upon the ground of a yearly sum, with the payment of which the grantor has charged himself, and which would have been liable at the common law to a writ of annuity. *Pennington v. Metropolitan Museum of Art* (N. J.) 55 Atl. 468, 471.

An annuity is a bequest of certain specified sums periodically; and, if the fund or property out of which they are paid fails, resort may be had to the general assets, as in the case of a general legacy. Civ. Code Mont. 1895, § 1820, subd. 3; Civ. Code Cal. 1903, § 1357, subd. 3; Civ. Code S. D. 1903, § 1071.

It seems to be well settled in the American courts that, as a general rule, a bequest of the interest of a particular sum will not be construed the same as giving an annuity of the same amount, although payable annually; but it will be regarded simply as a gift of the income or interest of that amount. *Whitson v. Whitson*, 53 N. Y. 479, 482 (citing *Redf. Wills*, pt. 2, p. 453).

Annuities given by wills ordinarily commence from the death of the testator. *Wethered v. Safe Deposit & Trust Co.*, 28 Atl. 812, 813, 79 Md. 153; *Welsh v. Brown*, 43 N. J. Law (14 Vroom) 87, 42; *In re Stanfield*, 31 N. E. 1013, 1015, 135 N. Y. 292.

#### **Income or profits distinguished.**

"There is a distinction between income and annuity. The former embraces only the net profits, after deducting all necessary expenses and charges. The latter is a fixed amount, directed to be paid absolutely and without contingency." *Carr v. Bennett* (N. Y.) 3 Dem. Sur. 433, 442; *Ex parte McComb* (N. Y.) 4 Bradf. Sur. 151, 152. Hence, where a testator by will gave his wife an "annuity" of a certain amount per annum, directing his executors to retain in their hands and keep invested a sum sufficient to pay the "annuity," the "annuity" is not liable for the annual taxes on the property. *Ex parte McComb* (N. Y.) 4 Bradf. Sur. 151, 152.

The income or interest of a certain fund is not an annuity, but simply profits to be earned, and, although directed to be paid annually, that relates only to the mode of payment, and does not change the character of the bequest. *Bartlett v. Slater*, 22 Atl. 678, 679, 53 Conn. 102, 55 Am. Rep. 73.

An annuity is a stated sum per annum, payable annually, unless otherwise directed. It is not income or profits, nor indeterminate in amount, varying according to the income or profits, though a certain sum may be provided out of which it is to be payable; and

hence, where testator gave a beneficiary the interest upon a certain sum, payable annually, it is not an annuity, but merely an ordinary legacy, for it is not a stated sum, but may be more or less, according to the earnings of the capital, and is merely interest or income. *Booth v. Ammerman* (N. Y.) 4 Bradf. Sur. 129, 133.

An annuity usually consists of a gross sum payable in any event, and in principle there is no difference between the gift of an annuity and the gift of income with respect to the time when each begins to accrue. An annuity is payable from the death of the testator, unless a different time is prescribed in the will. *In re Stanfield*, 31 N. E. 1013, 1015, 135 N. Y. 292.

#### **Legacy distinguished.**

The terms "legacy" and "annuity" are often used interchangeably. Thus a devise of real estate to a city, on condition that the city pay to the devisor's widow annually \$3,000, creates a legacy, an annuity, in her favor. *Budd v. Budd* (U. S.) 59 Fed. 735, 740.

Lord Eldon, in *Gibson v. Bott*, 7 Ves. 96, drew the distinction between an annuity and a legacy for life, which has been cited in every thoroughly considered case since: If an annuity is given, the first payment is payable at the end of the year from the death; but if a legacy for life is given, with the remainder over, no interest is due until the end of two years. It is only the interest of the legacy, and until the legacy is payable there is no fund to produce interest. *Bartlett v. Slater*, 22 Atl. 678, 679, 53 Conn. 102, 55 Am. Rep. 73.

#### **Rent charge distinguished.**

An annuity is a yearly sum of money, granted by one person to another for life or years, and which charges only the person of the grantor, while a rent charge, frequently confounded with an annuity, is a burden imposed on and issuing out of land. *Wagstaff v. Lowerre*, 23 Barb. 209, 216.

A devise reading: "I give and bequeath to my daughter the sum of \$60.00 as an annuity, to be paid to her out of the profits of my real estate annually," constituted an "annuity," and not a rent charge. *Robinson v. Townshend* (Md.) 3 Gill & J. 413, 424.

A covenant in a deed to pay the grantor a certain sum in each and every year during the lifetime of the grantor, such payment to be made a lien on the land, was a covenant to pay an annuity, and not rent. *Nehls v. Sauer*, 93 N. W. 346, 119 Iowa, 440.

## **ANNUL.**

To "annul" means to abrogate, to make void; and a bequest is not annulled by a codicil because the time for the payment of

the bequest is extended. In re Morrow's Estate, 54 Atl. 342, 343, 204 Pa. 484.

To annul is to make void. Webster's Dict. To dissolve constitutes an annulment, and a dissolution of a marriage by a divorce a vinculo matrimonii, is therefore an annulment, and defeats the dower rights of the widow. Wait v. Wait, 4 Barb. 192, 205.

To annul is to render void, or declare invalid, nullify, or abolish. Standard Dict. The annulment of a special assessment, spoken of in Laws 1896, c. 910, providing that, whenever an assessment for a local improvement has been "annulled" by a judgment of any court, the amount paid on such assessment may be recovered, refers to the annulment of the assessment against the particular property affected thereby, and such annulment does not operate as an annulment of the entire assessment on all property affected thereby. Wallace v. City of New York, 65 N. Y. Supp. 855, 859, 53 App. Div. 187.

The word "annul," in a statute giving the right to annul a sale of a lot in the St. Louis commons, is not a technical word, and there is nothing which prevents the idea conveyed by it from being expressed in equivalent words. The annulling of a lease is nothing more in effect than causing a forfeiture of it, and therefore the annulment of a sale, within the meaning of the statute, is accomplished by declaring the lot forfeited to the city. Woodson v. Skinner, 22 Mo. 13, 24.

A testator, who bequeathed a certain sum to an orphanage, afterwards executed a codicil which recited: "I hereby annul and revoke such bequest, and instead thereof I give the same to a trustee, to be invested during the life of [a person] for his benefit, and upon his death to be paid to the orphanage for the purpose expressed in the will." In construing the codicil, it was held that the words "annul and revoke," taken in connection with expressed purposes of the codicil, did not constitute a revocation of the will. "The fact that the testator called it by that name does not make it so." "Revoke" means to recall, to take back, to appeal. "Annul" means to abrogate, to make void. The codicil did not recall or make void the bequest in any part, except as to the time of payment, and this it changed. In re Watts' Estate, 32 Atl. 42-44, 168 Pa. 422.

A warrant of attachment against property is said to be "annulled" when the action in which it was granted abates or is discontinued, or a final judgment rendered therein in favor of the plaintiff is fully paid, or a final judgment is rendered therein in favor of the defendant; but in the case last specified a stay of proceedings suspends the effect of the annulment, and the reversal or vacating of the judgment revives the warrant. Code Civ. Proc. N. Y. 1899, § 3343, subd. 12.

## ANOMALOUS INDORSER.

A person not a party to a negotiable promissory note, who places his name on the back thereof, after its execution and delivery, before maturity, and before it has been indorsed by the payee, is an irregular, or, as it has been sometimes styled, an "anomalous indorser," and is, as to bona fide holders, an indorser of the paper. Buck v. Hutchins, 47 N. W. 808, 809, 45 Minn. 270, 271.

## ANOMALOUS PLEA.

An anomalous plea is one which is partly affirmative and partly negative, and must always be supported by an answer in subsidium as to the allegations which constitute the replication and as to all charges of evidence, if any, in support of such allegation. Baldwin v. City of Elizabeth, 6 Atl. 275, 280, 42 N. J. Eq. (15 Stew.) 11.

An "anomalous plea" is a plea which is neither strictly affirmative or negative may be filed by a complainant, who, after stating his case, proceeds to set out some fact which exists, or which the defendant pretends exists, which fact, if standing alone, would defeat his suit, and then goes on to state circumstances to show that the existence of such fact cannot be used against him. Thus, where the bill states that there had been an account stated between the parties, or an award of arbitrators, or a former judgment or decree, either of which would bar the suit, and then proceeds to attack the account stated or award or judgment or decree by setting up circumstances to invalidate them, such a plea is permissible. Potts v. Potts (N. J.) 42 Atl. 1055, 1056.

## ANOTHER.

In Comp. St. c. 68, § 2, providing that the printing of all bills for the Legislature shall be let in one contract, the printing and binding of the Senate and House Journals shall be let in another contract, the word "another" signifies one more, and precludes the idea that such contracts can be divided into several contracts. State v. Cornell, 71 N. W. 961, 965, 52 Neb. 25.

In Code 1891, c. 157, § 10, providing that, "when one grand jury has been discharged, another may by order of the court be summoned to attend the same term," "another" does not mean that only one other may be summoned, but only declares the common-law power to have further grand juries. Eastham v. Holt, 27 S. E. 883, 884, 43 W. Va. 599.

The word "another," in How's Ann. St. § 9121, providing that any person who shall assault "another," with intent to do great bodily harm, less than the crime of murder, shall be punished, etc., is not to be construed

to mean one, and no more, and therefore such an assault may be made on two or more persons jointly. *People v. Ellsworth*, 51 N. W. 531, 532, 90 Mich. 442.

In a statute providing for the punishment of any person who shall forge or counterfeit any writing whatever to obtain the possession or to deprive another of any money or property, or cause him to be injured in his estate or lawful rights, "another" will be construed to include the state; and hence the forgery of a witness' certificate payable by the state is within the statute. *Moore v. Commonwealth*, 18 S. W. 833, 92 Ky. 630.

In Rev. St. 1881, § 2204, as amended by Acts 1883, providing penalties for whoever, with intent to defraud another, designedly, by color of any false writing or pretense, obtains from any person any money or thing of value, "another" refers to a person or persons, and should be construed to include a city as an artificial person. *State v. Bruner*, 35 N. E. 22, 24, 135 Ind. 419.

The term "personal goods of another," in 1 Stat. 116, a criminal statute in reference to larceny of the "personal goods of another," applies to the personal goods of the United States. *United States v. Maxon* (U. S.) 26 Fed. Cas. 1220.

"Another," as used in Rev. St. art. 2399, subd. 2, allowing the actual damages for the death of any person through the wrongful act, neglect or default of another, construed to mean an individual, and not an artificial person, as a corporation. "Person" and "another," as used in the statute, are employed in their popular sense, and mean an individual, and not an artificial person. *Ritz v. City of Austin*, 20 S. W. 1029, 1031, 1 Tex. Civ. App. 455.

The word "another," when used in a statute, may extend and be applied to communities, companies, corporations, public or private, societies, and associations. *Gen. St. Conn. 1902, § 1*.

The word "another," when used to designate the owner of any property subject to any offense, includes not only natural persons, but every other owner of property. *Bates' Ann. St. Ohio 1904, § 6794*. As used in that part of the statutes relating to crimes and criminal procedure, the words "person" and "another," when used to designate the owner of any property, the subject of any offense, include not only natural persons, but every other owner of property. *Rev. St. Wyo. 1899, § 5190*.

The word "another," as used in the provisions of the Code defining and punishing forgery, includes the United States, and the several states and territories, and all the several branches of government of either of them, all public and private bodies politic and corporate, all partnerships, as well as in-

dividuals. *Shannon's Code Tenn. 1896, §§ 6612, 6613*.

Within the meaning of the word "another," as used in the definition of forgery, are included this state, the United States, or either of the states or territories of the Union, and all the several branches of the government, or either of them, all public or private bodies, politic and corporate, all courts, all officers, public or private, in their official capacity, all partnerships in professions or trades, and all other persons, whether real or fictitious, except the person engaged in the forgery. *Pen. Code Tex. 1895, art. 535*.

#### As a different one.

*Gen. St. c. 128, § 8*, provides that, when a judgment for damages and costs is rendered against an executor or administrator, an execution for the debt or damage shall be ruled against the goods or estate of the deceased, and "another execution" for costs against the goods or body of the executor as if it was his own debt. It was held that "another" should be construed to mean a different and separate execution, in no manner affected by the execution rendered on the debt, and hence the fact that the execution on the debt was stayed, because of the estate's insolvency and of the appointment of commissioners to settle the same, did not require that the execution for costs against the administrator should likewise be stayed. *Greenwood v. McGilvray*, 120 Mass. 516, 521.

"Another," as used in statute of frauds, requiring an agreement to answer for the debt, default, or miscarriage of another to be in writing, must be understood as referring to persons other than the contracting parties. *Preble v. Baldwin*, 60 Mass. (8 Cush.) 549, 553.

The statute of frauds, requiring a contract to "answer for the debt, default, or miscarriage of another person to be in writing" does not include a promise made to a debtor to pay the debt due the creditor. *Flemm v. Whitmore*, 23 Mo. 430, 432.

"Money or property of another," within the meaning of *Gen. St. c. 95, § 23*, authorizing the punishment of any clerk, agent, servant, etc., for embezzling without the consent of his employer or master any money or property of another, means any money or property not belonging to the defendant. *State v. Kent*, 22 Minn. 41, 42, 21 Am. Rep. 764.

The word "another," as used in the Kentucky statute providing for the punishment of any person who shall forge or counterfeit any writing whatever, thereby fraudulently to obtain the possession of, or to deprive "another" of, any money or property, means a different person. *Moore v. Commonwealth*, 92 Ky. 630, 633, 18 S. W. 833, 13 Ky. Law Rep. 733.

**ANOTHER COUNTRY.**

The words "another country" signify any part of the world out of this state. *Sand. & H. Dig. Ark. 1893, § 7215.*

**ANOTHER OFFICER.**

Where a bond stipulated for the good conduct of an officer holding office for a fixed time, and until another officer be appointed, "another" was not used in the sense of another person, but meant another officer; and, where the original incumbent of the office was re-elected, he was another officer within the meaning of the bond. A man who is re-elected to his office may be usually said to have changed his official personality. Such a person, with respect to his position, is another officer, and in this sense a man may be said to be his own successor. *Citizens' Loan Ass'n v. Nugent, 40 N. J. Law (11 Vroom) 215, 217, 29 Am. Rep. 230.*

**ANOTHER PARTY.**

Devisees are proper parties to an action for an accounting by the executors against the surviving partner of the testator, and, though joined as defendants, their interests are adverse to those of the surviving partner, and they may ask for a discovery of his books, as being "another party to the action," within Code Civ. Proc. § 803. *Applebee v. Duke, 21 N. Y. Supp. 890, 892, 66 Hun, 634.*

**ANOTHER PERSON.**

A corporation is another person, distinct in law from a natural or artificial person who holds its stock. When, therefore, upon the faith of a stockholder's promise a corporation obtains property, the person who makes the promise is not the person who obtains the property; and, if the stockholder be a married woman, it is a promise on her part to pay the debt of "another person," and not to her own use or for her separate estate. *Allen v. Beebe, 43 Atl. 681, 63 N. J. Law, 377.*

Pub. St. c. 78, § 4, declares that false representations with reference to the credit and ability of another person in writing shall be actionable. Held, that the words "another person" included representations by the officers of a corporation with reference to its financial standing or means, made with reference to its credit and ability. *Hunnewell v. Duxbury, 81 N. E. 700, 702, 135 Mass. 1.*

"Another person," as used in the definition of a *fidel commissum* as a disposition *causa mortis* by which the heir or legatee is requested to give or return a certain thing to another person, means the person or institution so named or indicated as to individualize him or her of it, and a general bequest to a city, and to it alone, is held not to come within this definition. *Succession of Meun-*

*nier, 26 South. 776, 779, 52 La. Ann. 79, 48 L. R. A. 77.*

**ANOTHER STATE.**

A corporation chartered by congress is a corporation of "another state," within Act March 24, 1870, relating to the leasing by a railroad in the state of its road to a corporation in another state. *Smith v. Pacific R. R., 61 Mo. 17, 18.*

**ANSWER.**

See "Complete Answer"; "False Answer"; "Full Answer"; "Sham Answer"; "Supplemental Answer."

Irrelevant answer, see "Irrelevancy—Irrelevant."

The answer is the statement of the defense or any counter claim or claims. *Talbott v. Garretson, 49 Pac. 978, 979, 31 Or. 256.*

An answer is a counter statement of facts in the course of pleading; a confutation of what the other party has alleged. When an answer is spoken of in legal proceedings, it generally implies something that is written. *Larrabee v. Larrabee, 33 Me. 100, 102.*

The term "answer," in the law of pleading, includes both denials and defenses, and may consist of a denial or denials only, or of a defense only, or of both. *Schmidt v. McCaffrey, 70 N. Y. Supp. 1011, 34 Misc. Rep. 693 (citing Code Civ. Proc. § 500).*

An answer must contain, first, a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, and, second, a statement of any new matter constituting a defense, offset, or counterclaim. *Singer v. Effler, 39 N. Y. Supp. 720, 721, 16 Misc. Rep. 334.*

An answer, in pleading, is a statement of defense. It is not its office to demand affirmative relief, unless a counterclaim, nor can it be made to take the place of a motion to cite in new parties. *Russell v. Easterbrook, 40 Atl. 905, 906, 71 Conn. 50.*

The "answer," as the term is used in admiralty, is the pleading occupying a similar position in admiralty proceedings to that occupied by the plea in a proceeding at common law. *The Atlas, 93 U. S. 302, 316, 23 L. Ed. 863.*

**As affidavit.**

See "Affidavit."

**Appearance.**

As an appearance, see "Appearance."

The term "answer," as used in a statute requiring the defendant, in order to defeat

a judgment by default, to file his answer within the time required by law, means a written pleading of some character (that is, in courts where pleas are required to be reduced to writing); and the simple appearance of the defendant in court, without submitting himself to the jurisdiction of the court for the purposes of the trial of the case, would not be an answer. *State v. Patterson* (Tex.) 40 S. W. 224.

#### **Counterclaim or set-off distinguished.**

An answer is to be distinguished from a counterclaim or set-off by the fact that the purpose of an answer is to defeat the action and bar the recovery by the plaintiff on the cause of action set up by him, while a counterclaim or set-off, on the contrary, is a pleading by which the defendant states a cause of action in his own favor and against the plaintiff. It does not purport to answer the complaint, or to set forth any facts which bar a recovery upon it. It has none of the parts of an answer. It neither admits nor denies the allegations of the complaint. It does not confess and avoid them. Where a defendant succeeds upon an answer, the only judgment that the court can pronounce is that the plaintiff take nothing by his complaint; that the defendant go hence, therefore, without day, and recover his costs. The same pleading cannot be tried both as an answer and a counterclaim. If a defendant wishes to obtain affirmative relief against the plaintiff, he must state his cause of action by way of counterclaim or set-off. Hence it is held that where defendants filed a pleading alleging certain facts "for a third and further defense," and stating as a conclusion that because of such facts the plaintiffs were not entitled to recover, and asked judgment, the pleading was an answer, and not a set-off or counterclaim, and hence could not be made the foundation of a judgment for damage or other affirmative relief in favor of the defendants against the plaintiff. *Bird v. St. John's Episcopal Church*, 56 N. E. 129, 133, 154 Ind. 138.

#### **Defense synonymous.**

Rev. St. p. 352, § 9, having given a right to plead several pleas in an answer, the term "answer," as used in Code, § 247, refers to such entire answer as a distinct pleading, and not one or more parts of an answer, or one or more of several defenses, as constituting the answer. An answer is one thing, and well understood when referred to as such, and a single defense making a part of an answer is quite another thing; and the one is never confounded with the other, either in the statutes or in popular legal phraseology. *Stronge v. Sproul*, 53 N. Y. 497, 499.

An answer, strictly speaking, is a pleading by which the defendant in a suit at law endeavors to resist the plaintiff's demand by an allegation of facts, either denying the al-

legations of plaintiff's complaint, or confessing them and alleging new matter in avoidance, which defendant alleges should prevent a recovery on the facts alleged by plaintiff. The word, however, has been liberally used in the adjudications to include all manner of forms of pleadings by defendant, except demurrers and pleas in abatement, including pleas of set-off and counterclaim and cross-bills in equity, and may properly be defined as used to-day as a pleading by the defendant alleging facts barring plaintiff's right of recovery, and as synonymous with the word "defense." *Brower v. Nellis*, 33 N. E. 672, 673, 6 Ind. App. 323.

#### **Dilatory plea.**

A dilatory plea is not an answer, within the act of Congress providing that the petition for removal of a case must be filed at or before the time at which the defendant is required to plead or answer. *Mahoney v. New South Building & Loan Ass'n* (U. S.) 70 Fed. 513, 515.

All pleas or answers of a defendant, whether in matter of law by demurrer, or in matter of fact, either of dilatory plea to the jurisdiction of the court, or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said in the standard works on pleading to answer the declaration or complaint, which the defendant is summoned to meet. *Pennsylvania Co. v. Leeman*, 66 N. E. 48, 50, 160 Ind. 16 (citing *Martin v. Baltimore & O. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311).

#### **Demurrer or motion.**

A demurrer to a bill is an answer in law, though not in a technical sense and according to the common language of practice. *New Jersey v. New York*, 31 U. S. (6 Pet.) 323, 327, 8 L. Ed. 414.

A demurrer is not an answer in any legal sense. *Cashman v. Reynolds*, 9 N. Y. Supp. 614, 615, 56 Hun. 333.

Under Hill's Ann. Laws, § 536, providing that any party to the judgment, other than those given by confession or for want of an answer, may appeal therefrom, it was held that an appeal would lie from a judgment entered on demurrer. "A demurrer is an answer," said the court, "in so far as it questions the law of the case upon the facts stated. An answer charges the facts themselves; and within the purview of the statute the demurrer is as effective in giving the right of appeal as an answer." *Willis v. Marks*, 45 Pac. 293, 294, 29 Or. 493.

"Answer," as used in Rev. St. c. 138, § 1, declaring that the objection that an action was not commenced within the time limited can only be taken by answer, includes demurrers. "This provision came with the Code, in which the word 'answer' is frequently used in a general sense, so as to signify any

pleading by which an issue, whether of law or of fact, is made or tendered on the part of defendant." *Howell v. Howell*, 15 Wis. 55, 59.

A demurrer is an "answer," within the meaning of Practice Act, § 150, authorizing a clerk to enter default judgment in an action for money or damages arising on a contract, "if no answer has been filed" with him within the time specified in the summons. *Olyphant v. Whitney*, 34 Cal. 25, 27.

As used in Rev. St. § 2886, providing that the relief granted to plaintiff, if there be no "answer," cannot exceed that amended in the complaint, a demurrer will be held to constitute an answer. *Viles v. Green*, 64 N. W. 856, 857, 91 Wis. 217.

The word "answer," as used in an original notice stating that, unless the defendant appears and answers by a certain day, default will be entered, construed not to be limited to its technical meaning, but to include demurrers and motions, as well as answers. *Lyman v. Bechtel*, 7 N. W. 673, 674, 55 Iowa, 437.

As used in Gantt's Dig. § 4727, providing that, before judgment is rendered against a defendant constructively summoned who has not appeared, it shall be necessary that an attorney be appointed to defend for him, etc., and that the attorney so appointed may take any step in the progress of the action, except filing an "answer," without it having the effect of entering the appearance of such defendant, cannot be construed as equivalent to a "demurrer," for a demurrer is not an answer; and hence an attorney appointed under the statute may enter a demurrer to the complaint, which will not be appearance for the absent defendant, when filed by virtue of his appointment only. *Henry v. Blackburn*, 32 Ark. 445, 449.

In Code, § 275, providing that, if there be no answer, the relief granted the plaintiff cannot exceed that which he shall have demanded in his complaint, but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue, the term "answer" is used in its technical sense, and does not include a demurrer. Answers and demurrers are distinct pleadings under the Code, having different offices and different characteristics, one forming an issue at law and the other an issue of fact, and as generally used in statutes and law-books the term "answer" does not include or mean demurrer. *Kelly v. Downing*, 42 N. Y. 71, 77.

#### Reply.

The term "answer," within the provisions of Code Civ. Proc. § 542, providing that within 20 days after a pleading or the answer or demurrer thereto is served, or at any time

before the period for answering expires, the pleadings may be once amended as of course, relates to pleadings of fact exclusively. It includes a reply, as well as an answer. *Seaman v. McClosky*, 53 N. Y. Supp. 554, 23 Misc. Rep. 445.

#### ANSWERABLE.

A marine insurance policy, providing that, if the insured shall have made any other insurance on the premises prior in date to this policy, then the company shall be "answerable" only for so much as the amount of such prior insurance may be deficient toward fully covering the premises hereby insured, means that the insurer shall not assume the risk, except so far as it has not been assumed by the prior policy. *American Ins. Co. v. Griswold*, 14 Wend. 399, 500.

#### ANTECEDENT.

##### See "Last Antecedent."

In holding that the phrase, "such institution shall pay to the state an annual tax of one-half of 1 per cent. on each share of capital stock," in the charter of 1856 by the state of Tennessee to the Bank of Commerce, which provided that the bank should have a lien on the stock for debts due by stockholders, and that "such institution shall pay to the state an annual tax of one-half of 1 per cent. on each share of capital stock, which shall be in lieu of all other taxes," was the antecedent of the phrase, "in lieu of all other taxes," it was said that an "antecedent" may be a noun, a pronoun, a clause or a phrase. *Tennessee v. Bank of Commerce* (U. S.) 53 Fed. 735, 744 (citing *Maxw. Adv. Gram.* §§ 280, 570-572).

#### ANTECEDENT DEBT.

An "antecedent debt," within the rule that the right of the seller to rescind a sale for fraud is superior to the right of the mortgagee whose mortgage was taken to secure an antecedent debt, is a debt created before the date of the sale sought to be rescinded. A debt created after the sale on the faith of property in the possession of the vendee, though not secured by mortgage until some time after the debt was created, is not an antecedent debt within the meaning of the rule, provided, of course, the mortgage was executed before the seller exercised his right to rescind. *George D. Mashburn & Co. v. Dannenberg Co.*, 44 S. E. 97, 101, 117 Ga. 567.

#### ANTHRACITE MINE.

The term "anthracite mine," as used in the acts relating to mines and mining, includes any coal mine not now included in the bituminous boundaries. *P. & L. Dig. Laws Pa.* 1897, vol. 4, col. 1249, § 33.

## ANTHRAX.

Anthrax is a disease caused by the infection upon the body of putrid animal matter containing poisonous bacillus anthrax, so that death from such cause is death from disease, and not from accident, within the terms as used in an insurance policy. *Bacon v. United States Mut. Acc. Ass'n*, 25 N. E. 399, 123 N. Y. 304, 9 L. R. A. 617, 20 Am. St. Rep. 748.

## ANTI-MEANS DOCTRINE.

The "anti-means religious doctrine" is a belief and faith that conversions of sinners to Christianity and the salvation of human souls is not and cannot be brought about or aided by any human means or effort whatever, but that the same must be and is wholly and naturally the work of the Lord, as contradistinguished from the "means doctrine," which is a belief and faith in the exact opposite; that is, that such conversions and salvation may be aided by the use of human means. *Smith v. Pedigo*, 44 N. E. 363, 370, 145 Ind. 361, 19 L. R. A. 433, 32 L. R. A. 838.

## ANTICHRESIS.

Antichresis is a kind of mortgage, investing the mortgagee with a right of possession of the mortgaged property, and entitling him to receive the rents and income, which, after the payment of interest on the mortgage, taxes, etc., is to be applied to the liquidation of the debts secured by the antichresis. *Marquise De Portes v. Hurlbut*, 14 Atl. 891, 892, 44 N. J. Eq. (17 Stew.) 517.

Antichresis is a pledge of immovables; and it must be reduced to writing. A creditor acquires by this contract the right of taking the fruits or other awards of the immovables given to him in pledge, on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt. The creditor is bound to pay the taxes, as well as all annual charges of the property, unless the contrary be agreed on. Likewise he is bound under the penalty of damages to provide for the keeping and necessary repairs of the pledgor's estate, and may lay out from the revenues of the estate sufficient for such expenses. The creditor does not become the proprietor of the pledged immovables by the failure of payment at the stated time, and any clause to the contrary is of no validity; but he may sue the debtor, in order to obtain sentence against him and cause the objects which have been put into his hands to be seized and sold. A debtor cannot, before the full payment of his debt, claim any enjoyment of the immovables; but the creditor, if at any time he wish to free himself from

the obligation under the antichresis, may always compel the debtor to retake the enjoyment. *Livingston v. Story*, 38 U. S. (11 Pet.) 351, 389, 9 L. Ed. 746.

## ANTICIPATION.

In the case of *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, in speaking of patents, the court said: "It is not sufficient to constitute anticipation that the device relied on might by modification be made to accomplish the functions performed by that invention, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions." Following this guide, it was held, in *Taylor Burner Co. v. Diamond* (U. S.) 72 Fed. 182, that a mere accidental use of the features of an invention, without recognition of its benefits, does not anticipate a patent. *Ryan v. Newark Spring Mattress Co.* (U. S.) 96 Fed. 100, 103.

"Anticipation," in patent law, is defined in *Black's Dict.* as the patenting of a contrivance or thing already known in the country granting the patent. The mere drawing, not followed by construction and actual use, of the machine, does not amount to "anticipation." *Detroit Lubricator Mfg. Co. v. Itenhard* (U. S.) 9 Fed. 293, 298.

A device, which is an infringement if later than a patent, constitutes an "anticipation" if earlier. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* (U. S.) 99 Fed. 758, 772 (citing *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059).

## ANTICIPATORY PUBLICATION.

A publication which describes an invention as consisting of an "acid-resisting protective material for lining sulphite digesters," without disclosing the substances of which the material is composed, cannot be considered "anticipatory publication." *American Sulphite Pulp Co. v. Howland Falls Pulp Co.* (U. S.) 70 Fed. 986, 994 (citing *Seymour v. Osborne*, 78 U. S. [11 Wall.] 516, 20 L. Ed. 33; *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073, 30 L. Ed. 1064).

## ANTIPYRINE.

Antipyrine is a patented medicine, ready for administration in the condition as imported, made of the aniline from coal tar; alcohol being chemically used and broken up in the manufacture. *Schulze-Berge v. United States* (U. S.) 66 Fed. 748, 749.

## ANTIQUITIES.

See "Collection of Antiquities."



## ANY.

## See "If Any."

In cases where construction is necessary to determine whether an instrument creates a joint tenancy or tenancy in common, the distributive words "among," "any," and "each," are used to distinguish estates in common from joint tenancies, and are given controlling effect in determining the estates to be tenancies in common. *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254, 257.

A deed of bargain and sale, wherein the premises are conveyed to the grantees, or "any of them," their or any of their heirs or assigns, creates a tenancy in common. *Galbraith v. Galbraith's Lessee* (Pa.) 3 Serg. & R. 392.

"Any," as used in an affidavit for attachment, stating that defendant is about to conceal or dispose of "any of his property" with intent, etc., is not synonymous with "some" and is insufficient, as not alleging the disposal of property. *Miller v. Munson*, 34 Wis. 579, 17 Am. Rep. 461.

The words "any quantities," in a statute forbidding the sale of spirituous liquors in any quantities without a license, operate to preclude the sale without a license of any such liquors whatsoever, and the statute, therefore, repeals former acts forbidding the sale in certain quantities only. *State v. Turner*, 18 S. C. 103, 106.

## As a.

"Any," when used as a substitute for "a" in the phrase "a reasonably prudent man," in a definition of negligence or care or diligence, does not impose a higher degree of care than would be imposed by the same definition with the use of the phrase "a" reasonable man, instead of "any" reasonable man. *Taylor, B. & H. R. Co. v. Warner* (Tex.) 60 S. W. 442, 444.

There is no distinction between giving the right of appeal to "any party aggrieved" and giving it to "a party aggrieved." *Chandler v. Railroad Com'rs*, 5 N. E. 509, 514, 141 Mass. 208.

## As all or every.

"Johnson says the word 'every' means each one of all, and the same great lexicographer defines 'any' to mean 'every,' and says it is, in all its senses, applied indifferently to persons or things." *Purdy v. People*, 4 Hill, 384, 413. The court in the same case, speaking through Senator Scott, say: "However, if we apply the rule to this case, and seek to ascertain the meaning of the word by examining the context, it will be found that in every section of the Constitution where the words 'every' and 'any' are used, it is in the same sense defined by Johnson. \* \* \* Thus the use of the word 'any,'

instead of 'every,' in Stock Corporation Law, § 52, as amended by Laws 1897, c. 384, providing a penalty for 'any' refusal by such corporations to allow an inspection of their stock books by stockholders and certain other persons, does not limit the scope of the statute. The statute makes it the duty of the corporation to have the book within the reach of the stockholders daily." *Cox v. Island Min. Co.*, 73 N. Y. Supp. 69, 74, 65 App. Div. 508, 515.

In a power of attorney, appointing an attorney to remonstrate in writing against the granting of a license to any applicant for the sale of intoxicating liquors, the words "any applicant" meant every applicant who may apply; the word being often used in the plural as a pronoun, meaning a person or thing understood, as anybody, any one, or any person. In the case of *Dubuque County v. Dubuque & P. R. Co.* (Iowa) 4 G. Greene, 4, it was held that the word "any" extends to an indefinite number. In *McComas v. Amos*, 29 Md. 141, it was held that the word "any" might mean "every." So, also, in *Davidson v. Dallas*, 8 Cal. 239; *Chicot Co. v. Lewis*, 103 U. S. 164, 26 L. Ed. 495. So that under such power the attorney was under duty to file a remonstrance against all applications, and it appearing that the statute in relation to such remonstrance provided that a majority of the legal voters of any township or ward in any city might remonstrate, it is clear that, when the Legislature used the phrase "any township or ward in any city," it meant any town in the state and every ward in every city in the state, so that the phrase "any applicant" meaning "every applicant," the power of attorney was not indefinite. *White v. Furgeson*, 64 N. E. 49, 53, 29 Ind. App. 144. For a like holding see *Ludwig v. C.*, 64 N. E. 14, 18, 158 Ind. 532.

A statute authorizing the pleading of special matter in bar by notice in lieu of a special plea, provided that "any" special matter which was sufficient to bar the action might be set up by notice, which could present as many independent defenses as could be set up by special plea. Held, that the word "any," though in general used to represent a single one, in such act was used in its comprehensive sense of "every," and hence the statute should be construed as authorizing "every special matter which could be pleaded by special plea to be set up by notice." *Tillou v. Britton*, 9 N. J. Law (4 Halst.) 120, 128.

"Any," as used in Act April 21, 1899 (Laws 1899, p. 237, § 1), providing that any number of persons not less than 13 may in the manner hereinafter prescribed form a corporation for the purpose of issuing policies for "any" of the following kinds of insurance business, means "all" or "every." *Bouvier*, in his Law Dictionary, says that the word "any" is given the full force of "ev-

ery" or "all." "The word 'any' is frequently used in the sense of 'all' or 'every,' and when thus used has a very comprehensive meaning." *People v. Fidelity & Casualty Co. of New York*, 38 N. E. 752, 753, 153 Ill. 25, 26 L. R. A. 295; *People v. Van Cleave*, 58 N. E. 422, 425, 187 Ill. 125.

Code, art. 47, § 27, provides that if, in the descending or collateral line, "any" father or mother may be dead, the child or children of such father or mother shall by representation be considered in the same degree as the father or mother would have been, if living, and shall have the same share of the estate as the father or mother, if living, would have been entitled to, and no more, and in such case, when there are more children than one, the share aforesaid shall be equally divided among such children, provided that there shall be no representation admitted among collaterals after brothers' and sisters' children. It was held that "any" means "every," and embraces as well the case where all of the class have died in the lifetime of the intestate, as where some one or more only may have died. "The words 'any father or mother' cannot be restricted to mean any father or mother dead, leaving brother or sister surviving." *McComas v. Amos*, 29 Md. 132, 138.

"Any number," in specifications for a patent, stating that "any number" of the springs may be removed, and rings put in their places, may be held to include "all." *Harris v. Allen* (U. S.) 15 Fed. 106.

The words "any building," last used in Comp. Laws, § 7557, providing that every person who shall set fire to any building mentioned in the preceding sections, or to any other material, with intent to cause any such building to be burned, or shall by any other means attempt to cause "any building" to be burned, shall be punished by imprisonment, etc., should be construed as meaning every building mentioned in the preceding sections, as it cannot be supposed that the Legislature meant by this general phrase to go beyond the objects intended to be protected by the earlier and definite provisions. *McDade v. People*, 29 Mich. 50, 54.

Code, § 798, exempting from taxation all poorhouses, almshouses, houses of industry, or any house belonging to any charitable institution, "any" is to be construed as "every," and, as a Masonic lodge is a charitable institution, any house belonging to such lodge is exempt from taxation. *City of Savannah v. Solomon's Lodge, No. 1, F. & A. M.*, 53 Ga. 93, 94.

In Laws 1885, c. 342, § 7, providing that any lienor may enforce his lien by a civil action in a court of record, "any" is used in the sense of "each" or "every." *Egan v. Laemmle*, 25 N. Y. Supp. 330, 332, 5 Misc. Rep. 224.

The statutory provision that a transfer of "any" unpaid stock shall not relieve the subscriber from liability for "any" debts due from the corporation means all debts due from the corporation; that is to say, all unpaid stock shall be a fund for the payment of all debts of the corporation. *Jones v. Whitworth*, 30 S. W. 736, 738, 94 Tenn. (10 Pickle) 602.

The word "any," as used in Code, § 165, providing that, in actions for libel or slander, defendant may allege in his answer both the truth of the matter charged as defamatory and "any" mitigating circumstances to reduce the amount of damages, means "all." *Heaton v. Wright* (N. Y.) 10 How. Prac. 79, 83.

The word "any." in Laws 1893, c. 150, providing that any city shall have power to construct a system of sewers, and that the expense of the sewers constructed under the act shall be paid by special assessment, is used in the sense of "every," and therefore the act applies to cities organized under special charters, as well as to those organized under the general law. *Heyler v. City of Watertown* (S. D.) 91 N. W. 334.

#### As any one out of a number.

As used in Act Cong. 1822, c. 107, § 15, providing that no deputy of a collector, naval officer, or surveyor in any of certain districts shall receive more than \$1,500, nor any such other deputy more than \$1,000, for any services he may perform for the United States in "any office or capacity," means in any such office or capacity. The true intent and meaning of the clause is to limit the emoluments of the deputy collector in that office to the sum specified, and to make no allowance to him on account of any incidental services he may perform or emoluments he may receive beyond that sum. It was not intended to say that if he actually performed the duties or services of any other independent office, such as inspector in any of the nonenumerated ports, he was not entitled to receive the emoluments thereof. "In any office or capacity" may well be interpreted to mean in any one office or capacity. *United States v. Morse* (U. S.) 27 Fed. Cas. 1, 2.

The words "any defendant," in Act March 3, 1887, c. 373, § 2, 24 Stat. 553 [U. S. Comp. St. 1901, p. 582], giving the right to remove a suit, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, to any defendant who is a citizen of another state, must be construed to mean any single defendant, and not to require that all defendants, where there are several, shall be nonresidents in order to entitle one nonresident defendant to a removal. *Fisk v. Henarie* (U. S.) 32 Fed. 417, 424.

"Any railroad," as used in Act July 23, 1868, authorizing any county in the state to

subscribe to the stock of "any railroad" in the state and issue bonds therefor, but limiting the subscription to a certain amount, is to be construed so as to mean any one railroad taken separately from other railroads, and hence does not restrict the county to a single subscription of the designated amount. *Chicot County v. Lewis*, 103 U. S. 164, 167, 26 L. Ed. 495.

In a will by which testator gave a legacy to a city, in trust to use the income for the purchase of books for the Young Men's Institute, or "any" public library which may from time to time exist in said city, "any," being used as an adjective, means one out of several or many, implying a selection, thus giving the city power to determine and select the one among the others. *New Haven Young Men's Institute v. City of New Haven*, 22 Atl. 447, 448, 60 Conn. 32.

In an action of trespass against two police officers for assault and battery, defendants pleaded that plaintiff had been guilty of a misdemeanor, and that plaintiff interfered with defendants in the discharge of their duties in conveying a person they had arrested to a police station; and the court charged that, if the jury believed that the plaintiff had not committed "any offense" charged in the pleas, they should find the defendants guilty. Held, that then the instruction was not erroneous, on the ground that the word "any," before the word "offense," meant one out of many, inasmuch as the sentence meant the same as if the language had been, "committed one of the offenses." *Mullin v. Spangenberg*, 112 Ill. 140, 144.

"Any of the following causes," as used in Code, § 5242, providing that when a person indicted for a criminal offense is arraigned before a court having jurisdiction of the matter, and pleads not guilty, and is tried on the merits and convicted, he shall not be entitled to a new trial for "any of the following causes," must be construed as meaning for any one of the following causes, and therefore if more than one of the causes mentioned existed, and such causes would, but for the provisions of section 5242, entitle the party to a new trial, the party is entitled to the relief, notwithstanding the provisions of that section. *Thurston v. State*, 43 Tenn. (3 Cold.) 115, 118.

The phrase "any time or sitting," in Gen. St. 1872, c. 407, § 6, providing that any person losing \$50 or more at any time or sitting, by playing at cards or other games, may recover the same by action at law, is to be construed to read "at any one time or sitting." It is true the word "any" is indefinite as to the particular thing referred to; but it is singular, and in connection with a name singular means one of the particular things indicated. *Trumbo v. Finley*, 18 S. C. 305, 810.

#### As any other.

"Any," as used in charter of Omaha, providing that the mayor and city council may order the improvement of a street in any district within certain limits, and that they may order street improvements in "any" district upon a petition being signed, will in the latter clause be held "any other." *Kountze v. City of Omaha*, 88 N. W. 117, 118, 63 Neb. 52.

"Not to impose 'any further tax' or burden, when used in reference to some tax already imposed, means no other tax besides that to which reference is made. These words, so used, cannot be limited, by refinement upon the etymology of the word 'any,' out of or beyond its meaning in common discourse, to 'any like,' and the words 'any further tax,' used in reference to some other tax, will by common consent, as it always has been, be intended to mean any additional tax beside that referred to, and any further like tax." It was so held in construing Act Md. 1821, § 11, exempting certain banks from any further tax or burden. *Gordon v. Appeal Tax Court*, 44 U. S. (3 How.) 133, 147, 11 L. Ed. 529.

#### As each.

The word "any," in Act March 22, 1881, authorizing a tax collector to sell township school lands on the written petition of a majority of the male inhabitants of such township, and that, if any tract is offered and not sold, it may be offered again on the first day of the next or "any" succeeding term of the county court, and so offered until sold, without a new petition, cannot be construed to mean "each," or "every," but only one indifferently, and therefore land not sold when first offered for sale may be offered for sale and sold at a subsequent term of the county court, without its having been offered for sale at intervening terms. *Brown v. Rushing*, 66 S. W. 442, 446, 70 Ark. 111.

Code, § 1966, imposes a penalty on "any" railroad which shall charge for transportation of any freight over its road a greater sum than shall be charged at the same time by it for an equal quantity of the same class of freight transported in the same direction over any portion of the same railroad of equal distance. Held, that the word "any" is used in the sense of "each," "every," and "all," and hence includes a foreign railroad company. *Hines v. Wilmington & W. R. Co.*, 95 N. C. 434, 440, 59 Am. Rep. 250.

#### As either.

The word "any," in a statute relative to counterfeiting, providing that any person who shall counterfeit, or attempt to pass knowing them to be counterfeit, "any" of the aforesaid gold or silver coins, is synonymous with "either." *State v. Antonio*, 2 Tread. Const. 776, 783.

**As ejusdem generis.**

"Any false pretense whatever," as used in Act 1811, imposing a penalty upon a person for the use of any false writings, tokens, or "any false pretense whatever," calculated to impose on the credulity of ordinary men, means pretenses of a like kind with those specifically enumerated, and would not include a mere naked lie. *State v. Simpson*, 10 N. C. 620, 622.

Rev. St. § 3854, providing that any person convicted of horse racing, cock fighting, or playing at cards or "games of any kind" on Sunday, shall be guilty of a misdemeanor, means games of a like nature to those mentioned; that is, such sports and games as have a demoralizing tendency, and does not include mere athletic sports. *St. Louis Agricultural & Mechanical Ass'n v. Delano*, 18 S. W. 1101, 108 Mo. 217.

Rev. St. 1809, § 2242, providing that every person who shall be convicted of horse racing, cock fighting, or playing at cards or "games of any kind" on Sunday, shall be deemed guilty of misdemeanor, cannot be construed to include the game of baseball. The general words "games of any kind" must be construed to mean games of the same kind as the games specially designated in the statute, and baseball does not belong to the same class, kind, species, or genus as horse racing, cock fighting, or card playing. It is to America what cricket is to England. It is a sport or athletic exercise, and is commonly called a "game," but is not a gambling game, or productive of immorality. In a qualified sense it is affected by chance, but it is primarily and properly a game of science, of physical skill, of trained endurance, and natural adaptability to athletic skill. It is a game of chance in the sense that chance or luck may enter into anything that man can do. *Ex parte Neet*, 57 S. W. 1025, 1026, 157 Mo. 527, 80 Am. St. Rep. 638.

The phrase "work of any kind," in Rev. St. § 5095, which prohibits any person holding a lucrative office from being interested in any contract for the construction of any state building, courthouse, schoolhouse, bridge, public building, or work of any kind, must be restricted to works of like kind with those specially enumerated. The rule of construction is that, when a specific enumeration concludes with a general term, it is held to be limited to things of the same kind. It is restricted of the same genus as the things enumerated. *Baker v. Board of Com'rs of Crook County*, 59 Pac. 797, 798, 9 Wyo. 51.

**As an indefinite number.**

The word "any," in Laws 1805, c. 398, § 153, providing that the fees imposed and collected in any prosecution for practicing medicine without lawful registration shall be paid to "any" medical society which institutes

such proceedings, is to be construed in its common sense, as usually understood, to mean an indefinite number or quantity, and therefore any medical society instituting such prosecution is entitled to such fees, and the act cannot be construed to be for the exclusive benefit of the medical, homeopathic, and eclectic societies only. *New York County Medical Ass'n v. City of New York*, 65 N. Y. Supp. 531, 532, 32 Misc. Rep. 116.

In an act providing for suits against "any or all of the shareholders" of a corporation under certain circumstances, the term "any" is not used in its limited sense, but in its enlarged and plural sense, and is to be construed as meaning some or an indefinite number. *Witherhead v. Allen* (N. Y.) 28 Barb. 661, 666, \*42 N. Y. (3 Keyes) 562, 563.

A parol license to enter upon land at any and all times, and cut and carry away growing timber, cannot be construed as giving an indefinite time to cut and remove the timber, but means at any and all times within a reasonable time. Thus it was held that, if not acted on within three years, such license could be revoked. *Hill v. Hill*, 113 Mass. 103, 18 Am. Rep. 455.

The words "any goods," when used in letters of credit, have repeatedly been construed as affording evidence of a continuing guaranty, when the order contained no limitation as to time. *Tischler v. Hofheimer*, 83 Va. 35, 38, 4 S. E. 370.

Defendant executed to plaintiff a written guaranty of payment by W., plumber, for any and all materials which plaintiff may deliver to W., not exceeding \$500, for any balance due. Held, that the words "any and all materials" were ambiguous, and might mean that the guaranty was intended to attach to the purchase money for materials required for a particular purpose, or for materials required indefinitely; and hence parol evidence was admissible to explain the ambiguity. *Henry McShane Co. v. Padian*, 20 N. Y. Supp. 679, 681, 1 Misc. Rep. 332.

In a note containing a stipulation that all defenses on the ground of any extension of time for payment were waived, the use of the word "any," before "extension," indicated that any one of an indefinite number of extensions was intended. *Winnebago County State Bank v. Hustel*, 93 N. W. 70, 71, 119 Iowa, 115.

**As one or more.**

Act March 8, 1872 (P. L. 264), confirming the consolidation of certain railroads, provides that the company shall annually pay into the treasury of the city of Philadelphia a tax of 6 per cent. on so much of "any dividend declared" as shall exceed 6 per cent. per annum on their said capital stock. Held, that the words "any dividend declared" contemplated that the tax should

be based on the aggregate dividend declared in any one year, and not that it should be based on any single dividend. *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 102 Pa. 190, 193.

"Any person," as used in Code 1873, § 45, subd. 3, providing that all property within the jurisdiction of this state which shall pass to any person shall be subject to a tax, etc., "any person" does not necessarily mean one person only, but will include more than one, when that is necessary to give the statute the effect it was intended to have. In *re McGhee's Estate*, 74 N. W. 695, 696, 105 Iowa, 9.

A statute forbidding cruelty to "any of the crew" of a vessel means "any one or more of the crew." *United States v. Harriman* (U. S.) 26 Fed. Cas. 172, 173.

"Any," as used in Act 1872, providing that a railroad company is empowered to build, maintain, and use a railroad or railroads on "any" public road or highway extending from the city of Camden into the county of Camden, does not have the force of "one," but, in connection with the plural of "railroads," must be construed as giving the right to use more than one public road. The *Century Dictionary* shows that, with the context here presented, "any" implies unlimited choice as to the particular unit, number, or quantity; an indeterminate unit or number of units out of many or all. In affirmative sentences, "any," being indeterminate in application, in effect has reference to every unit of the sort mentioned, and thus may be nearly equivalent to "every." *West Jersey Traction Co. v. Camden Horse R. Co.*, 29 Atl. 333, 337, 52 N. J. Eq. (7 Dick.) 452; *Id.*, 35 Atl. 49, 52, 53 N. J. Eq. (8 Dick.) 163.

Under a statute providing that, "if 'any person' shall lay off an addition and be legal owner of all the lots," etc., he may have the same vacated on taking certain procedure, the phrase is not limited to one person only so situated, but applies equally to any number of persons who together come within the descriptive terms employed. *Spurgeon v. Hennessey*, 32 Mo. App. 83, 87.

The words "any school," in a statute providing that it should not affect or repeal any special law enacted for the benefit of any school, is held to be applicable to several schools; the court observing that a word implying the singular number only in a statute may be applied to several persons or things. *Kirk v. Roberson*, 76 S. W. 183, 25 Ky. Law Rep. 633.

St. 1889, c. 105, § 50, empowered the commissioners of the city of Chicago to connect any public park, boulevard, or driveway under its control with any part of an incorporated city by selecting and taking any connecting streets or parts thereof leading to

such park. Held, that the word "any," as applied to the parks under the control of the park commissioners, could not be construed as limiting the power to connect by a street or streets only one park of the city, but that the power to connect any parks under their control was intended to mean that all parks under their control might be so connected. *West Chicago Park Com'rs v. McMullen*, 134 Ill. 170, 179, 25 N. E. 676, 10 L. R. A. 215.

#### Any action.

Gen. St. tit. 1, § 95, providing that in "any action" pending in the superior court, if either of the parties die, his representative may enter, is not confined in operation to proceedings at common law technically known as "actions," but would include proceedings on appeal from the probate court. *Appeal of Stiles*, 41 Conn. 329, 333.

Writs of error and appeals are within a construction to be given to the words "any suit or action," in Act July 20, 1892, c. 209, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706], allowing any citizen in the United States to prosecute any suit or action in the federal courts, without prepaying fees or costs, upon filing an affidavit of poverty. *Columb v. Webster Mfg. Co.* (U. S.) 76 Fed. 198, 200.

#### Any advantage or benefit.

Const. art. 1, § 18, declares that private property shall not be taken for public use without just compensation first being made, etc., as soon as the damages shall be assessed by a jury, who shall not take into consideration "any advantage" that may result to said owner on account of the improvement for which it is taken. Held, that the expression "any advantage" means all benefits of every kind that may result. Incidental, indirect, consequential, and remote benefits are meant, as well as direct and immediate. Those benefits that result to the land itself, as the improvement of the soil, if that be possible, or drainage of ponds, etc., which increase its intrinsic value, are included in the expression, as well as other consequences attending the location of highways, which increase the value of real estate. *Frederick v. Shane*, 32 Iowa, 254, 256.

"Any benefit," as used in Gen. St. c. 34, § 19, providing that the commissioners, in determining the damages to land by the construction of a railroad, shall make due allowances for "any benefit" that such owners may derive from the railroad, construed not to include all the benefit which the landowner may receive from the construction of the road, whether it is peculiar to himself or common to the whole community, but only includes benefits special to the landowner and not shared by the community. *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 155, 160 (Gil. 139, 144).

**Any animals.**

Rev. St. 1893, c. 61, § 6, making it unlawful to sell or expose for sale, etc., "any of the animals, wild fowls, or birds" mentioned in section 1 of the act, which declares that it shall be unlawful at specified times to kill or take specified animals, should be construed to apply equally to game taken or killed out of the state as to those killed or taken within the state. *Merritt v. People*, 48 N. E. 323, 169 Ill. 218.

**Any articles of traffic.**

The words "any kind of articles of traffic," in a statute prohibiting the sale of any kind of articles of traffic, spirituous liquors, wines, porter, beer, cider, or any other fermented, mixed, or strong drink, within three miles of any place of religious worship, except, etc., embraces everything that is the subject of trade or traffic, whether it is dry goods, groceries, liquors, hardware, or lumber. The specification of liquors afterwards seems to have been added out of abundant caution. *Rogers v. Brown*, 20 N. J. Law (Spencer) 119, 122.

**Any attempt.**

In a will directing testator's executors to pay the income of a certain sum to testator's grandson, and providing that, should any attempt, at law or otherwise, be made during the minority of such grandson to withdraw his person from the custody of the executors, they should suspend all further payment of such income, "any attempt" does not include unsuccessful and abandoned attempts. The attempt against which the testator tried to guard was not an abortive one, that should leave the custody unchanged, but a successful one, that should change the custody. In *re White's Estate*, 80 Atl. 192, 194, 163 Pa. 388.

**Any bank or joint-stock company.**

"Any bank," as used in Act 1874, § 39, providing that any bank may be subject to being thrown into bankruptcy, means a banking institution owned by a natural person, partnership, or joint-stock company, and includes an institution incorporated as a bank. In *re Leavenworth Sav. Bank* (U. S.) 15 Fed. Cas. 117, 118.

Laws 1892, c. 689, § 130, providing that the property of "any bank" which shall become insolvent shall be applied, first, to the payment in full of money deposited by any savings bank, includes national banks. *Elmira Sav. Bank v. Davis*, 26 N. Y. Supp. 200, 202, 73 Hun, 357.

Code 1892, § 3758, provides that any bank or joint-stock company, the capital of which is taxable, shall furnish the assessor a written statement of the stock paid in and its market value, except such as is not liable to be taxed, and in default of such statement

the entire authorized capital shall be assessed. Held, that the phrase "any bank or joint-stock company" meant all incorporated associations having stock. *State v. Simmons*, 12 South. 477, 481, 70 Miss. 485.

**Any bond.**

In Act April 19, 1873, regarding all actions on any bond, obligation, or contract under seal which shall be commenced within seven years, the words "any bonds" are comprehensive enough to embrace all bonds of every sort, and therefore include official bonds. *Furlong v. State*, 58 Miss. 717, 733.

**Any borough or town.**

In Act April 3, 1851, § 30, authorizing the burgess and town council of any borough, on petition of 20 of the freehold owners of lots in any section lying adjacent to said borough to admit such section into the borough, "any borough," means only boroughs created after the passage of the act. *Commonwealth v. Council of Montrose Borough*, 52 Pa. (2 P. F. Smith) 391, 392.

A statute forbidding the digging up of a human body without the authority of the selectmen of "any town" of the commonwealth refers to the selectmen of the town within which the offense was committed. *Commonwealth v. Loring*, 25 Mass. (8 Pick.) 370, 372.

**Any borrower.**

Act March 27, 1865, which makes it lawful for "any borrower" to contract for the payment of taxes on the loan in addition to the interest, applies to both private and municipal corporations, and is not confined to natural persons. *Fidelity Ins., Trust & Safe Deposit Co. v. City of Scranton*, 102 Pa. 387, 393.

**Any bridge.**

The term "any bridge," in a statute giving a mechanic's lien to any person who performs any work or labor on any bridge, has a general application, and includes all bridges not excluded on grounds of public policy, and therefore includes railroad bridges. *Purtell v. Chicago Forge & Bolt Co.*, 42 N. W. 265, 266, 74 Wis. 132; *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37, 52, 52 Am. Rep. 66.

**Any candidate.**

Act No. 208, Laws 1887, authorizes the presentation of a petition for a recount of ballots cast for "any candidate voted for at any election" to the boards of city canvassers, if a city or ward office is voted for, and to the district board or board of county canvassers in all other cases. Held, that the terms "any candidate voted for at any election" was limited by the natural purport of the rest of the statute to elections for city, county, and state officers, and could not be extended to cover village, school district,

and other elections for lesser offices. *Johnson v. Board of Canvassers of Village of Canova*, 59 N. W. 412, 413, 101 Mich. 187.

In 3 How. Ann. St. § 234a, declaring that any candidate voted for at any election may file his petition and ask for a correction of the canvass, "any candidate" refers to candidates for state offices, and does not apply to a candidate for Congress, inasmuch as the House of Representatives is the judge of the election of its members. *Belknap v. Ionia County Canvassers*, 54 N. W. 376, 94 Mich. 516.

**Any case or cause.**

In Loc. Acts Mo. 1885, p. 59, § 13, establishing a court of probate in a certain county, and declaring that, whenever the circuit judge of said county shall be disqualified from trying "any cause," the same shall be transferred, the term "any cause" embraces any civil cause. *Logan v. Small*, 43 Mo. 254, 256.

The words "any case" in Rev. St. § 806 [U. S. Comp. St. 1901, p. 663], which authorized a *dedimus potestatem* to take depositions according to common usage to be issued in any case in which it is necessary, includes criminal as well as civil cases. *United States v. Cameron* (U. S.) 15 Fed. 794.

When the statute says "in any case," it includes the only two classes of cases we have, namely, civil and criminal, and doubtless it was in the legislative mind that, having used the words "in any case," the words "either civil or criminal," would be mere surplusage. *Litton v. Commonwealth* (Va.) 44 S. E. 923, 927.

"Any case," as used in Rev. St. § 866 [U. S. Comp. St. 1901, p. 663], providing that, in any case where it is necessary to prevent a failure or delay of justice, any of the courts of the United States may issue a *dedimus potestatem* to take depositions, means "any case" in which the court has jurisdiction of the proceedings in which the deposition is desired; and hence, where Chinese persons, alleged to be unlawfully in this country, are being examined before a commissioner, whose jurisdiction is exclusive under Chinese Exclusion Act, Sept. 13, 1888, c. 1015, § 13, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317], the federal court has no authority to issue a *dedimus potestatem* for the taking of testimony. *United States v. Hom Hing* (U. S.) 48 Fed. 635, 637.

**Any cask.**

Rev. St. § 3289 [U. S. Comp. St. 1901, p. 2132], providing that all distilled spirits found in "any cask" containing five gallons or more without having thereon the mark and stamp required by law shall be forfeited to the United States, does not apply generally to such spirits found in all casks whatever, but

refers to such casks and in such quantities as by other sections of the statute are required by law to be marked and stamped. *United States v. Cask of Gin* (U. S.) 3 Fed. 20, 21.

**Any cause whatever.**

In a contract for city work, providing that, if the contractor desires an extension of time to complete his contract by reason of any hindrance or delay "from any cause whatever," he shall give notice of the cause of detention to the engineer, to be reported to the council, which is to determine the amount of time that may compensate for the detention, the words "any cause" must be construed to refer to any cause other than the act of the city; otherwise, the city might cause the contractor such delay that he could not complete the contract within say 30 days after the time specified, and then the city might allow but 5 or 10 days on account of it, which would be an unconscionable result. *Hill v. City of Duluth*, 58 N. W. 992, 57 Minn. 231.

As used in a contract for shipment of livestock between the shipper and a common carrier, providing that the carrier should not be liable for loss caused by "escapes from any cause whatever," cannot be construed literally, so as to exempt the carrier from all liability whatever, but only for such escapes in which the negligence of the carrier is not an active and co-operative cause. *Oxley v. St. Louis, K. C. & N. Ry. Co.*, 65 Mo. 623, 631.

The phrase "any cause whatever," in a fire policy on a mill, providing that the stoppage of the mill for more than 20 days from any cause whatever should have the effect of suspending the policy, means any and every cause that may have the effect of stopping the operation of the mill, even though such stoppage were for the purpose of making necessary repairs. *Day v. Mill Owners' Mut. Fire Ins. Co.*, 29 N. W. 443, 445, 70 Iowa, 710.

**Any child.**

"Any child," as used in a will giving property equally to testator's children living at his death, for life, thereafter to their children, conditioned that, if any child shall have died previous to his death leaving children, the share of such child should go to the child's children, mean any child of every class of children previously named; that is, any of the testator's own children, or any of the children of his children—that is, any of his grandchildren. *Douglas v. James*, 28 Atl. 319, 320, 66 Vt. 21, 44 Am. St. Rep. 817.

**Any claim.**

The term "any claim of any character," as used in Ashland city charter, declaring that no suit of any kind or "any claim of any character" shall be brought against said

city, but the claimant shall file his claim with the city clerk, should not be construed as limited to claims arising on contracts, but includes as well claims arising on torts. *Koch v. City of Ashland*, 53 N. W. 674, 83 Wis. 361; *Van Frachen v. City of Ft. Howard*, 60 N. W. 1062, 1063, 88 Wis. 570; *Mason v. City of Ashland*, 74 N. W. 357, 358, 98 Wis. 540.

"Any legal claim to real property," as used in Judiciary Act 1875, § 8, relating to bringing in absent defendants by substituted service in actions to enforce any legal claim to real property, is employed in a general and comprehensive sense, and includes an action of ejectment; such action being a legal claim to realty. *Spencer v. Kansas City Stockyards Co.* (U. S.) 56 Fed. 741, 745.

#### Any contract.

The term "any contract," in a statute giving a mechanic's lien to any person who shall do or perform any work by virtue of "any contract" for any incorporated company, was construed not to be limited to anybody's contract with the company, but to refer to any kind of contract, whether written or verbal, express or implied. *Richardson v. Norfolk & W. R. Co.*, 17 S. E. 195-196, 37 W. Va. 641.

"Any contract," as used in Code, § 3078, providing that agricultural laborers shall have a lien on the crop grown during the current year for labor and services rendered in cultivating the crop under any contract for such labor and services, includes implied, as well as express, contracts. *Wilson v. Taylor*, 8 South. 149, 89 Ala. 368.

"Any contract," as used in the mechanic's lien law, giving a lien for labor and materials by virtue of "any contract" with the owner of a building, is sufficiently comprehensive to include special contracts, as well as contracts which arise by implication. *McMurray v. Austin*, 3 Cent. Law J. 158, 159; *McMurray v. Brown*, 91 U. S. 257, 23 L. Ed. 321.

"Any contract," as used in Revision 1860, § 1846, providing that all contractors, mechanics, laborers, etc., engaged in the construction of any railroad or other work of internal improvement, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, etc., includes the contracts of laborers working for day wages. *Mornan v. Carroll*, 35 Iowa, 22, 26.

The words, "any contract for the sale of real estate," as used in the statute of frauds, includes every agreement by which one promises to alienate an existing interest in land, upon a consideration either good or valuable, so that a contract to convey land in consideration of labor or services to be rendered is within the statute. *Sprague v. Haines*, 68 Tex. 215, 216, 4 S. W. 371.

#### Any corporation or body corporate.

Rev. St. Tex. art. 1198, providing that suits against any private corporation may be commenced in any county in which the cause of action arose, or in which the corporation has an agent, includes both domestic and foreign corporations. *Angerhoefer v. Bradstreet Co.* (U. S.) 22 Fed. 305, 307.

"Any religious corporation," as used in Laws 1892, c. 390, exempting from personal tax property devised or bequeathed to any religious corporation, does not include a foreign religious corporation. *In re Balleis' Estate*, 38 N. E. 1007, 1008, 144 N. Y. 132.

Within Const. art. 9, § 7, providing that the assent of two-thirds of the members of the Legislature shall be required to every bill creating, altering, or renewing any body politic or corporate, "any" means "all"; its term being comprehensive, explicit, and unambiguous, so as to extend to public, as well as private, corporations. *Purdy v. People* (N. Y.) 4 Hill, 384, 394.

#### Any county.

Act March 19, 1857 (Laws 1857, p. 244), created the county of Union, and declared that it "shall have and enjoy all the jurisdiction, powers, rights, privileges, liberties, and immunities which any other county in the state doth or may enjoy." Held, that the purpose of this declaration is that this county shall be politically equal with the other counties in the state. The word "any" has several meanings, according to the subject which it qualifies. In synonyms it is distinguished from "some." Thus it is said "some" applies to one particular part, in distinction from the rest, while "any" applies to every individual part, without distinction. The former is altogether restrictive in its sense, while the latter is altogether universal and indefinite. *Crabb, Eng. Synonyms*. This is more noticeable when it is joined with another word, as "anything," "anywise." Webster says, although the word "any" is formed from "one," it often refers to many. *State v. Freeholders of Union County*, 11 Atl. 143, 144, 50 N. J. Law (21 Vroom) 9.

"Any county," as used in Wag. St. p. 408, § 7, declaring that, in all actions brought by or against any county, inhabitants of the county so suing or sued may be jurors or witnesses, if otherwise competent, not only means "counties" in the usual sense of the word, but the city of St. Louis, not being purely a municipal corporation, but having attributes of a county, is within the statute. *O'Brien v. Vulcan Iron Works*, 7 Mo. App. 257, 259.

#### Any court.

"Any court," as used in Act July 13, 1866, § 19, providing that no suit shall be maintained in any court for the recovery of



any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, should be construed in their ordinary sense, and include state courts, as well as federal courts. *The Collector v. Hubbard*, 79 U. S. (12 Wall.) 1, 14, 20 L. Ed. 272.

Rev. St. § 3224 [U. S. Comp. St. 1901, p. 2088], provides that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. Held that, taken literally, the phrase "in any court" would prohibit such a proceeding as that described from being maintained in any of the state courts, as well as federal, but that, inasmuch as Congress has no control over state courts in respect to state taxes, and as it was not to be presumed that Congress intended to reach beyond where its power extended, but to the contrary, the broad or literal construction could not prevail, but that the term "in any court" must be construed to mean in any federal court. *Wells v. Central Vermont R. Co.* (U. S.) 29 Fed. Cas. 643, 644.

In a statute providing that every person who shall, in the presence of any court, either by words or actions behave contemptuously or disorderly, may be punished, etc., the term "any court" includes the court of common pleas, though it was created after the passage of the statute. *Middlebrook v. State*, 43 Conn. 257, 267, 21 Am. Rep. 650.

"Any court," as used in Act Cong. July 13, 1866, providing that no deed or other instrument shall be used in evidence in any court, unless stamped, is used in its broadest and fullest form, without qualification or exception, and is not limited to the federal courts. *Chartiers & R. Turnpike Co. v. McNamara*, 72 Pa. (22 P. F. Smith) 278, 281, 13 Am. Dec. 673.

The term "any court," in 2 Tayl. St. p. 1610, § 123, in reference to deeds executed at judicial sales in pursuance of any judgment, order, or decree of any court, includes the county court, when acting as a court of probate. *Chase v. Whiting*, 30 Wis. 544, 545.

Rev. St. § 4284 [U. S. Comp. St. 1901, p. 2943], authorizing freighters and owners of property to take appropriate proceedings in "any court" for the purpose of apportioning the sum for which the owner of the vessel may be liable among parties for loss to goods shipped in the vessel, will be construed to mean "any court of competent jurisdiction." *Ex parte Phenix Ins. Co.*, 7 Sup. Ct. 25, 31, 118 U. S. 610, 30 L. Ed. 274.

The term "any court," within the meaning of Act 1881, providing that, whenever the property, rights, powers, immunities, privileges, and franchises of any turnpike, bridge, plank road, gas, and water corporation shall be sold under any process or decree

of any court of the state, the purchaser shall be a body politic and corporate, cannot be construed to include every court, because that would give the power to justice courts and courts of common pleas. A narrower meaning must be attributed to the enactment, by restricting its operation to such process or decree and such proceedings as would at the time of the passage of the act vest a title to franchises in the purchaser, which view excludes the power of the circuit court over the subject. *State v. Turnpike Co.*, 46 Atl. 569, 570, 65 N. J. Law, 73.

Acts 1886, c. 496, conferring "on any court of record" power to issue writs of mandamus against the board of excise, etc., means any court having power to issue the writ, and not a court of record possessing no authority whatever in such proceedings. *People v. Board of Excise*, 3 N. Y. St. Rep. 253, 255.

2 Gav. & H. St. p. 329, § 777, providing that "any court of record" may suspend an attorney from practicing therein for any of certain specified cases, means any court of record having jurisdiction, and does not include a court whose jurisdiction is limited to the trial of criminal actions alone. *Mattler v. Schaffner*, 53 Ind. 245, 246.

Rev. St. § 2103, declaring that such suit as is provided for by said section may be brought in "any court of the United States," means any court of the United States within the territorial jurisdiction of which a defendant may be an inhabitant. *United States v. Crawford* (U. S.) 47 Fed. 561, 565.

#### Any creditor.

Under the provisions of the bankrupt act that any creditor of such bankrupt may attend his examination, the words "any creditor" include all creditors, as well those who have not, as those who have, come in under the commission. *Livermore v. Swasey*, 7 Mass. 213, 227.

In Bankr. Act 1841, § 6, providing as to any creditor or creditors who shall claim any debt or demand, the words "any creditor" mean any creditor of the bankrupt whose debts constitute present subsisting claims on the bankrupt's estate, and cannot be construed as referring exclusively to such creditors as come in and prove their debts under the bankruptcy. *Ex parte City Bank of New Orleans*, 44 U. S. (3 How.) 292, 293, 11 L. Ed. 603.

Bankr. Act 1867, authorizing "any creditor" to apply for an order to examine a bankrupt, construed to only mean a creditor who has proved his claim. *In re Ray* (U. S.) 20 Fed. Cas. 322, 323.

#### Any criminal case.

The fifth amendment to the United States Constitution, declaring that no person

shall be compelled to be a witness against himself "in any criminal case," means that no one shall in any criminal proceeding be compelled to give testimony damaging to himself in a criminal case, and is not limited to cases against the witness himself. *Counselman v. Hitchcock*, 12 Sup. Ct. 195, 198, 142 U. S. 547, 35 L. Ed. 1110.

#### **Any crime or offense.**

Laws 1877, p. 179, providing that, when "any crime or offense" shall have been committed in respect to any portion of a railroad train, an indictment may be found in any county through which the train passed in the course of its trip, means any crime or offense already known to the law. *People v. Dowling*, 84 N. Y. 478, 487.

#### **Any damages.**

"Any," as used in a constitutional provision for compensation "for any damage done to lands or property," in condemnation proceedings, means all or every damage so done. *Monongahela Nav. Co. v. Coon*, 6 Pa. (6 Barr) 879, 383, 47 Am. Dec. 474.

The charter of a bridge company, requiring the payment of damages, "if any," by reason of the erection of the bridge, means all damages, including consequential damages. *Buckwalter v. Black Rock Bridge Co.*, 38 Pa. (2 Wright) 281, 287.

Where the contract between a shipper of cattle and the carrier recited that "we take upon ourselves the risk of all and any damages that may happen to our cattle, and will not call upon said railroad company for any damages whatsoever," the phrase "for any damages whatsoever" should not be construed to mean cases where the damage has arisen from gross negligence of the carrier or want of ordinary care. *Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 Me. 228, 238, 1 Am. Rep. 659.

#### **Any debt or indebtedness.**

"Any indebtedness," as used in a mortgage reciting that the grant was intended as collateral security for the payment of any indebtedness, referred to contemplated, as well as to existing, debts, and the intention of the parties may be shown allunde, without infringing the rule which excludes parol evidence to extend or change the meaning of written instruments. *Simons v. First Nat. Bank*, 93 N. Y. 269, 272.

#### **Any debtor.**

The use of the word "any" in a statute providing that "any debtor, having become insolvent or against whom attachment proceedings have been instituted," etc., may make an assignment, is broad enough to include debtors nonresident of the state, and will not be limited to those who are resi-

dents only. *Rollins v. Rice*, 62 N. W. 325, 326, 60 Minn. 358.

As used in the bankrupt law, the term "any debtor" includes any one who is capable of contracting a debt and who has done so. *Kinney v. Sharvey*, 50 N. W. 1025, 48 Minn. 93.

#### **Any defendant.**

The phrase "any defendant," as used in Laws 1853, c. 511, as amended by Laws 1863, c. 212, in relation to substituted service, and providing for service on any defendant, indicates an intention to include infants within the provisions of the statute. *Steinhardt v. Baker*, 46 N. Y. Supp. 707, 709, 20 Misc. Rep. 470.

Rev. St. § 639, subsec. 3, as amended by Act 1887, § 2, giving the right to remove a suit under certain circumstances to "any defendant," cannot be construed to mean all the defendants, and so will be denied to any unless all have such citizenship as is required. *Fisk v. Henarie* (U. S.) 32 Fed. 417, 422.

#### **Any defect.**

"Any defect," as used in Judiciary Act, c. 15, § 4, providing that the court may at any time permit either of the parties to amend "any defect" in the process or pleadings, is broad enough to include substantial, as well as merely formal, defects. *Wilson v. New York, N. H. & H. R. Co.*, 29 Atl. 300, 18 R. I. 598.

#### **Any deficiency.**

"Any deficiency," as used in a bond in which defendants guarantied the payment of an amount secured by a mortgage or any deficiency, covered the whole amount due on the mortgage, where the mortgaged premises were sold under foreclosure to satisfy a prior mortgage. *Crouse v. Owens*, 3 N. Y. Supp. 863, 864, 49 Hun, 610.

#### **Any election or election law.**

Const. art. 8, declaring that any person who, while a candidate for office, shall be guilty of bribery, fraud, or willful violation of "any election law," etc., includes any law relating to elections, and includes a statute which punishes bribery or fraud in an election officer, as well as the statute which prescribes the hours when the polls shall open and close on election day. *Leonard v. Commonwealth*, 4 Atl. 220, 224, 112 Pa. 607.

The term "any election," in Code, § 4289, prohibiting illegal voting at any election held in the state of Alabama, includes a local election held under statutory provisions to ascertain the sense of the people on the subject of prohibiting the sale of intoxicating liquors. *Gandy v. State*, 2 South. 465, 82 Ala. 61.

The term "any election," in the statute making it criminal to bet on any duel or the result of any election, etc., includes all elections held in the state. *Sharkey v. State*, 33 Miss. 353, 354.

**Any error or irregularity.**

Laws 1876, c. 34, § 145, requiring a county to refund the purchase money of lands sold for taxes, where the title shall fail on account of error or irregularity, "includes not merely irregularity in the tax proceedings, but also jurisdictional defects, such as that the lands are not subject to taxation." *School District No. 15 v. Allen County Com'rs*, 22 Kan. 568, 570.

**Any estate.**

In Clay's Dig. § 8, providing that, when any estate attached shall be shown by certain evidence to be likely to waste or to be destroyed by keeping, it may be ordered to be sold, the words "any estate" are to be construed as comprehending "all property upon which a levy may be made." *Millard's Adm'rs v. Hall*, 24 Ala. 209, 229.

The words "any estate or interest," in a statute, means either a legal or equitable estate or interest. *Bernards Tp. v. Warren Tp.*, 15 N. J. Law (3 J. S. Green) 447, 454 (citing *Rex v. Geddingtong*, 2 Barn. & C. 129).

Insolvent Act 1853, § 19, providing that, if any creditor shall present a claim against "any estate in settlement" under the provisions of this act, it shall be the duty of the commissioners, etc., will be construed "to include estates in settlement at the time of the passage of the act, as well as future ones." *Appeal of Mechanics' & Farmers' Bank*, 31 Conn. 63, 68.

**Any evidence.**

As used in the rule that a case will not be taken from the jury, and a verdict directed for defendant, if there is any evidence of the allegations of the complaint, the words "any evidence" are not used in their strictest sense; but, while there may be some evidence tending to establish an issue, yet, if its probative effect is so small that it only raises a surmise or suspicion, in legal contemplation it falls short of being any evidence, and it is the duty of the court to decide the issue. In other words, if the evidence is not of sufficient directness and force to form the basis of a reasonable conclusion, the court should decide the issue; but, if there is sufficient evidence to lead a reasonable mind to a conclusion, it is for the jury. *Joske v. Irvine*, 44 S. W. 1059, 1063, 91 Tex. 574; *Cahill v. Benson*, 46 S. W. 888, 891, 19 Tex. Civ. App. 30.

By "any evidence" is meant, in legal contemplation, evidence of such probative force as to create more than a mere surmise or suspicion of the existence of the fact

sought to be established. Where there is any evidence adduced to establish a fact, the court is not authorized to determine its weight, but it must be submitted to the jury for consideration. Where, however, the probative force of the evidence is so weak that it only raises a mere surmise or suspicion of the existence of the fact sought to be established, or of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it, the court is authorized to take the question from the jury and direct the proper verdict. *Berry v. Osborn* (Tex.) 52 S. W. 623, 624.

The terms "some evidence," "any evidence," "any evidence whatever," and "any evidence at all," as used in opinions holding that the court must submit a case to the jury whenever there is "some evidence," "any evidence," "any evidence at all," and "any evidence whatever," pertinent to the issue, must be construed to mean evidence legally sufficient to warrant a verdict. The legal sufficiency of evidence in that sense is a question of law which the court must decide, no matter when or how it arises, and hence, where the evidence in an action for injuries from negligence would not warrant a verdict on any view that could be taken of the facts which the evidence could be said to tend to establish, the question of negligence was one of law for the court to decide, and not for the jury. *Catlett v. St. Louis, I. M. & S. Ry. Co.*, 21 S. W. 1062, 1063, 57 Ark. 461, 38 Am. St. Rep. 254.

The rule requiring a question of negligence to be passed upon by the jury, if there is "any evidence" in the case, does not mean a mere scintilla, but such as, taken alone, would justify the jury in inferring the fact. *Citizens' Pass. Ry. Co. of Pittsburgh v. Foxley*, 107 Pa. 537, 539.

**Any form.**

A by-law of a bank declared that no transfer of stock shall be allowed or valid so long as the holder is in arrears to the bank or "in any form indebted" to it. *Wag. St. § 16*, p. 292, provided that no shares shall be transferred until all previous calls thereon shall have been fully paid in. Section 53, p. 611, provided that, when any shares of bank stock should be sold, the officer should execute a bill of sale to the purchaser, and leave with the cashier a copy of the execution and his return thereon, and the purchaser should thereupon be entitled to all dividends and stock, and to the same privileges as a member of such corporation as such debtor was entitled to. Held, that the phrase "in any form indebted" refers to indebtedness outside of the stock subscription. *Kahn v. Bank of St. Joseph*, 70 Mo. 262, 268.

In a prosecution under Gen. St. c. 47, art. 1, § 1, as amended by Act March 25, 1866, inflicting a penalty on any one who for

compensation sets up or conducts a game of cards, whereby money or other thing may be won or lost, the addition of the words "in any form whatever," after the word "compensation," in an instruction, is not error; the words "in any form whatever" being embraced by the word "compensation" in the sense in which it is used in the statute. *Harper v. Commonwealth*, 19 S. W. 737, 93 Ky. 290.

#### **Any future extensions or branches.**

A contract between two connecting railroad corporations for a division of freights and fares over their roads, or "any future extensions or branches" of the same, will not be construed, in the general sense of the word "any," to apply to extensions then unauthorized, where there are existing powers at the time of the contract to build other extensions or branches. *Morris & E. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. (5 C. E. Green) 542, 557.

#### **Any game.**

Rev. St. § 1580, prohibiting horse racing, cards, or games of "any" kind on Sunday, includes the game of baseball, and the general rule in the construction of statutes, that where particular words are followed by general, as if, under the enumeration of classes of persons or things, there is added "and all others," the general words are restricted in meaning to objects of the like kind with those specified, has no application. *State v. Williams*, 35 Mo. App. 541, 548.

#### **Any goods or chattels.**

As the words "any goods or chattels" are used in Laws 1790 (2 Smith's Laws, p. 531), which declares that if any person shall feloniously steal, take, and carry away "any goods or chattels," etc., he shall be deemed guilty of petit larceny, etc., means such goods or chattels as had been before esteemed subjects of larceny; hence, would not include a dog, as he is not a subject of larceny. *Findlay v. Bear* (Pa.) 8 Serg. & R. 571.

#### **Any house.**

"Any house," as used in Code, § 1062, which makes it a misdemeanor to unlawfully and willfully "deface, damage, or injure any house," etc., does not ordinarily include damaging, defacing, or injuring one's own house or property; but it does include defacing, damaging, or injuring a house which is legally in the possession of another, although the party who commits the offense may have a better title thereto. *State v. Howell*, 12 S. E. 569, 570, 107 N. C. 835.

The words "any house," as used in Gen. St. c. 29, art. 7, which provides that "if any person shall willfully burn a powder house, warehouse, storehouse, stable, barn, or any house or place where wheat, corn, or other grain, fodder, hemp, wood, fruit, ice, hay, or

straw is usually kept, or 'any house' whatever, \* \* \* shall be confined in the penitentiary," includes a church. *McDonald v. Commonwealth*, 4 S. W. 687, 86 Ky. 10, 9 Ky. Law Rep. 230.

#### **Any interest in or concerning land.**

"Any interest in land," as used in Rev. St. 1843, c. 28, § 16, providing that any contracts, etc., relating to "any interest in land," etc., must be in writing, includes an agreement to lease land for two years at a rent equal to the full rental value of the premises, the occupation to commence at a future day. *Stackberger v. Mosteller*, 4 Ind. 461, 462.

The statute of frauds provides that any contract for the sale of lands, or any "interest in or concerning" them, shall be in writing, etc. A. contracted to purchase from B. a tract of land at a stipulated price, and gave his written obligation to that effect. Afterwards C. by parol agreed to purchase A.'s interest in the contract, and A., by indorsement on his obligation, directed B. to convey to C. Held, that the words "any interest in or concerning" should be construed to include the contract between A. and C. *Simms v. Killian*, 34 N. C. 252, 253.

"Any interest in or concerning them," as used in the statute of frauds, means "concerning the sale of lands or any interest therein, which includes the various tenures by which lands may be holden," and cannot be construed to include contracts respecting labor on lands. A contract to cut down and clear away trees on a farm is not a contract concerning lands. *Forbes v. Hamilton* (Vt.) 2 Tyler, 356, 357.

The phrase "any interest in or concerning them," as used in the statute of frauds, providing that contracts for the sale of lands, or "any interest in or concerning them," should be in writing, etc., does not include a parol submission and award that a certain party should pay to another a sum of money as a compensation for the future use of the latter's private road. A right of way is not an interest in land within the meaning of the statute. *Mitchell v. Bush* (N. Y.) 7 Cow. 185, 186. It does not include a contract to sell the mere improvements made on lands. Improvements upon land distinct from the title or possession are not an interest in land within the meaning of the statute. They are only another name for the work and labor bestowed on the land. *Lower v. Winters*, (N. Y.) 7 Cow. 263, 264. It does not include "a parol contract to pay for work to be done on land, or what has been done at the instance and request of the promisor. The statute could have had in view to avoid such agreements in relation to lands as rested in parol only where some interest was to be acquired in the land itself, and not such as were collateral, and by which any kind of interest was to be gained by the agreement in

the land." *Frear v. Hardenbergh* (N. Y.) 5 Johns. 272, 275, 4 Am. Dec. 356.

It does not include an agreement to remove a fence, so as to open a certain road to its original width. *Storms v. Snyder* (N. Y.) 10 Johns. 109, 110.

**Any insurance company.**

Rev. St. § 1977, providing that "any insurance company shall be bound by the contract of its agent," includes mutual as well as stock corporations. *Zell v. Herman Farmers' Mut. Ins. Co.*, 44 N. W. 828, 830, 75 Wis. 521.

Act Oct. 24, 1887, providing that any person who solicits in behalf of any insurance company shall be deemed an agent thereof, applies only to agents of incorporated companies, and not to those of unincorporated companies, though the expression of itself might be construed to include both. *Fort v. State*, 18 S. E. 14, 15, 92 Ga. 8, 23 L. R. A. 86.

**Any intoxicating beverage or liquor.**

"Any intoxicating beverage" necessarily includes spirituous, vinous, and malt liquors of all kinds. *Rush v. Commonwealth* (Ky.) 47 S. W. 586, 587.

The word "any," as defined by the Century Dictionary, means "to imply unlimited choice as to the particular unit, number, or quantity, and hence, subordinately as to quality, whichever, of whatever quantity or kind"; and the word as used in Act Cong. March 1, 1895, c. 145 (28 Stat. 697) prohibiting the manufacture or sale within the Indian Territory of "any vinous, malt or fermented liquors, or any other intoxicating drinks of any kind whatsoever," includes all of the liquors mentioned in quality and kind, as well as quantity, and a malt liquor sold under the name of "Rochester Tonic" whether intoxicating or not, is within the provisions of such act. *United States v. Cohn*, 52 S. W. 38, 45, 2 Ind. T. 474.

**Any judge or justice.**

The statute authorizing "any judge" in any other state to take depositions includes "an assistant judge" of a county court of another state. *City Bank v. Young*, 43 N. H. 457, 460.

Code, §§ 4077, 4078, providing that a landlord may go before "any" justice of the peace to procure a warrant to dispossess a tenant, includes all the justices in the state, so that a justice of one county may administer the oath and issue the warrant to dispossess a tenant holding over in another. *Du Bignon v. Tufts*, 66 Ga. 50, 61.

Act Feb. 18, 1848, providing that an application for the imprisonment for debt of fraudulent debtors may be made to "any judge of a court of record" in any county in

which the judgment on which the complaint is grounded is docketed and in which the defendant resides, means any judge of a court of record, commonly called "judge," and known and spoken of as a judge of a court of record, such being the common and ordinary use of the word "judge," and does not include the recorder of the city of New York, who has the power of a judge of the court of general sessions and is in fact a judge thereof for he is not commonly called or known and spoken of as a judge of such court, not even when actually holding the court of general sessions. *People v. Goodwin* (N. Y.) 50 Barb. 562, 566.

**Any judgment.**

"Any judgment," as used in Gen. St. § 85, giving an attorney lien on any judgment obtained by him and belonging to his client, is employed in a latitudinous sense, and embraces all kinds of judgments, regardless of the subject-matter to which they relate. *Fillmore v. Wells*, 15 Pac. 343, 347, 10 Colo. 223, 3 Am. St. Rep. 567.

An act authorizing writs of error to review "any judgment" in favor of a defendant tried for a criminal offense does not apply to judgment rendered before the act was passed. *People v. Carnal*, 6 N. Y. (2 Seld.) 463.

"Any judgment," as used in Gen. St. tit. 19, c. 5, § 15, providing that, in civil actions before a justice of the peace, an appeal shall be allowed from "any judgment rendered therein on any issue," means final judgments. *Denton v. Town of Danbury*, 48 Conn. 368, 370.

"Any judgment," as used in Act Dec. 31, 1868, § 44, providing that the bond of a tax collector shall operate from its execution as a lien in favor of the state and county for the amount of "any judgment which may be rendered against him in his official capacity," "does not mean 'judgment' in a technical or restricted sense, as confined solely to an action at law, but refers to the judgment of any court to which the state or county may properly resort, whether such judgment be rendered in a court of law or equity." *Dallas County v. Timberlake*, 54 Ala. 403, 412.

**Any lands.**

Laws 1887, c. 320, authorizing the board of street opening and improvement of the city of New York to select and lay off parks therein, and to enter upon and condemn "any and all lands" which the board shall deem necessary for such purpose, should be construed to include land used as a cemetery. In re Board Street Opening & Improvement, 16 N. Y. Supp. 894, 895, 62 Hun, 499.

"Any and all lands," as used in Laws 1887, c. 320, authorizing the board of street opening and improvement of New York to lay out parks therein and to enter on and condemn any and all lands which the board

should deem necessary for such purposes, means any land not already occupied for a public purpose. In re Board of Street Opening, etc., 31 N. E. 102, 103, 133 N. Y. 329, 16 L. R. A. 180, 28 Am. St. Rep. 640.

St. 1892, c. 341, § 1, as amended by St. 1893, c. 337, § 1, declaring that a certain city may "take and hold," by purchase or otherwise, "any and all" such real estate and lands within said city as it may deem advisable, and lay out, maintain, and improve the same as a public park or parks, was not intended to authorize the taking in fee of lands already devoted to public use as part of the actual location of a railroad. *Boston & A. R. Co. v. City Council of Cambridge*, 44 N. E. 140, 141, 166 Mass. 224.

#### Any law.

St. 1872, c. 11, §§ 1, 48, chartering a street railway corporation, and which provides that the said city (New Bedford) or town (Fairhaven) is hereby authorized and empowered to contract with said railway corporation concerning the construction, maintenance, and operation of said railway on such terms as it may agree with said railway corporation, "any laws now existing to the contrary notwithstanding," refers simply to laws limiting the authority of the city, and cannot be construed to mean that any general laws to which the company has been declared subject may be overridden by contract. In any event it extends only to laws existing at the passage of the act, and hence would have no operation on general laws subsequently passed. *New Bedford & F. St. Ry. Co. v. Achushnet St. R. Co.*, 9 N. E. 536, 539, 143 Mass. 200.

#### Any license or right to possession.

Civ. Code, § 316, declaring that a defendant shall not be allowed to give in evidence "any license or right to possession" of real property, unless the same be pleaded in his answer, should be construed to mean only such a license or right to possession as to constitute a legal defense, and not to include mere equitable rights. *Newby v. Rowland*, 1 Pac. 708, 709, 11 Or. 133.

#### Any lien.

In Laws 1882, c. 410, § 1813, as amended by Laws 1883, c. 276, providing that, where a claimant for a mechanic's lien is made a party defendant to any action brought to enforce "any" other lien, the notice of the pendency of such action must be filed by him or in his behalf, "any" means "each and every," and is the same as if the statute read "each and every other lien," and hence includes a mortgage lien, as well as a mechanic's lien. The word "any" is used in various ways, and may convey different meanings. It may mean "one" or "many," "each" or "every." In some instances it

means an indefinite number. *Danziger v. Simonson*, 22 N. E. 570, 575, 116 N. Y. 329.

#### Any manner whatsoever.

A contract for the shipment of cattle guaranteed the payment of freight by the shippers, whether or not the cattle were "lost in any manner whatsoever," and also provided that the freight should be payable on the arrival of the ship at Liverpool. Held, that the guaranty of the shippers, including the words "lost in any manner whatsoever," should be construed as absolute and unlimited in its terms, and not to depend on the subsequent clause, as meaning that payment should only be made when the cattle should arrive at Liverpool, and hence the shippers were liable on their absolute guaranty, though the cattle were lost through fire and subsequent wreck of the vessel, which failed to reach its port of destination. *Myers v. The Queensmore* (U. S.) 53 Fed. 1022, 1024, 4 C. C. A. 157.

Comp. St. c. 32, § 3, declares that no estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, "or in any manner relating thereto," shall hereafter be created, granted, assigned, or surrendered, unless by deed of conveyance in writing, subscribed, etc. It was contended that the words "or in any manner relating thereto" applied only to what immediately preceded them, or, in other words, to "trusts concerning lands," and not to estates or interests therein; but the court held that the words could not be so limited, and therefore required all assignments of interests in lands to be in writing, which included a promise of the grantor of real estate to warrant and defend the title of his grantee. *Kelley v. Palmer*, 60 N. W. 924, 42 Neb. 423.

#### Any married woman.

Laws 1868, c. 52, providing that the contracts of "any married woman" made for any lawful purpose shall be valid and binding, and may be enforced in the same manner as if she were sole, cannot be construed to include infants, though literally the words "any married woman" include married female minors. *Cummings v. Everett*, 19 Atl. 456, 457, 82 Me. 260.

Act 1848, c. 200, as amended by Act 1849, c. 375, providing that "any married female" may take by inheritance or by gift, grant, devise, or bequest, real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried, means any married female not an infant. The word "any" does not qualify the entire provision and make marriage the important requirement, without consideration of the age other than the legal age only. The power to devise real property given to married females is like that which

they could exercise if unmarried. *Zimmerman v. Schoenfeldt* (N. Y.) 6 *Thomp. & C.* 142, 146.

**Any mismanagement, neglect, or negligence.**

In Laws 1870, c. 93, making a railroad company liable for "any neglect" on its part which causes injury, the words "any neglect" have been construed to mean "ordinary negligence." *Atchison, T. & S. F. R. Co. v. Shaft*, 6 *Pac.* 908, 912, 33 *Kan.* 521 (citing *St. Joseph & D. C. R. Co. v. Grover*, 11 *Kan.* 302).

"Any negligence," as used in an instruction to the effect that any negligence would defeat the defendant, meant a want of that degree of care required in the particular instance. *Chicago, K. & N. Ry. Co. v. Brown*, 24 *Pac.* 497, 499, 44 *Kan.* 384.

Where a bill of lading contained a clause excepting "any act, neglect, or default whatsoever" of the master or mariners, and a clause against liability for leakage or breakage "when properly stored," the two clauses "any act, neglect, or default whatsoever," and "when properly stored," should be construed not to exempt the vessel from responsibility for leakage and breakage occurring as the result of bad stowage by the master or mariners. *The Colon* (U. S.) 6 *Fed. Cas.* 143.

"Any neglect," as used in Act 1870, § 1, providing that the railroads in the state should be liable for all damages done in consequence of "any neglect" on the part of the railroad companies, means failure to use ordinary care and diligence; that is, ordinary negligence. If the company fails to use ordinary care, it is guilty of ordinary negligence. If it fails to make ordinary and usual efforts to prevent the injury, there is some neglect on its part. It cannot omit that degree of diligence which men in general exercise in respect to their own concerns, without being open to the charge of neglect. *St. Joseph & D. C. R. Co. v. Grover*, 11 *Kan.* 302, 306.

The use of the terms "any neglect" and "any mismanagement," in an instruction that it is the law of Iowa that every railroad company shall be liable for all damages sustained by any person, including employes, in consequence of any neglect of the agents or any mismanagement of the engineers or other employes of the corporation to any person sustaining such damages, providing the plaintiff does not contribute to the injury complained of by his own want of proper care or his own negligence, "implies that the defendant is liable for want of extraordinary care, and not for the want of ordinary care only, as ruled by this court in *Hunt v. Chicago & N. W. R. Co.*, 26 *Iowa*, 363, 364." The terms do not include negligence and mis-

management of all degrees and character. The word "any," the use of which is the ground of objection, is an indefinite pronominal adjective, and is used to designate objects in a general way, without pointing out any one in particular. It indicates an indefinite number. It is not used to describe the qualities or character of objects. The language of the instruction, therefore, cannot be understood to lay down the rule that defendant is liable for want of the highest care. *Hamilton v. Des Moines Valley R. Co.*, 36 *Iowa*, 31, 39.

**Any money, jewels, or ornaments.**

Act N. J. April 6, 1865, provides that the proprietor of a hotel, inn, or boarding house who provides a safe for the safe-keeping of "any money, jewels or ornaments" belonging to the guests or boarders, after posting a notice stating such fact, shall not be liable for any loss of such money, jewels, or ornaments sustained by a guest or boarder, by theft or otherwise, who has neglected to deposit them in the safe. Held, that the act does not mean the money, jewels, or ornaments in excess of what the guest may reasonably require for his traveling expenses or personal convenience, but embraces all money, jewels, or ornaments which the guest brings with him, without reference to the amount or value. *Hyatt v. Taylor*, 42 *N. Y.* 258, 262.

**Any officer.**

"Any officer," as used in Code, § 627, providing that if the ballots for "any officer" are found to exceed the number of voters in the poll lists, etc., means any district, state, county, or township officer or officers for whom an excess of ballots are cast. *Rankin v. Pitkin*, 50 *Iowa*, 313, 316.

**Any part.**

In a fire policy providing that if the building, "or any part thereof," fall, except as the result of fire, all insurance immediately ceases, the clause "any part thereof" should not be construed technically or literally. The clause must have a fair and reasonable interpretation and construction, and that which is most favorable to indemnity. The clause is not to be understood so as to avoid the policy if an atom or some minute portion of the material in the insured building should fall. It means some functional portion of the structure, the falling of which would destroy its distinctive character as such, so that if the roof was blown from the building, and one of the upper rooms was uncovered, and the walls thereof partially blown away, but leaving more than three-fourths of the building intact and suitable for a dwelling house, and that on this condition it was burned, the clause would not exempt defendant company from liability. *London & L. Fire Ins. Co. v. Crunk*, 23 *S. W.* 140, 91 *Tenn.* (8 *Pickle*) 376.

A will authorizing and empowering the executors to convey and sell "all and any part" of the real estate belonging to testator, to pay his debts out of the proceeds, and giving the net residue, after payment of such debts, to the executors and to the survivor of them as joint tenants, should be construed to mean "all or any part" of the real estate of which testator died seised, and out of the proceeds of which his debts were payable, and did not require them, if they sold any, to sell all. *Forster v. Winfield*, 23 N. Y. Supp. 169, 170, 8 Misc. Rep. 435.

#### Any party.

"Any party," as used in Act 1880, requiring that in all civil actions "any party" thereto may be sworn and examined as a witness, notwithstanding "any party" thereto may sue or be sued in a representative capacity, included both parties, and did not permit the surviving party to a contract with a decedent alone to testify, but also the representative. *McCartin v. Traphagen's Adm'r*, 17 Atl. 809, 810, 43 N. J. Eq. (18 Stew.) 265.

Civ. Code, § 3214, providing that the mere delay in presenting a bill of exchange or promissory note, payable, with interest, at sight or on demand, does not exonerate "any party thereto," should be construed to mean the indorser, for the maker, surety, and the guarantors are never exonerated by any mere delay till the statute of limitations runs in their favor. *Machado v. Fernandez*, 16 Pac. 19, 20, 74 Cal. 362.

An act providing for the appointment of viewers to assess damages on the taking or occupying of private property for the construction of sewers, and authorizing "any party" to file exceptions to a report of the viewers, means any party interested in the proceedings. In re Construction of Sewer of Borough of Olyphant, 48 Atl. 487, 488, 198 Pa. 534; Appeal of Receivers of Pennsylvania Steel Co., 29 Atl. 294, 161 Pa. 571; In re Second St. in Steelton Borough, Id.

"Any party," as used in the Code, providing that any party aggrieved by the judgment of the district court may appeal, construed to mean any person who is a party to the action and aggrieved thereby. *Senter v. De Bernal*, 38 Cal. 637, 640; *Jones v. Quantrell*, 9 Pac. 418, 419, 2 Idaho (Hasb.) 153.

"Any party," as used in a statute authorizing appeals from a justice of the peace to the circuit court, and providing that "any party," etc., might appeal, means any one party, and it is not necessary, where there are several plaintiffs and defendants, that all should unite in the appeal. *People v. Wayne County Circuit Judge*, 36 Mich. 331.

#### Any person.

"Any person" means every person. *Peterson v. Delaware River Ferry Co.*, 42 Atl.

935, 190 Pa. 364 (citing *Williams v. Ivory*, 173 Pa. 536, 34 Atl. 292).

"Any person," as used in Rev. St. § 700, declaring that during the usual hours of business each day "any person" may enter the office of the register of deeds and examine the records in order to make a set of abstract books, means every person, and not that merely those who are interested in a particular piece of land may inspect and copy the records as to such piece. *Hanson v. Eichstaedt*, 35 N. W. 30, 33, 69 Wis. 538.

Rev. St. c. 58, § 13, gives any person injured by a dog a remedy against the owner or keeper. It was held that "any person" as there used was used in its broadest sense as anybody, any human being, and not in contrast to property. *Brewer v. Crosby*, 77 Mass. (11 Gray) 29.

"Any person," within Supplemental Act 1868, authorizing "any person" aggrieved by an assessment to appear before the commissioners, includes all persons without exception. *Virginia & T. R. Co. v. Ormsby County Com'rs*, 5 Nev. 341, 348.

By section 124 of the Criminal Code, "any person" who advises, aids, or participates in the embezzlement of public money by the officer or person charged with the collection, receipt, safe-keeping, transfer, or disbursement of such money is himself guilty of embezzlement. The words "any person" refer to all, and are not confined in meaning to a person or persons, or officer or officers, in some manner interested with the collection, handling, or care of money. *Mills v. State*, 73 N. W. 761, 765, 53 Neb. 263.

The words "any person," as used in statute providing that the filing of mechanics' liens to designate who may acquire such liens, includes both natural and artificial persons or corporations, and includes foreign corporations as well as domestic. *Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320, 321, 47 Am. St. Rep. 779.

Under Code 1873, § 1543, providing that "any person" violating an injunction against maintaining a legal nuisance on the premises described in the injunction shall be punished for contempt, a person not a party to the injunction can be punished for contempt if he uses property for the sale of liquor, since the decree reaches further than the party named, and in order to enforce the mandate of the law for the abatement of a nuisance, which is the property itself. *Silvers v. Traverse*, 47 N. W. 888, 889, 82 Iowa, 52, 11 L. R. A. 804.

"Any person," as used in Act April 8, 1833 (P. L. 251), providing that when "any person" shall make his last will and afterwards shall marry, or have a child not provided for, and shall die, leaving such child, such person shall be deemed intestate as to



such child, should be construed to include females as well as males. *Owens v. Haines*, 48 Atl. 859, 860, 199 Pa. 137.

"Any person," as used in Rev. St. § 6038, providing that when "any person" shall die leaving a widow, or minor child or children under the age of 15 years, certain property should not be deemed assets or administered as such, includes both men and women. In re *Hinton's Estate*, 60 N. E. 621, 623, 64 Ohio St. 485.

"Any person," as used in Act July 12, 1842, providing that "any person" arrested in a civil action may procure his discharge by executing a deed of assignment for the benefit of his creditors, means every person, and includes a minor or other person under disability. *Williams v. Ivory*, 34 Atl. 291, 292, 173 Pa. 536.

The term "any person," as used in Code Prac. art. 869, authorizing a mandate to prevent a usurpation in office to be obtained by any person, means what it says, and therefore a resident and a taxpayer of the city is competent to stand in judgment to determine the right of office of certain members of the sewerage and water board of the city. *State v. Kohnke*, 33 South. 793, 797, 109 La. 838.

The words "any person whomsoever," as used in Laws 1897, c. 312, § 28, subd. 2, providing for cancellation of a liquor certificate where any provision of the tax law has been violated by "any person whomsoever in charge of said premises," is not restricted to the sense of an agent or servant, for this would render them meaningless. In re *Cullinan*, 80 N. Y. Supp. 186, 187, 39 Misc. Rep. 641.

**Same—In limited sense.**

"Any person," as used in Act March 4, 1893, providing that every corporation shall be liable for injuries suffered by any employè for such injury resulting from the act or omission of "any person" done or made in obedience to any regulation of such corporation, or in obedience to any particular instruction given by any person delegated with the authority of the corporation, do not include the person injured, though such words in their usual and ordinary sense are inclusive and embrace every employè. *Dixon v. Western Union Tel. Co.* (U. S.) 68 Fed. 630, 634.

As used in Laws 1883, c. 104, § 1, providing that if "any person" shall be drunk in any highway, street, or in any public place or building, or if "any person" shall be drunk in his own house, or any private building or place, disturbing his family or others, he shall be punished, etc., "any person" should be construed to mean only such persons as act voluntarily in the performance of the interdited act, and hence does not include

idiots, insane persons, children under seven years of age, babes, and persons who have been made drunk by force or fraud and carried into a public place. Human actions can hardly be construed as culpable either in law or morals unless an intelligent consent of the mind goes with the actions, and to punish where there is no culpability would be the most reprehensible tyranny, and hence one who innocently drinks of the liquor which intoxicates him, and without having any knowledge of its intoxicating quality, and without having any idea that it would make him drunk, is not guilty of the offense prescribed by the statute. *State v. Brown*, 16 Pac. 259, 260, 38 Kan. 390.

Under Gen. St. Ky. c. 57, p. 550, which gives a right of action for damages to the personal representative of "any person" whose life is lost by the negligence of a railroad company, etc., to be pursued in the same manner that the person himself might have done for any injury where death did not ensue, the right is not confined to decedents who were citizens or residents of Kentucky, the words "personal representative" not being limited to a personal representative appointed in and by the state of Kentucky, but meaning any one appointed in any state, the action being transitory. *Marvin v. Maysville St. R. & Transfer Co.* (U. S.) 49 Fed. 436, 437.

"Any person," as used in Collection Law 1799, § 43 (1 Stat. 1660), providing that if any chest of tea shall be found in the possession of "any person," unaccompanied with the proper marks and certificates, it shall be presumptive evidence that the same shall be liable to forfeiture, means the possession of the purchaser to whom the certificates are required to be delivered on the sale, and not the possession of the wrongdoer. 651 Chests of Tea v. United States (U. S.) 22 Fed. Cas. 253, 257.

Act Oct. 19, 1876 (Sess. Laws, 8), amending section 17, Act Dec. 22, 1853 (Or. Laws, 656), provides that every boat used in navigating the waters of the state shall be subject to a lien for all debts due to persons by virtue of a contract with the owners of a boat, or with the agents, contractors, or subcontractors of such owner, or any of them, or with "any person" having been employed to construct, repair, or launch such boat or vessel, on account of labor done and materials furnished by mechanics, tradesmen, or others in the building, repairing, etc., of such vessel. Held, that the phrase "any person" should be construed to mean any person sustaining some relation to the owner; one having others employed by authority of the owner. *The City of Salem* (U. S.) 10 Fed. 843, 845.

"Any person or persons," as used in the Constitution relating to those who commit misprision of treason or felony, are necessarily confined to any person or persons owing

allegiance to the United States, though the words in themselves are broad enough to comprehend every human being. *United States v. Palmer*, 16 U. S. (8 Wheat.) 610, 631, 4 L. Ed. 471.

"Any person," as used in Act Nov. 14, 1786, which provides that no mortgage hereafter made should affect a bona fide purchaser unless put on record within 30 days after its execution, and that mortgages heretofore given shall have no effect in law or equity against "any person" except the mortgagor unless recorded under the act of 1785, etc., means only such persons as were previously mentioned in the preamble or the preceding section of the act; that is, mortgagees and purchasers without notice. *Low v. Goldtrap*, 1 N. J. Law (Coxe) 272, 274, 275.

A corporate charter, providing that if "any person" chosen to be warden shall refuse to accept the office of warden he shall forfeit a certain sum, means, under the direct provisions of the charter, only such persons eligible by the terms of the charter to the office of warden. *Company of Tobacco Pipe Makers v. Woodroffe*, 7 Barn. & C. 838.

The words "any person," in Code Civ. Proc. § 401, subd. 7, providing for the taking of the affidavit of any person for the purposes of a motion when required by his adversary, is applicable only to those persons who may by existing laws be subjected to this species of examination, and a party to an action cannot be compelled by the adverse party to make an affidavit for the purpose of a motion. *Hodgkin v. Atlantic & P. R. Co.* (N. Y.) 5 Abb. Prac. (N. S.) 73, 74.

**Same—In law of negligence by carriers.**

Under a statute providing that, whenever "any person" shall die from any injury resulting from or occasioned by the negligence of any person or employé while running a train of cars, his representatives may recover, the words "any person" do not include a servant whose death was occasioned by the negligence of a fellow servant. *Sullivan v. Missouri Pac. Ry. Co.*, 10 S. W. 852, 854, 97 Mo. 113; *Atchison, T. & S. F. R. Co. v. Farrow*, 6 Colo. 498, 505; *Lutz v. Atlantic & P. R. Co.*, 30 Pac. 912, 913, 6 N. M. 496, 16 L. R. A. 819; *Proctor v. Hannibal & St. J. R. Co.*, 64 Mo. 112, 122; *Connor v. Chicago, R. I. & P. R. Co.*, 59 Mo. 285, 292.

The term "any person," in Rev. St. Mo. § 4425, authorizing a suit for damages for wrongful death when any person shall die from any injury resulting from the negligence, etc., of any officer, etc., while running, conducting, or managing any locomotive, car, or train, etc., has been held to include all persons—employés as well as others. *Matz v. Chicago & A. R. Co.* (U. S.) 85 Fed. 180, 184; *Schultz v. Pacific R. R.*, 36 Mo. 13, 28.

In Pub. St. c. 204, § 15, providing that carriers shall be liable for the loss of life of "any person," whether a passenger or not, in the care of such carrier, "any person" cannot be construed to include an employé injured by the negligence of a fellow servant. *Miller v. Coffin*, 36 Atl. 6, 8, 19 R. I. 164.

The words "any person," as used in Code 1880, § 1047, declaring that a railroad company shall be liable for any damages or injury which may be sustained by any person from a locomotive or cars while running at a certain rate of speed, does not embrace employes of the road. *Dowell v. Vicksburg & M. R. Co.*, 61 Miss. 519, 529.

"Any person," as used in Rev. St. c. 81, § 21, providing that railroad corporations shall be liable for damages sustained by "any person" by the neglect of their servants, is limited in its application to such persons as were not the servants of the corporation, and who sustained damages without any contributory fault. *Carle v. Bangor & P. Canal & R. Co.*, 43 Me. 269, 271.

**Same—As including particular persons.**

1 Rev. St. p. 728, § 55, authorizing the application of rents and profits to the use of "any person," includes persons unascertained at the time of the designation of those to whom there is granted a contingent remainder. *Harrison v. Harrison*, 36 N. Y. 543, 546.

The term "any person" in Gen. St. § 3087, prescribing a penalty for "any person" who shall keep for sale and sell spirituous and intoxicating liquors without a license, includes a licensed pharmacist. *State v. Gray*, 22 Atl. 675, 676, 61 Conn. 89.

A city ordinance prohibiting "any person" not an employé of a railroad from jumping on or off a moving train includes all persons, so that one not an employé, attempting to board a moving train in violation of such ordinance, was guilty of contributory negligence, although he intended to become a passenger. *Mills v. Missouri, K. & T. R. Co. of Texas* (Tex.) 57 S. W. 291, 292.

Gen. Laws 1885, c. 296, § 4, providing that "if any person shall vend" any intoxicating liquors or drinks in any county whatever without a license he shall be punished, is broad enough to include a brewer who establishes an agency for the sale of beer of his own manufacture in a town some miles from his duly licensed place of business, and there sells to such persons as desire to purchase, without obtaining a license for carrying on the business from the authorities of such town. *Peltz v. State*, 32 N. W. 763, 68 Wis. 538.

In Code, § 1772, providing that "any person," after 90 days and within 12 months thereafter, may recover money lost at gaming, by an action for the use of the wife, "any person" includes a husband as well as

third persons. *Forrest v. Grant*, 79 Tenn. (11 Lea) 305, 306.

Laws 1872, c. 127, § 5, giving to any city, town, or village, or "any person" who may take charge of and provide for an intoxicated person, a right of action to recover from the vendor of the liquor a reasonable compensation and \$2 per day, etc., should be construed to include a wife who had taken charge of and provided for her intoxicated husband. *Wightman v. Devere*, 33 Wis. 570, 578.

Comp. Laws 1881, § 172, requiring every county officer to keep all books and papers required to be kept in any public county office open for the examination of "any person," includes any person having "some or any present and existing interest to be subserved by the examination, and it can make no difference whether such interest be great or small, or whether he is interested as a principal or as an agent, or as an attorney or as a client. He has a right to examine such books and papers to the extent of his interest." *Boylan v. Warren*, 18 Pac. 174, 176, 39 Kan. 301, 7 Am. St. Rep. 551.

In Transfer Act 1892, § 2, exempting from taxation a transfer to "any person" to whom the decedent's grantor, donor, or vendor has stood for not less than 10 years in the mutually acknowledged relation of a parent, "any person" cannot be considered to apply only to illegitimate children of the decedent, etc., but applies also to any person, infant or adult, though not of his blood nor legally adopted by him, to whom he has stood in loco parentis, receiving in return filial devotion and services. In *re Beach's Estate*, 48 N. E. 516, 517, 154 N. Y. 242.

Rev. St. c. 126, § 29, making it criminal for any clerk, agent, or servant to embezzle or fraudulently convert, without the consent of his employer or master, any money or property of "any person," construed to include the property belonging to his master. *Commonwealth v. Stearns*, 43 Mass. (2 Metc.) 343, 346.

#### **Any person interested.**

"Any person interested," as used in Code 1876, § 2519, authorizing "any person interested" to appear and contest any item of the account, and to examine witnesses, etc., in a settlement by a personal representative of one deceased, includes a creditor, as our whole system of legislation in reference to estates of decedents rests on the theory that creditors have a primary interest in all proceedings pertaining to the settlement of estates, and the policy of the law has been to afford them every reasonable opportunity to protect that interest by intervening as parties. *Byrd v. Jones*, 4 South. 375, 377, 84 Ala. 336.

The words "any person interested," used in *Sess. Laws 1895*, p. 327, declaring that any

person interested may under certain conditions bring a suit in equity to contest a will, means a person who at the time of the probate is directly interested in the estate in a pecuniary way, and so, where one's father had a right to maintain such an action, but failed to do so during his lifetime, and the person himself had no interest under the will, and would not have inherited excepting through his father, he could not maintain the action after the ancestor's death. *Storrs v. St. Luke's Hospital*, 54 N. E. 185, 187, 180 Ill. 368, 72 Am. St. Rep. 211.

Rev. St. 1874, p. 112, which provides that "whenever any person dies seized or possessed of any real estate in this state, or having any right or interest therein, and has no relative or creditor within this state who will administer upon such deceased person's estate, it shall be the duty of the county court on application of 'any person interested' therein to commit the administration of such estate to the public administrator of the proper county," is not confined to persons residing within the state, but is general in its application, and would include any person interested, without reference to his place of residence. *Branch v. Rankin*, 108 Ill. 444, 447.

#### **Any place.**

In Pub. St. c. 107, § 25, providing that whoever is found in a state of intoxication in a public place, or is found in "any place" in a state of intoxication, committing a breach of the peace, or disturbing others by noise, may be arrested without a warrant by a police officer, "any place" will be construed to include a dwelling house in which the accused resides. *Ford v. Breen*, 53 N. E. 136, 173 Mass. 52.

The phrase "any place," as used in a statute defining "bunko steering," undoubtedly means and contemplates some place within the state, and the meaning thereof cannot be so enlarged as to make it apply to and include some place in another state. *Cruthers v. State* (Ind.) 67 N. E. 930, 932.

#### **Any pollbook.**

"Any pollbook," as used in Election Law, § 41, providing that if the clerk of the county should refuse to count the vote on "any pollbook" of any election held by the people he shall be liable to indictment, has reference to the pollbook of a legal election, and not to the pollbook of an election that the record in the office of the clerk of the county advises him is prima facie void, since the law does not contemplate any such thing as an illegal election. *Howard v. McDiarmid*, 26 Ark. 100, 106, 109.

#### **Any poor person.**

The term "any poor person," as used in Rev. St. c. 48, § 14, providing that, when

"any poor person" shall be unable to support himself, his parents, grandparents, children, or grandchildren shall be liable for his support in the order named, are of a general import, and include all poor persons of every kind or class, insane as well as rational. *Trustees of Poor of Sussex County v. Jacobs* (Del.) 6 Houst. 330, 336.

#### **Any portion of my estate.**

The words "any portion of my estate," in a will conferring power of sale to the devisees of a life estate, extend the power to the principal, and permit the conveyance of a fee. *Glover v. Stillson*, 15 Atl. 752, 754, 56 Conn. 316.

A will giving the executrix "power to sell 'any portion of my estate' not devised to my children" has no ambiguous meaning, and the power to sell is unrestricted, except as to the property specifically devised to the children. *White v. Guthrie* (Ky.) 8 S. W. 274, 275.

#### **Any process or writ.**

In Rev. Code Del. c. 120, § 60, providing that if the goods and chattels of a tenant are received by fraud, or any process of execution, attachment, or sequestration, the goods and chattels shall be liable to one year's rent of such premises in arrear or growing due in pursuance of said process, the words "any process of execution, attachment or sequestration," include all kinds of process by which creditors can proceed against the goods and chattels of the tenant on demised premises to enforce payment of their claims. In *re Mitchell* (U. S.) 116 Fed. 87, 94.

The statutory remedy for the enforcement of a claim for rent is embraced within the terms "any process of law" contained in the exemption article of the Constitution of 1868, and the personal property exemption secured by that instrument, other than agricultural products raised on the land rented, may be claimed by the head of a family, residing in this state, as against the lien for rent given by the statute in favor of the landlord. *Hodges v. Cooksey*, 15 South. 549, 551, 83 Fla. 715, 24 L. R. A. 812.

"Any and every writ," in Act April 4, 1873, as amended by Act June 20, 1883, providing that no foreign insurance company shall do any business in the state unless it has filed a stipulation agreeing that no legal process served on an agent shall have the same effect as if served personally upon the company within the state, and that the term process shall include "any and every writ," clearly comprehends an attachment execution. *Kennedy v. Agricultural Ins. Co.*, 30 Atl. 724, 725, 165 Pa. 179.

#### **Any profits or income.**

1 Rev. St. p. 416, § 9, provides that if the president or other officer of any incorporated

company named in the assessment roll shall show to the satisfaction of the board of supervisors at their annual meeting, by an affidavit of such officer, that such company is not in receipt of "any profits or income," the name of such company shall be stricken out of the assessment roll, and no tax shall be imposed on it. Held, that "any profits or income" does not mean net profits and income. *People v. Supervisors of City and County of New York* (N. Y.) 18 Wend. 605, 606.

#### **Any property.**

Act May 2, 1852, § 7, providing that the board of supervisors of a county shall have power, with the consent of a majority of all its members, to purchase or receive "any property" for the use of the county to erect or lease a courthouse, jail, and such other buildings as may be necessary for the use of the county, should be construed to mean both real and personal property. *De Witt v. City of San Francisco*, 2 Cal. 280, 295.

In Laws 1872, c. 161, authorizing an action against any person, acting for or on behalf of a municipality, by whose acts the corporation or its taxpayers may be injured in its property rights or pecuniary interests, to "prevent waste or injury to any property, funds, or estate" of such county, town, or municipal corporation, such words mean "not only property and funds in possession, but the credit and power of taxation, and of borrowing money in anticipation of taxation, and every process or means by which the municipal corporation can be charged peculiarly, or the taxable property within its limits burdened." *Ayers v. Lawrence*, 59 N. Y. 192, 198; *Osterhoudt v. Rigney*, 98 N. Y. 222, 231.

"Any kind of property," as used in a statute authorizing a mechanic's lien on any building, lot, farm, or "any kind of property" not herein enumerated, does not include railroad property, and hence does not authorize a lien thereon. *Buncombe County Com'rs v. Tommey*, 5 Sup. Ct. 626, 629, 115 U. S. 122, 29 L. Ed. 308.

The words "any personal, mixed or real property, franchises and rights," in the statute authorizing the levy of a special execution process against an insolvent corporation upon such property, are certainly broad enough to cover patent rights. For to hold otherwise would defeat the legislative intention, which clearly was to subject all the property and rights of every description belonging to an insolvent corporation to the discharge of its debts. *Erie Wringer Mfg. Co. v. National Wringer Co.* (U. S.) 63 Fed. 248, 249.

#### **Any provision by will.**

The Illinois statute declaring that "any provision by will" bars dower means that where any property is bequeathed to the wid-

ow which from its amount might be presumed to be in lieu of dower, and there is nothing in the will to direct it, the dower is barred unless the widow elected to take her dower within the statutory period; it does not mean that any bequests to the widow, however small, necessarily bar the dower. *United States v. Duncan* (U. S.) 25 Fed. Cas. 926.

**Any public purpose.**

"Any public purpose," within the charter of the city of Burlington providing that whenever, in the opinion of the city council, it is expedient to borrow money for "any public purpose," the question shall be submitted to the citizens, etc., is to be construed to mean any purpose within the legitimate objects of the charter; that is, any public purpose which may be necessary for the execution of the corporate powers conferred. The purpose must relate to and be connected with the objects of the incorporation, and it must be a public purpose; that is, relating to and concerning the public, as contradistinguished from one or more individuals or corporations. The term does not include the construction of a railroad, and therefore confers no power upon the city to borrow money to aid in the construction thereof. *Chamberlain v. City of Burlington*, 19 Iowa, 395, 402.

**Any railroad.**

"Any railroad," as used in Rev. St. 1895, art. 3017, giving a right of action when the death of a person is caused by the negligence of the receiver or other person in charge of any railroad, includes street railroads. *Bammel v. Kirby*, 47 S. W. 392, 19 Tex. Civ. App. 198 (citing *Johnson's Adm'r v. Louisville City Ry. Co.*, 73 Ky. [10 Bush] 231).

The term "any railroad," in a statute expressly referring to any railroad, indicates a legislative intent to enact a general law regulating all railroad corporations. *Inhabitants of Montclair v. New York & L. G. R. Co.*, 18 Atl. 242, 244, 45 N. J. Eq. (18 Stew.) 436.

**Any respect untrue.**

Where a life insurance policy contains a condition that if the statement in the application be found in "any respect untrue" it shall be void, untrue answers to specific questions avoid the policy, although relating to matters not materially affecting the risk, and not made with a view to deceive the company. *Wilkinson v. Union Mut. Life Ins. Co.* (U. S.) 29 Fed. Cas. 1268.

**Any road.**

Code, § 419, providing for the submission to the people of the question whether the county will construct or aid to construct "any road" which may call for extraordinary expenditure, the term "any road" is not restricted to common roads, streets, and lanes,

but applies to an indefinite number of roads, to all and to all kinds which may require an extraordinary expenditure, and includes railroads. *Dubuque County v. Dubuque & P. R. Co.* (Iowa) 4 G. Greene, 1, 2.

The use of the word "any," in a statute authorizing the submission of the question whether the county will construct or aid to construct "any" road or bridge which may call for an extraordinary expenditure, refers to any such road as may require the expenditure named, and does not operate to extend the meaning of the word "roads" to include railroads. *Stokes v. Scott County*, 10 Iowa, 166, 167, 177.

**Any scheme or artifice to defraud.**

The expression "any scheme or artifice to defraud," within Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], making it a crime to use the mails for promoting such a scheme, will not be limited to the particular deceptions mentioned in the statute, but will be taken to mean any scheme or artifice of a general character of those specified in the act. The general language of the act must be limited to such schemes and artifices as are ejusdem generis. *United States v. Beach* (U. S.) 71 Fed. 160, 161.

**Any such case.**

In construing the statute providing that writs of quo warranto might be issued in certain cases, and "in any such case the writ aforesaid may be issued upon the suggestion of the Attorney General," etc., the court said: "Upon every principle of grammatical relation and obvious meaning, we must intend that the Legislature (by the use of the words 'in any such case') had in view the cases specified in the same section immediately preceding the final clause. It was of these it had been speaking, and it was of these it was continuing to speak." *Commonwealth v. Burrell*, 7 Pa. (7 Barr) 34, 37.

**Any such person.**

The phrase "any such person" in Laws 1899, c. 499, providing that the state superintendent of elections or any deputy may call on any person to assist him in the performance of his duty, and providing that any such person who fails to respond thereto, or who shall willfully or feloniously hinder or delay, or attempt to hinder or delay, such superintendent in the performance of his duty, shall be guilty of a felony, plainly refers to the persons called upon by the officer to aid him, and does not include a person not called upon to mean any person. *People v. Hochstim*, 73 N. Y. Supp. 626, 634, 36 Misc. Rep. 562.

**Any tax certificate.**

"Any tax certificate," as used in Laws 1878, c. 334, § 7, providing that every action to cancel any tax certificate shall be brought

within a certain time, would include a certificate issued on sale of land for nonpayment of a special assessment. *Dalrymple v. City of Milwaukee*, 10 N. W. 141, 144, 53 Wis. 178.

**Any term of years.**

How. Ann. St. § 9124, provides that the offense of arson shall be punished by imprisonment for "any term of years." Held, that the phrase "any term of years" must be construed to mean for a time not less than two years. *People v. Burridge*, 58 N. W. 319, 99 Mich. 343 (citing *In re Lamphere*, 61 Mich. 105, 108, 27 N. W. 882; *Ex parte Seymour*, 31 Mass. [14 Pick.] 40, 48; *Ex parte Dick*, Id. 86; *Ex parte White*, Id. 90, 93).

**Any time.**

See "At Any Time."

**Any unsettled person.**

"Any unsettled person," as used in St. 1874, c. 274, § 3, relating to settlements of paupers, which provides that no existing settlement shall be changed by any provisions of this act unless the entire residence and taxation herein required accrue after its passage, but "any unsettled person" shall be deemed to have gained a settlement upon the completion of the residence and taxation herein required, etc., means any person unsettled at the time the statute took effect. *Worcester v. Great Barrington*, 5 N. E. 491, 492, 140 Mass. 243.

**Any viaduct.**

Where the charter of a city authorized the city to require railroad companies to keep in repair any viaduct or viaducts over streets crossed by their tracks, the phrase "any viaduct or viaducts" included such as were then in existence, as well as those subsequently constructed. *Chicago, B. & Q. R. Co. v. State*, 66 N. W. 624, 628, 47 Neb. 549, 41 L. R. A. 481, 58 Am. St. Rep. 557.

**Any way.**

A will bequeathing an annuity to the testator's wife, payable "annually or in any way she may wish," should not be literally construed, but the more moderate construction should be adopted, namely, that she should be at liberty to call for the payment of annuity at short periods; that is to say, at the beginning of each quarter. The words should not be construed to mean that the wife could claim the payment of the whole annuity in advance. *Hall v. Hall* (S. C.) 2 McCord, Eq. 269, 281.

In an accident insurance policy which insures against death from injuries through external violence and accidental means, unless it is caused from taking poison "in any way," suicide, etc., the words "in any way" relate to the mode or manner in which the

poison is taken, and not to the motive of the insured in taking it, and hence cannot be construed to embrace his involuntary as well as his voluntary action in that regard. *Metropolitan Acc. Ass'n v. Frolland*, 43 N. E. 766, 768, 161 Ill. 30, 52 Am. St. Rep. 359.

**Any will or codicil.**

"Any will or codicil," as used in the enacting clauses of an act relating by its title only to wills and codicils of real estate, was so limited by the title, and could not be construed to affect mere testaments, wills, or codicils of personal estate only. *Brett v. Brett*, 3 Add. Ecc. 210.

The preamble of 25 Geo. II, c. 6, after reciting the provision in the statute of frauds which requires that all devises of land should be attested and subscribed in the presence of the devisor by credible witnesses, and declaring that it had been found to be a wise and good provision, but that doubts had arisen who were to be deemed legal witnesses within the intent of the act, declares in the enacting portion that if any person shall attest the execution of "any will or codicil" which shall be made after the time therein mentioned, to whom any devise, legacy, or gift shall be made of real or personal estate, such devise, legacy, or gift shall, so far as regards such person, be utterly null and void. Held, that "any will or codicil" in the enacting clause meant such wills or codicils as by the statute of frauds require to be attested by witnesses, and did not extend to wills of personal estate only. Therefore a legacy to a person who is an attesting witness to such a will is not void. *Emanuel v. Constable*, 3 Russ. 436, 439.

**Any woman.**

St. 1855, c. 304, § 1, providing that the real estate and personal property of "any woman who may hereafter be married in this commonwealth," and its rents, issues, and profits, shall remain her sole and separate property, must be construed as extending to and including a woman who, with her husband, had her domicile in this commonwealth at the time of their marriage, although the marriage was solemnized in another state. *Woodbury v. Freeland*, 82 Mass. (16 Gray) 105, 107.

As used in a statute providing that divorce might be granted for certain named offenses, and that the party should prefer a petition, and on proof of the allegations the court might grant a divorce, and that the court might assign to "any woman so divorced" part of the estate of her husband, the expression "any woman so divorced," though by itself all-inclusive, meant only those women who were divorced for the fault of the husband. *Allen v. Allen*, 43 Conn. 419, 424.

**ANY LAW, USAGE, OR CUSTOM TO THE CONTRARY NOTWITHSTANDING.**

The fact that a statute concludes "any law, usage, or custom to the contrary notwithstanding" does not imply that it should be given a repealing tendency. The phrase was formerly frequently used by the Legislature to round off a period, and perhaps to jog the memory of the judges, lest they forget that posterior laws abrogate those which happen to be prior and contrary to them. *City of Philadelphia v. Davis* (Pa.) 6 Watts & S. 269, 278.

**ANY ONE.**

"Any one creditor," as used in 2 Rev. St. p. 473, § 122, providing that justices of the peace may issue writs of attachment against the personal property of a debtor when the amount claimed by any one creditor does not exceed \$100, is to be construed to mean any one claiming under the same bond and affidavit. *State v. King*, 5 Ind. 439, 440.

"Any one year," as used in Act Cong. April 20, 1818, c. 118, providing that receivers of public money for the lands of the United States shall receive an annual salary and a commission of 1 per cent., provided the whole amount shall not exceed for any one year the sum of \$36,000, meant any one year from the date of the commission of the receiver, and not necessarily commencing with the calendar year. *United States v. Dickson*, 40 U. S. (15 Pet.) 141, 159, 10 L. Ed. 639.

**ANY OTHER.**

A power authorized an attorney to demand plaintiff's just dower be assigned to her in any and all of the before mentioned premises or "any other," but no premises were described. Held, that the words "any other" added nothing to its meaning. *Sloan v. Whitman*, 59 Mass. (5 Cush.) 532, 533.

A building contract providing that any change in the plans, either in quantity or quality of the work, should be executed by the contractor without holding the contract as violated or void "in any other respect," excludes the implication of any change in terms, except such as would result from the alteration of the plans, but not such changes as would be the necessary consequence thereof. *Lilly v. Person*, 32 Atl. 23, 24, 168 Pa. 219.

**As ejusdem generis.**

The general words "any other thing," in a statute first enumerating certain particular things, and then using the general terms "any other things," is ordinarily to be confined to things ejusdem generis; that is, of the same kind as the special words have enumerated. But the reason of this rule of con-

struction is not applied when it is evident that the intention of the statute will be thwarted by its application. *State v. Williams*, 35 Mo. App. 541, 548.

The phrase "any other dangerous weapon," following in a statute immediately the kind of weapons declared to be dangerous, referred to other weapons not included in the description, but of the same class. *State v. Brown*, 6 South. 541, 41 La. Ann. 345.

A fire policy which provided that, if camphene, spirit gas or burning fluid, phosgene, "or any other inflammable liquid" should be used, an additional premium would be required, meant some liquid equally inflammable with those enumerated. *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421, 426.

Section 36 of the act concerning boats and vessels, which enumerates the causes of indebtedness for which a part owner of a boat may sue a boat, and reciting thereafter "any other cause of indebtedness whatever," means such causes of indebtedness as had been previously enumerated. *Langstaff v. Rock*, 13 Mo. 579, 580, 582.

The clause "any other matter or thing whatsoever," as used in Act 1882, rendering it indictable to put into any bag or bale of cotton any stone, wood, trash cotton, cotton seed, "or any other matter whatsoever," is employed literally, and is not restricted to the things previously enumerated. *State v. Holman* (S. C.) 3 McCord, 306, 308.

Rev. St. c. 192, § 1, gives a review as of right to the party against whom judgment has been rendered in any civil action in the court of common pleas in which an issue of fact has been joined, and section 2 authorizes the Supreme Court, upon petition, to grant a review "in any other case" where it shall appear that justice has not been done through any accident, mistake, or misfortune. Held, that the words "any other case" are not to be construed as meaning in any other actions than those described in section 1, but as meaning in any other than those cases in which the party alleging injustice in the judgment has had an opportunity to correct it by a rehearing upon review as of right. *Coburn v. Rogers*, 32 N. H. 372, 374.

**Any other cause or reason.**

In Rev. St. c. 95, § 4, providing that any married woman whose husband, either from drunkenness, profligacy, or "any other cause," shall neglect or refuse to provide for her support and the support and education of her children, shall have the right in her own name to transact business, and to receive and collect her own earnings and the earnings of her own minor children, and apply the same free from the control of her husband, the phrase "any other cause" should not be construed as meaning every case where for any reason the husband does not furnish his

wife with food and raiment and all the necessities of life, but means vices of like kind to drunkenness or profligacy, or to conduct tending to the same result; hence, where a husband was not lazy, indolent, or vicious, but was merely a careless manager, and in debt, and unable to supply the necessary wants of his wife, though he worked sometimes on a farm and sometimes in a stone quarry, the statute did not apply. *Edson v. Hayden*, 20 Wis. 682, 684.

"Any other cause," as used in a contract for the purchase of sugar cane, providing that the purchaser should be entitled to refuse to receive cane in case its machinery became disabled in consequence of fire, want of water, breakdown, labor strikes, or "any other cause" beyond the control of defendant, was not subject to the rule *ejusdem generis*, but was a sufficiently broad expression to cover any uncontrollable overpowering cause necessitating the suspension of operation. *Vredenburg v. Baton Rouge Sugar Co.*, 28 South. 122, 124, 52 La. Ann. 1668.

"Any other reason," as used in Civ. Code, § 2533, providing that "the surety of any guardian on his bond, may at any time make complaint, to the ordinary of any misconduct of his principal in the discharge of his trust or for any other reason show his desire to be relieved as surety," relates to some ground or grounds of relief not *ejusdem generis* with those which arise from the guardian's official misconduct, such as want of personal integrity, lack of business capacity, extravagant or reckless living, indulgence in vicious or immoral habits, criminality, etc. *National Surety Co. v. Morris*, 86 S. E. 690, 691, 111 Ga. 307.

#### Any other felony.

"Any other felony," as used in Sanb. & B. Ann. St. § 4385, providing a penalty for any person who shall assault another with intent to commit burglary, robbery, or mayhem, and who shall attempt to commit arson or any other felony, means such felonies as are committed by force, and does not include adultery. *State v. Goodrich*, 54 N. W. 577, 84 Wis. 359.

"Any other felony," as used in Rev. St. § 819 [U. S. Comp. St. 1901, p. 629], providing that when the offense charged is treason or a capital offense the defendant shall be entitled to 20 and the United States to 5 peremptory challenges, and on the trial of "any other felony" the defendant shall be entitled to 10 and the United States to 3 peremptory challenges, is to be construed to mean offenses other than capital offenses. *United States v. Coopersmith* (U. S.) 4 Fed. 198, 199.

#### Any other funds.

By a codicil to a will a testator bequeathed to his executors, for the use of his chil-

dren, "whatever stock now stands in my name, or may hereafter stand in the Dutch funds, or 'any other funds,'" including any interest arising therefrom. Held, that the words "any other funds" included stock in British funds, as well as the testator's interest in Dutch funds. *Montresor v. Montresor*, 1 Colly. 693, 694.

#### Game or gambling device.

The phrases "any other species of gaming whatever" and "any other game of hazard or address" in Act 1879, c. 8, making void all contracts the consideration of which is money lost by playing at cards, dice, billiards, horse racing, or any other species of gaming whatever, include cockfighting. *Bagley v. State*, 20 Tenn. (1 Humph.) 486, 489.

Under a statute which prohibits gaming, and, after enumerating several banking games, prohibits "any other banking game," the phrase "any other banking game" means any banking game not enumerated. *Randolph v. State*, 9 Tex. 521, 524.

Under a statute prohibiting the use of certain named gambling devices, and also of "any other gambling devices whatever," it is held that the latter phrase intended to have reference to such device as changed the name of the bank or table, or other device specifically prohibited, without any essential change in the game played, and that a horse race could not be considered as coming within the prohibition of the statute contained in the phrase quoted. *McElroy v. Carmichael*, 6 Tex. 454, 456.

#### Any other house.

The phrase "any other house," in Act 1809, c. 138, making it an offense to willfully burn a mill or any other house, includes a schoolhouse not parcel of a dwelling house. *Jones v. Hungerford* (Md.) 4 Gill & J. 402, 406.

Under 2 Litt. & S. St. Law, 989, providing that all and every person or persons that shall intentionally and unlawfully burn any tobacco house, warehouse, or storehouse, or any house or place where wheat, Indian corn, or other grain shall be kept, or "any other house or houses whatsoever," shall be punished, etc., the offense is not limited to houses of the class mentioned in the act, and hence includes a schoolhouse. *Wallace v. Young*, 21 Ky. (5 T. B. Mon.) 155, 156.

#### Any other law.

Laws 1872, c. 182, relating to the grant of railroad aid by towns, section 11 provides that, if any county, town, city, or village shall issue and deliver to any railroad company any bonds in pursuance of the provisions of the act, it shall not thereafter issue or deliver any bonds or incur any liability in aid of the construction of the railroad of such company



by virtue of the authority of "any other law" of the state. Held, that "any other law" means laws which were in existence when the act of 1872 was passed, for it could not operate on laws thereafter enacted, as future acts in conflict with it would necessarily operate as a repeal of the section pro tanto, and the Legislature of 1872 could not bind future Legislatures. *Oleson v. Green Bay & L. P. Ry. Co.*, 36 Wis. 383, 389.

**Any other manner.**

In Rev. St. c. 90, § 83, providing that when any person shall claim any title or interest by force of a subsequent attachment, or a purchase, or a mortgage, "or in any other manner," in any estate that is attached in a suit between other persons, a claim asserted "in any other manner" means any claim subsequent to a prior attachment. *Peirce v. Richardson*, 50 Mass. (9 Metc.) 69, 71.

**Any other matter.**

Code 1888, § 3299, allowing a defendant to plead as a counterclaim "any other matter as would entitle him either to recover damages at law from the plaintiff \* \* \* or to relief in equity," does not permit him to set up unliquidated damages based on breach of a contract other than that sued on. *American Manganese Co. v. Virginia Manganese Co.*, 21 S. E. 466, 91 Va. 272.

The release of a debtor, executed by his creditors, and reciting that they released all claims or demands which they or any person claiming under them might have for and on account of certain bonds, notes, and debts, and from "any other matter or thing" from the beginning of the world, meant those claims which were positively released and covenanted not to be sued for. Words of such nature are often found in giving releases, but they are generally restrained to the subject-matter on which the parties act. *Halsey v. Fairbanks* (U. S.) 11 Fed. Cas. 295, 303.

**Any other means.**

"Any other means," as used in Comp. Laws, § 7557, enacting that every person who shall set fire to any building, or by "any other means" attempt to cause any building to be burned, shall be punished by fine or imprisonment in the state prison, means some physical act on the part of accused, and does not embrace a case where one solicits another to fire a building. *McDade v. People*, 29 Mich. 50, 55.

**Any other officer.**

Under Code Civ. Proc. § 14, authorizing an action on bonds of guardian, sheriff, "or any other officer," county treasurers are included, though they are not specially named in the section. *Alexander v. Overton*, 34 N. W. 629, 630, 22 Neb. 227.

**Any other person.**

Code 1873, § 1553, providing that any express company, railway company, or any person in the employ of any express company, or any common carrier, or any person in the employ of any common carrier, or if "any other person" knowingly bring within this state intoxicating liquor, he shall be punished, etc., cannot be construed to enlarge the classes which precede the words "any other person" and means simply other persons of like kind or in like employment with those specified, and are limited to other like persons. Hence a driver for one who was engaged in the business of moving, transporting, or delivering goods for hire the same as a transfer company, though not a public carrier, because his employment with one corporation was exclusive, belongs to the classes enumerated in the statute, or, rather, to a like class. *State v. Campbell*, 40 N. W. 100, 101, 76 Iowa, 122.

Gen. St. c. 47, art. 1, § 4, provides that, if the loser or his creditor does not sue for the money or thing lost at gaming within six months after its payment or delivery, any other person may sue the winner and recover treble the amount of value of the property or thing lost. Held, that the words "any other person" did not include the wife of the loser, since the loss would not affect her personal estate, and therefore she was disqualified to sue alone. *Moore v. Settle*, 82 Ky. 187, 56 Am. Rep. 889.

Code, p. 542, § 10, providing that the court shall have power at any time to revoke an order committing the estate of a decedent to the sheriff for administration, and to grant letters to "any other person," does not mean that the court will revoke the order at the application of any person, but is limited by the power of the court to exercise its discretion as to the suitableness of the person and the time and circumstances of his application. *Hutcheson v. Priddy* (Va.) 12 Grut. 85, 89.

Rev. St. tit. 1, § 277, providing that every person who shall set a fire on any land that shall run on the land of "any other person" shall pay the damages, means by such other person, a proprietor of land, other than the one on whose land the fire was set; meaning that the damage which might be recovered shall be that which is occasioned, not to the land on which the fire was set, but to the land of "any other person" on which it should afterwards run. *Grannals v. Cummings*, 25 Conn. 165.

Gen. St. c. 47, art. 1, § 4, declaring that if a loser at gaming, or his creditor, shall not sue for the money within six months, "any other person" might sue the winner and recover triple the value of the money lost, creates a new cause of action in favor of any person competent to sue, but does not

enable an alien or married woman to sue the winner. *Moore v. Settle*, 82 Ky. 187, 189, 56 Am. Rep. 889.

A statute providing for the creditors' bill against the defendant and "any other person" to compel a discovery is not to be understood literally, and does not mean that such a bill may be filed against any one. It must be construed, "any other person legally liable." Neither does it in the least imply that it may not be brought against the defendant alone. *Bay State Iron Co. v. Goodall*, 39 N. H. 223, 234, 75 Am. Dec. 219.

"Any other persons," as used in a contract that there should be no liens entered or filed by any subcontractor or "any other persons" for or on account of any work, labor, or materials done or supplied in or upon a building, include all other persons, and necessarily include the principal contractor, as the words are generic, and necessarily include all persons who have a right to file liens. *Commonwealth Title Ins. & Trust Co. v. Ellis*, 43 Atl. 1034, 1035, 192 Pa. 321, 78 Ar. St. Rep. 816.

#### Any other state.

In the construction of statutes the words "any other state" shall be held to include any state or territory, and any foreign government or country, and the District of Columbia. Ky. St. 1906. § 446

#### ANYTHING.

See "If Anything."

"Anything," as used in Rev. St. U. S. § 5056, providing that no person shall be entitled to maintain an action against an assignee in bankruptcy for "anything done by him as such assignee" without giving 20 days' notice, includes all things which the assignee assumes to do as such, and which an assignee is authorized to do under the circumstances. *Haven v. Place*, 11 N. W. 117, 28 Minn. 551.

In holding that an exception in a life policy that the insurer should not be liable for injuries, fatal or otherwise, resulting wholly or in part from poison or "anything" accidentally or otherwise taken, administered, or absorbed or inhaled, included death caused by blood poisoning from the effect of the absorption into the system of septic poison evolved by the propagation of germs in cotton inserted by a dentist in wounds caused by the removal of teeth, it was said "that while the word 'poison,' as used in the policy, may be construed to mean liquids commonly known as poison, it is followed by the words 'or anything,' which clearly indicates that the intent was to include under the entire term anything of a poisonous nature." *Kasten v. Interstate Casualty Co. of New*

*York*, 74 N. W. 534, 99 Wis. 73, 40 L. R. A. 651.

#### ANYTHING OF VALUE.

The term "anything of value," as used in the Penal Code, includes money, bank bills or notes, United States treasury notes, and other bills, bonds, or notes issued by lawful authority, and intended to pass and circulate as money; goods and chattels; any promissory note, bill of exchange, order, draft, warrant, check, or bond given for the payment of money; any receipt given for the payment of money or other property; any right in action; things which savor of the realty, and are, at the time they are taken, a part of the freehold, whether they be of the substance or produce thereof, or affixed thereto, although there be no interval between the severing and the taking away; and every other thing of any value whatever. *Bates' Ann. St. Ohio 1904*, § 6794; *Rev. St. Wyo. 1899*, § 5190.

Rev. St. § 6794, defines the term "anything of value," as used in the definition of larceny, as including things which savor of the realty, and are at the time they are taken a part of the freehold, whether they are of the substance or produce thereof or affixed thereto, if there be no interval between the time of severing and the taking away. *Bal' v. White*, 39 Ohio St. 650, 651.

In Rev. St. § 6900, providing that whoever promises any valuable thing to a member of the General Assembly to influence him shall be punished, etc., no distinction can be drawn between "anything of value" and "money," since the term "anything of value" includes money by the express provisions of Rev. St. § 6794. *Watson v. State*, 39 Ohio St. 123, 126.

#### ANYWISE.

See "In Anywise."

#### APART.

See "Separately Apart."

An acknowledgment executed by a married woman, which recited that her examination by the notary was "apart" from her husband, was not defective for not stating also that it was "separate," since "apart" is synonymous with "separate." *Belo v. Mayes*, 79 Mo. 67, 70.

In a certificate of acknowledgment, in the phrase "apart from her husband," as applied to a married woman, the word "apart" means the absence of the husband, and not necessarily the absence of all other persons. *Hadley v. Geiger*, 9 N. J. Law (4 Halst.) 225, 233; *Dennis v. Tarpenny*, 20 Barb. 371, 374.

**APARTMENT.**

As building, see "Building"; "Building (In Criminal Law)."

As dwelling house, see "Dwelling—Dwelling House."

As house, see "House."

The "apartments" within a house and the "house" are not the same. "House" may include the subjacent land, but "apartments" within it may not. It often occurs that each apartment of a house of several stories is leased to different persons. Each lessee has an interest in the land in so far as it supports the building, and ceases on destruction of the building by fire. A conveyance and lease of the apartments may be within the statute of frauds. *McMillan v. Solomon*, 42 Ala. 356, 358, 94 Am. Dec. 654.

"Apartment," as used in Act 1784, c. 41, § 8, declaring that persons incarcerated for debt should be confined at night in an "apartment" of the prison, meant some portion of the prison or grounds to which such debtor had been assigned, and hence the yard of a prison to which a person had not been assigned was not an apartment within the statute. *McLellan v. Dalton*, 10 Mass. 190, 191.

**APARTMENT HOUSE.**

Tenement house distinguished, see "Tenement."

The term "apartment house" only came into use about 1880. It is a building used as a dwelling house for several families, each family living separate and apart from the others. The building is commodious and handsome in outward and inward appearance, and each suite of rooms is a dwelling house, with a separate hall and bath, and complete in itself, each separate family using the main hall for an entrance into the building. *White v. Collins Bldg. & Const. Co.*, 81 N. Y. Supp. 434, 436, 82 App. Div. 1.

**APERTURE.**

An "aperture," in common parlance, is one thing, and an aperture with a tube in it is another, and therefore a contract for so much water as will pass through two metallic apertures does not authorize the taking of water through a certain kind of tube by which an additional quantity of water can be procured. *Schuykill Nav. Co. v. Moore (Pa.)* 2 Whart. 477, 491.

**APEX.**

The apex of a vein or lode is the highest part thereof, and it may be at the surface of the ground or at any point below the surface.

*Larkin v. Upton*, 12 Sup. Ct. 614, 144 U. S. 19, 36 L. Ed. 330.

The word "apex," as used in mining law, designates the highest point of a vein or lode. "The apex may or may not reach the surface of the ground. The United States mineral law gives to the miner the whole of every vein, the apex which lies within his surface exterior boundaries, or which lies within perpendicular planes drawn downward indefinitely on the planes of these boundaries. The miner may follow the 'dip,' using the word in either of its significations wherever it comes, providing he has the apex and the basis of operations, and that he does not cross the vertical planes of the end line." *King v. Amy & Silversmith Con. Min. Co.*, 24 Pac. 200, 202, 9 Mont. 543.

The "apex" of a vein is the highest point where it approaches nearest to the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein. If a vein at its highest point turns over and pursues its course downwards, then such point is merely a swell in the mineral matter, and not a true apex. *Stevens v. Williams (U. S.)* 23 Fed. Cas. 40.

**Top of vein distinguished.**

"In the Report of the Public Lands Commission, the word 'top,' while including apex, may also include a succession of points—that is, a line—so that by the top of a vein would be meant a line connecting a succession of such highest points or apices, thus forming an edge. The word 'apex' is not exactly synonymous with 'top.' The word 'apex' ordinarily designates a point, and, so considered, the apex of a vein is the summit, the highest point of a vein in the ascent along the line of its dip and downward course, and beyond which the vein extends no further, so that it is the end, or, reversely, the beginning, of the vein." *Duggan v. Davy*, 26 N. W. 887, 901, 4 Dak. 110.

**APIECE.**

A testator, in bequeathing to "each of my immediate nephews and nieces \$1,000 apiece," means by the word "apiece" the same as by the word "each," and that is simply that each nephew and niece shall have \$1,000. *Martin v. Trustees of Mercer University*, 25 S. E. 522, 523, 98 Ga. 320.

**APOTHECARY.**

An apothecary is one who practices pharmacy; one who prepares drugs for medicinal purposes, and keeps them for sale. *Webster*. *Commonwealth v. Fuller (Pa.)* 2 Walk. 550, 551.

Practicing as an apothecary is the mixing up and preparing medicines, prescribed

either by a physician, or by any other person, or by the apothecary himself. Woodward v. Ball, 6 Car. & P. 577.

In the strictest sense of the word, an "apothecary" is one who prepares and sells drugs for medicinal purposes, and, as he must necessarily be a trafficker in drugs, he would seem in a certain sense to be a merchant. Anderson v. Commonwealth, 72 Ky. (9 Bush) 569, 571.

In the most usual and familiar sense, an "apothecary" is understood to be one who vends drugs or medicines as a trade or business, and one who is engaged in selling and vending liquids compounded of roots and herbs under the "Thompsonian System" is an "apothecary," and must be licensed, under a statute requiring the licensing of apothecaries. Westmoreland v. Bragg (S. C.) 2 Hill, 414, 415.

#### As druggist or chemist.

In this country, the business of pharmacist, "apothecary," or druggist is all one, and the same person who prepares and compounds medicines also sells them, so that in popular speech all three are used interchangeably, as practically synonymous. State v. Donaldson, 42 N. W. 781, 41 Minn. 74.

The distinction between a "chemist" or a "druggist" and an "apothecary" is that the apothecary might not only prepare, dispense, and sell, but apply and administer, medicines, and if a druggist or chemist not only sold, but also applied and administered, medicines in the ordinary course of attending patients, he practiced as an apothecary within the meaning of 55 Geo. III, c. 194, § 20, imposing a penalty on one so practicing without certificate. Apothecaries' Co. v. Greenough, 1 Adol. & E. 799, 803.

#### As merchant.

See "Merchant."

## APPARATUS.

See "Philosophical Apparatus."

The terms "machinery" and "apparatus" are more apt to designate a flume built along the banks of a river leading to a mining claim, than the term "mining claim"; therefore such a flume is not exempt under a statute exempting mining claims from taxation. Hart v. Plum, 14 Cal. 148, 154.

#### Of electric company.

"Apparatus," as used in a contract by an electric light company for new "apparatus," means the full set of necessary machinery as furnished, and not merely dynamo and lamps. The definition of the word "apparatus" given in Webster's Dictionary is a

full collection or set of implements for a given duty, experimental or operative. This definition is implied in the derivation of the word. These implements or agencies may be numerous and various in character, but are all united in a common function. Morrison v. Baechtold, 48 Atl. 926, 928, 93 Md. 319.

In a mortgage of an electric light company of its buildings, machinery, tools, instruments, and "apparatus," "apparatus" is broad enough to include the lamps. Ramsdell v. Citizens' Electric Light & Power Co., 61 N. W. 273, 276, 103 Mich. 89.

#### For gaming.

See "Gambling or Gaming Apparatus."

#### Of school.

"Apparatus," within the meaning of Rev. St. § 3995, limiting the power of school boards in making purchases of school "apparatus" to a certain sum each year, is an equipment of things provided and adapted as a means to some end, and includes any complex instrument or appliance for a specific action or operation, such as a mechanism so constructed as when operated to represent the relative motions of the earth and the moon with respect to each other and the sun, and explain the various phenomena caused by such motions, and other related subjects. Board of Education v. Andrews, 37 N. E. 260, 51 Ohio St. 199.

#### Of trade or profession.

A typewriter is not exempt from execution as a "tool or apparatus" belonging to the profession of a physician, though he uses it in correspondence and advertising his business. Massie v. Atchley, 66 S. W. 582, 583, 28 Tex. Civ. App. 114.

A single man who is a land, loan, and insurance agent cannot claim a buggy and harness which he uses in his business as exempt from execution as "tools and apparatus" belonging to his trade or profession. Cates v. McClure (Tex.) 66 S. W. 224.

"Apparatus," as used in Rev. St. 1895, art. 2397, providing that tools, apparatus, and books belonging to any trade or profession of a debtor shall be exempt from execution, does not include a bicycle used by an architect and building superintendent, though useful and convenient in the prosecution of his business. As there used, the word "only" includes such tools as properly belong to, and are essential to, the conducting of the business. For instance, the printing press, type, cases, etc., are tools belonging to, and are exempt to, a printer; the awl, last, etc., to a shoemaker; the forge, anvil, tongs, hammers, etc., to the blacksmith. But the word does not include every convenience that might be beneficial to carrying on a particular busi-

ness. *Smith v. Horton*, 46 S. W. 401, 402, 19 Tex. Civ. App. 28.

A statute exempting the tools and "apparatus" of trade from execution for debt includes the printing press, types, and cases used in publishing a newspaper. "The word 'apparatus' is a generic term of the most comprehensive signification. The 'tools and apparatus' belonging to the trade or profession of the editor or publisher of a weekly newspaper is the printing press, type, cases, etc., and not alone the scissors, bottle of ink, and goosequill pen of the editorial department. The apparatus belonging to the trade of a publisher must of necessity include the press, type, cases, etc., which are essential to the conducting of that business. The blacksmith could as well be deprived of his anvil and hammer, the shoemaker of his awl and last, the farmer of his plow and hoe, as the publisher of his press, type, and cases." *Green v. Raymond*, 58 Tex. 80, 44 Am. Rep. 601.

In a statute providing that the "apparatus" and tools of trade of a mechanic shall be exempt from execution, "apparatus" is not limited to expensive and complicated machinery propelled by steam power, but embraces minor machinery operated by hand. *Willis v. Morris*, 1 S. W. 799, 803, 66 Tex. 628, 59 Am. Rep. 634.

"Apparatus," as used in *Sayles' Civ. St. art. 2337*, exempting from execution a tool or "apparatus" belonging to any trade or profession, includes an iron safe used by an insurance agent to store his policies, etc. *Betz v. Maier*, 33 S. W. 710, 712, 12 Tex. Civ. App. 219.

A steam engine, shingle machine, and saw gummer in use or lately used in business are articles exempt from execution as being "apparatus" to enable the person to carry on the business in which he is principally engaged. *Wood v. Bresnahan*, 30 N. W. 206, 208, 63 Mich. 614.

"Tools or apparatus." within the meaning of a statute exempting the tools and apparatus of a debtor from forced sale, includes a press and paper cutter owned by a job printer and necessary for his business. *St. Louis Type Foundry v. Taylor (Tex.)* 35 S. W. 691, 692.

## APPAREL.

See "Ship's Tackle, Apparel, and Furniture"; "Wearing Apparel."

The definition of the word "apparel" as given by lexicographers is not confined to clothing; the idea of ornamentation seems to be the rather prominent element in the word, and it is not improper to say that a man wears a watch and wears a cane. In *re Steele (U. S.)* 22 Fed. Cas. 1202.

## APPARENT.

See "Heir Apparent."

"Apparent" may mean that two things may be and clearly appear to be the same, as in the expression "heir apparent," which was formerly understood in a less absolute sense, and used to include an "heir presumptive"; or, as more popularly used, the term 'apparent violation' may mean things which appear to be the same, or which appear to be a violation of a rule or statute, whether they are so or not." *Ramsden v. Gray*, 7 Man. G. & S. 961, 968.

### As actual.

"Apparent," as used in *St. (Pasch. Dig. art. 2260)*, which provides that though a homicide may take place under circumstances showing no deliberation, yet if a person guilty thereof provoke a contention with the "apparent" intention of killing or doing serious bodily injury to deceased, the offense does not come within the definition of manslaughter, means "manifest," "beyond a doubt," "obvious." The more popular meaning of the word signifies that which seems to exist or is indicated by appearances, rather than that which is real or actual. *Johnson v. State*, 5 Tex. App. 423, 433.

"Apparent," as used in an instruction in a trial for murder that if a man provokes the difficulty with the "apparent intention" of taking the life of his adversary, and kills to save his life, such killing would be unlawful, should be construed to mean "actual." *Cunningham v. State*, 17 Tex. App. 89, 97.

As used in a charge in a prosecution for murder, limiting the right of self-defense if defendant provoked difficulty with the "apparent" intention of taking the life of the deceased, "apparent" means "evident," "obvious," "clear," and is as strong as "actual." *McCandless v. State*, 57 S. W. 672, 674, 42 Tex. Cr. R. 58.

### As visible.

"Apparent" means capable of being seen, or easily seen, and, as used in an instruction that plaintiff could not recover any damages for broken condition of corn shelled by defendant that was "apparent" when he removed the corn, compelled plaintiff to examine every sack, as it meant "capable of being seen by any one who examined all the sacks," and therefore was erroneous. *Chase v. Blodgett Milling Co.*, 87 N. W. 826, 828, 111 Wis. 655.

"Apparent" and "visible" are words of similar meaning. Thus, under a statute defining "disorderly persons" as those who have no visible means of support, it is not error to show that defendant had no "apparent" means of support. *People v. Herrick*, 26 N. W. 767, 59 Mich. 563.

**APPARENT AUTHORITY.**

"Apparent authority" is that authority which an agent appears to have by some act on the part of the principal. *Webster v. Wray*, 24 N. W. 207, 208, 17 Neb. 579.

"Apparent authority" of an agent is that authority which he appears to have by reason of the actual authority which he has, and which he exercises with the knowledge and ratification of the principal. *Oberne v. Burke*, 46 N. W. 838, 842, 30 Neb. 581.

"Apparent authority" is that authority of an agent which he appears to have by reason of the nature of his duties, or by reason of some act or conduct on the part of his principal; and so, where an agent was intrusted with the business of carrying on a lumber yard, with authority to sell and deliver lumber on cash, or give credit, as he should see proper, to collect and receive the money of his principal, to file and enforce mechanics' liens or not, as he deemed best, he was, so far as third persons were concerned, the general agent of his principal, who would be bound by any representation or statement made by him to a third party that no lien would be filed on certain property. *White Lake Lumber Co. v. Stone*, 27 N. W. 396, 397, 19 Neb. 402.

The apparent authority mentioned in the rule that an insurance company is bound by the acts of its agent within the scope of his apparent authority must be understood in a legal sense, and requires something on which to base the belief that the agent had authority to contract, such as the possession of blank policies signed by the officer of the company, or the declaration of the agent to the effect that he had such authority, coupled with the fact that such authority has been recognized by the company by issuing policies on such contracts or by permitting the agent to continue its business after it had known of such representation. *Bell v. Peabody Ins. Co.*, 38 S. E. 541, 543, 49 W. Va. 437.

"Apparent authority" is that authority which an agent appears to have from that which he actually does have, and not from that which he may pretend to have, or from his actions on occasions which are unknown to and unratified by his principal. Where a mortgagee retains the mortgage, but sends the coupons for interest to an agent for collection, with no other directions except to collect the coupons, the agent has no "apparent authority" to foreclose the mortgage. *Corey v. Hunter*, 84 N. W. 570, 573, 10 N. D. 5.

"Apparent authority," as applied to the right of one railroad company to sell tickets over another, means existence of some relation of business between the companies from which one would reasonably be led to believe that the authority existed. *Mexican Cent. R. Co. v. Goodman (Tex.)* 43 S. W. 580, 581.

**APPARENT DANGER.**

The term "apparent danger," as used with reference to the law of self-defense, means such overt actual demonstration by conduct and acts indicative of a design to take life or to do great personal injury as would make the killing apparently necessary to self-preservation. *Stoneman v. Commonwealth (Va.)* 25 Grat. 887, 896; *Evans v. State*, 44 Miss. 762, 773.

"Apparent danger," as used in reference to danger which would authorize a man to kill another as a matter of self-defense, is to be understood as meaning not apparent danger in fact, but apparent danger as to defendant's comprehension. *State v. Carter*, 45 Pac. 745, 746, 15 Wash. 121.

"Apparent danger," as used in an instruction that if the defendant, when not in actual or "apparent danger" of receiving death or great bodily harm at the hands of the deceased, shot and killed the deceased, the jury should find the defendant guilty as charged, means such circumstances of danger as would excite the fears of a reasonable person. *Leigh v. People*, 113 Ill. 372, 379.

**APPARENT EASEMENT.**

An "apparent easement" is an easement which depends upon some artificial structure, or the natural formation of the servient tenement, obvious and permanent, which constitutes the easement or is the means of enjoying it, as the bed of a running stream, an overhanging roof, a pipe for conveying water; and "nonapparent easements" are such as have no means specially constructed or appropriate to their enjoyment, and that are enjoyed at intervals, leaving between those intervals no visible sign of their existence, such as a right of way, or right of drawing the net upon the shore. *Fetters v. Humphreys*, 18 N. J. Eq. (3 C. E. Green) 360, 362.

"Apparent easement," as used in reference to a continuous and "apparent" easement which will pass with a conveyance of a dwelling alone by the owner of both yard and house, the owner retaining the yard, means that the parties should have either actual knowledge of the quasi easement, or knowledge of such facts as to put them upon inquiry. A water pipe leading from a driven well in a yard to a sink in the kitchen of a dwelling, there ending in a pump by which water can be and is habitually drawn from the well to the kitchen for domestic purposes, the well and the water pipe being completely hidden from view, form an "apparent easement." *Larsen v. Peterson*, 30 Atl. 1091, 1097, 53 N. J. Eq. (8 Dick.) 88.

**APPARENT ERROR.**

See "Error Apparent."

**APPARENT GOOD ORDER.**

A bill of lading reciting "shipped in apparent good order," of five cases of merchandise, means that the cases are in apparent good order with reference to the external condition of the same, and excludes any inference that the carrier admits anything as to the quality of the contents of the cases. The California (U. S.) 4 Fed. Cas. 1058, 1059.

A receipt by a railroad company for goods in "apparent good order" raises no presumption against the carrier as to the actual condition of the goods when received, and the burden rests upon the consignor to show by affirmative proof the nature and condition of the contents, and that they were in fact in good order when received by the carrier. *Thyll v. New York & L. B. R. Co.*, 84 N. Y. Supp. 175, 177.

Where a receipt given by a carrier for goods states that they were received in "apparent good order," it does not estop the company from showing that as a matter of fact they were damaged when received. *Blade v. Chicago, St. P. & F. D. L. R. Co.*, 10 Wis. 4, 5.

The use of the word "apparent" in a bill of lading stating that the goods were received by the carrier in "apparent good order" does not change the effect of the use of the words "good order" as an admission, and therefore the burden of showing that the goods were secretly defective or insufficient is on the carrier. *The Oriflamme* (U. S.) 18 Fed. Cas. 810.

**APPARENT MATURITY.**

The apparent maturity of a negotiable instrument, payable at a particular time, is the day on which by its terms it becomes due, or, when that is a holiday, the next business day. Civ. Code S. D. 1903, § 2204.

**APPARENT OWNERSHIP.**

"Apparent ownership" of a cause of action, as signed, is prima facie ownership. *State v. Hastings*, 15 Wis. 75, 84.

**APPARENT SERVITUDE.**

"Apparent servitudes" are such as are to be perceivable by exterior works, such as a door, a window, an aqueduct. Civ. Code La. 1900, art. 728.

**APPEAL.**

See "Devolutive Appeal"; "Probate Appeal"; "Right of Appeal"; "Special Appeal."

"The word 'appeal' is used to designate the act of lodging the action in the appellate court." *Williamson v. Judges of Court of*

Common Pleas of Middlesex County, 42 N. J. Law (13 Vroom) 386, 391.

"Appeal" is the name given a proceeding for the revision of questions of law arising in a trial. *White v. Howd*, 33 Atl. 915, 916, 66 Conn. 264.

An "appeal" is defined by Code Prac. § 564, to be the act by which one of the parties to a suit has recourse to a superior tribunal in order to have the judgment of the inferior court corrected. *Rausch v. Barrere* (La.) 33 South. 602, 603, 109 La. 563.

The idea of an appeal is to secure a re-hearing of the whole case, and, where no judgment has been rendered, there is nothing properly presented for review. *City of Jeffersonville v. Tomlin*, 85 N. E. 29, 7 Ind. App. 681.

An "appeal" is the act of the party which authorizes the appellate court to take cognizance of the cause, and, unless the record bears testimony that it was taken, the appellate court has no evidence of authority to entertain jurisdiction. *Lockhart's Ex'r v. Lockhart*, 1 Tex. 199, 200.

An "appeal" simply means a second hearing, so that, if the original hearing is not due process of law, the granting of an appeal cannot make it so. *Montana Co. v. St. Louis Min. & Mill. Co.*, 14 Sup. Ct. 506, 509, 152 U. S. 160, 38 L. Ed. 398.

An "appeal" is but one step in a suit towards the final adjudication which the law has provided for. In *re Luscombe's Will*, 85 N. W. 341, 344, 109 Wis. 186 (citing *Northwestern Mut. Life Ins. Co. v. Park Hotel Co.*, 37 Wis. 125, 131).

An appeal is a method of revising a definitive judgment, and is to be taken after such judgment is rendered. An order of appeal which is absolutely necessary is the first step in the process by which the cause is brought within the jurisdiction of the Supreme Court. *Gagneaux v. Desonier*, 29 South. 282, 284, 104 La. 648 (citing *Dupre v. Mouton*, 23 La. Ann. 543).

"Appeal," in the sense of transfer of jurisdiction from one court to another, cannot be predicated of any process by which a court is called upon to determine the legality of an action by officers of another department. In this sense there can be no appeal from a common council to a court, any more than there can be an appeal from the Legislature to the court, or from the court to the Legislature. In appeals from the court of probate to the superior court, we sometimes speak of the superior court as being for that case the court of probate, and speak correctly, for probate jurisdiction is within the judicial power, and may be exercised by the superior court; but when we speak in the same way, in commenting on the discretionary power

that may be exercised in one of these amorphous "appeals" from administrative boards, the expression is allowable only as a figure of rhetoric. Appeal of Norwalk St. Ry. Co., 37 Atl. 1080, 1088, 69 Conn. 576, 39 L. R. A. 794.

Within a statute providing that every insolvent corporation of which a receiver has been appointed, or any person aggrieved by the proceedings or determination of such receiver in the discharge of his duty, may appeal to the court of chancery, which court shall in a summary way hear and determine the matter complained of, and make such order touching the same as shall be equitable and just, the word "appeal" is used in a broad, general sense. The appeal referred to is not technical, and requires no particular form. Taylor v. Gray, 44 Atl. 668, 672, 59 N. J. Eq. 621.

Act May 9, 1899, providing that all appellate proceedings in the Supreme Court heretofore taken by writ of error, appeal, or certiorari shall hereafter be taken in a proceeding to be called an "appeal," does not affect the procedure so far as the consideration of the evidence or the opinion in the lower court are concerned, since the distinction between the three modes of reviewing decisions is not done away with, though the same name is applied to all. Appeal of Long, 134 Pa. 641, 646, 19 Atl. 806.

The right of appeal is not a natural or inherent one. It does not exist at common law, and in this state it is conferred wholly by statute, and when once conferred it may be withdrawn by the Legislature, unless, in so doing, some provision of the organic law of the state is violated. Evansville & T. H. R. Co. v. City of Terre Haute (Ind.) 67 N. E. 686, 690 (citing Lake Erie R. Co. v. Watkins, 157 Ind. 600, 62 N. E. 443, and cases cited; National Exch. Bank v. Peters, 144 U. S. 570, 12 Sup. Ct. 767, 36 L. Ed. 545).

#### **As an action, suit, or proceeding.**

See "Action"; "Criminal Action"; "Proceedings"; "Suit."

An appeal is not a new action, although in some earlier cases the old views seem to have continued in the language of the opinions. Boon v. City of Utica, 25 N. Y. Supp. 846, 848, 4 Misc. Rep. 583 (citing Shuler v. Maxwell [N. Y.] 38 Hun, 242).

#### **As action of court above.**

"Appeal," as used in an affidavit for appeal stating that the appellant believes that he has a just and legal defense to make upon the merits of the "appeal," means "the action in the court above." Snover v. Tinsman, 38 N. J. Law (9 Vroom) 210, 211.

#### **Application in same court.**

An application to the same court in which a decree is made, to reverse its de-

cision, is sometimes termed an "appeal." Longworth v. Sturges, 4 Ohio St. 690, 708.

#### **As application for relief.**

"Appeal," as used in Act 1855, p. 43, § 26, allowing an "appeal" from the assessment of the tax collectors to the selectmen, means an application for relief to be obtained by a reconsideration or review of the previous action, and should not be construed in its technical sense of a removal of a case from an inferior to a superior court for review. Leach v. Blakely, 34 Vt. 134, 135.

In this state "appeal" has been used by court and Legislature with two meanings only—one as applicable to the superior and inferior courts, when it means the transfer of the case to another jurisdiction for trial; and one as applicable to the Supreme Court of Errors, where it means an application to this court to reverse or set aside a judgment of the trial court for errors in law. In the latter sense it was never used until the act of 1882 authorized all errors previously corrected by the means of a writ of error, a motion in error, or a motion for new trial to be included in one application, and called that application an "appeal." The term in the act of 1882, which provides that upon the trial of any civil action to the court without a jury, in which an appeal to the Supreme Court of Errors may now be taken, each party may, etc., is used in the latter sense. Styles v. Tyler, 30 Atl. 165, 174, 64 Conn. 432.

#### **Certiorari distinguished.**

The distinction between an "appeal" and a "certiorari" is marked. The former brings the case up on its merits. The latter brings up the record only, and upon such a writ the court can look merely at the regularity of the proceedings. In re Thirty-Fourth St., Philadelphia, 81 Pa. (31 P. F. Smith) 27, 29.

#### **As election to change forum.**

"Appeal," as used in a justice's record which recited that the defendant offered in evidence title to the real estate in controversy and that the plaintiff "appealed" to the court of common appeals, means that the plaintiff elected to change the forum, and not that he took an appeal in its technical sense. Lawrence v. Souther, 49 Mass. (3 Metc.) 166, 168.

#### **As invoke aid of.**

"Appeal," as used in Mansf. Dig. § 5687, creating a board for the equalization of taxable values in each county, and providing that any party aggrieved by the action of the board may "appeal" therefrom to the county court, should not be construed in its technical sense of a removal of the case from an inferior to a superior court for review, but in its popular signification of "Invoke the aid of." Prairie County v. Matthews, 46 Ark. 383, 386.



**As original application.**

The word "appeal," as used in Pub. Acts 1893, c. 175, providing for an "appeal" from the acts of county commissioners in granting or refusing licenses, has been construed as providing for an original application to a superior court to exercise its appropriate judicial power in respect to acts of the county commissioners in excess of their power or in the unlawful abuse of that power. Such appeal is a process by which the superior court is enabled to determine the legality of certain specified actions of the county commissioners. *Appeal of Moynihan*, 53 Atl. 903, 904, 75 Conn. 358.

**As perfected appeal.**

"Appeal," as used in Cr. Code, § 281, providing that upon "the appeal" any decision of the court or intermediate order made in the progress of the case may be reviewed, means upon the complete and perfected appeal, and hence there can be no review until notice of the appeal has been given and a transcript of the case filed in the Supreme Court. In re *Chambers*, 2 Pac. 646, 649, 30 Kan. 450.

**As removal of cause.**

An appeal is the removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and new trial. *Dold v. Robertson*, 9 Pac. 302, 304, 3 N. M. 520; *Burris v. Peacock* (Ohio) 3 West. L. M. 264, 265; *Greenwoods County v. Town of New Hartford*, 32 Atl. 933, 934, 65 Conn. 461; *State v. Case*, 37 Pac. 95, 97, 14 Mont. 520; *Sullivan v. Thomas*, 3 S. C. (3 Rich.) 531, 548; *People v. Justices New York Marine Court* (N. Y.) 2 Abb. Prac. 126, 127; *State ex rel. Williams v. Anthony*, 65 Mo. App. 543-552.

Appeal is the mode of transmission of a cause to the Supreme Court by notice given in open court, or by application to the clerk at any time within 12 months and citation to the adverse party. *Cheek v. Rogers*, 1 Tex. 440, 442.

Appeal is a process of civil-law origin, and removes a cause entirely, subjecting the facts and law to review and retrial. *Lyles v. Barnes*, 40 Miss. 608, 609.

The words "appeal" or "writ of error," in section 5 of Act March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], which provides that appeals or writs of error may be taken from the district court, or from the existing circuit court, to the Supreme Court in any case in which the jurisdiction of the court is in issue must be understood to be within the meaning of those terms as used in a prior act of Congress relating to the appellate power of the Supreme Court, and in the long-standing rules of practice and proceedings of the federal courts. Taken in that sense, these terms mean the proceedings by

which a cause in which there has been a final judgment is removed from a court below to an appellate court for review, reversal, or affirmance. *McLish v. Roff*, 12 Sup. Ct. 118, 141 U. S. 661, 35 L. Ed. 893; *MacLeod v. Graven* (U. S.) 79 Fed. 84, 85, 24 C. C. A. 449.

"Appeal," as used in Civ. Code, § 525, giving the district court jurisdiction to hear appeals from final orders of the probate court, is a general term denoting not only what are technically denominated "appeals" as contradistinguished from a certiorari, writ of error, or petition in error, but any proceeding by which a case is said to be removed from probate courts to superior tribunals for the purpose of re-examination. *Crane v. Giles*, 3 Kan. 54, 55.

**As part of trial.**

The fundamental idea of the word "appeal" necessarily involves the idea of a review of the proceedings had in a trial which has already been had, and not a new trial of the case. An appeal is no part of the trial, so that a clause in the Constitution saving a defendant convicted in a trial before a trial justice the right to appeal does not give him the right to a trial by jury. *State v. Williams*, 19 S. E. 5, 7, 40 S. E. 373.

**Petition in error distinguished.**

An appeal is the same action as in the trial court, while a petition in error is a new action in the appellate court brought to reverse the judgment below. *Foster v. Borne*, 58 N. E. 66, 63 Ohio St. 169.

In Nebraska, under the form of procedure established by the Code in that state, it is held that a petition in error starts a new action, nothing being involved in it except the errors assigned. In this respect it differs from an appeal, which is a further proceeding in the same action, and brings up all the parties necessary to the determination of appellant's rights in the matter. *Clark v. Lancaster County* (Neb.) 96 N. W. 593, 598.

An "appeal," in the technical sense of the term, is a remedy which exists only by force of statute, and within the limits defined by statute. The word is sometimes used in a broader sense as applying to all methods of review by supreme tribunals, but a technical appeal will not be allowed, under a statute authorizing a review by a district court on petition in error of judgments rendered by any tribunal, board, or officer exercising judicial functions, of a decision of a county superintendent changing the boundaries of school districts or creating new districts. *Pollock v. School Dist. No. 42*, 74 N. W. 393, 54 Neb. 171.

**Petition in error included.**

"Appeal," as used in Laws 1872, § 7, of the act relating to contests of county seat elections and other elections, providing that

all appeals shall be taken within 60 days, includes appeals by petition in error, as the act declares that no appeal can be taken except by such petition. *State v. Smith*, 1 Pac. 251, 252, 31 Kan. 129.

The word "appeal" is used in many different senses, owing to the diversity of statutes relating to appellate procedure. In one sense it denotes all kinds of proceedings for the review of cases—all proceedings commonly known as "appellate." In its special and technical sense it designates the particular form of review, dependent upon statute for its existence, whereby a case is transferred after decision to a higher court for a re-examination of the whole proceedings, and final judgment or decree in accordance with the result of such re-examination. *State v. Doane*, 35 Neb. 707, 53 N. W. 611; *Western Cornice & Mfg. Works v. Leavenworth*, 52 Neb. 418, 72 N. W. 592. It is used in its former sense in a statute relating to condemnation proceedings by railroad companies, which provides that either party may appeal from the decision of the district court to the Supreme Court as to question of damages, and such appeal is by petition in error, and not by a technical appeal. *Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co.*, 78 N. W. 546, 547, 53 Neb. 248.

#### **Prior decision implied.**

An "appeal" is the removal of a cause or matter from an inferior jurisdiction after its decision to a superior jurisdiction for retrial on its merits, and a proceeding in a superior jurisdiction cannot with any propriety be called an "appeal," where the cause or matter involved was not before any inferior tribunal or body. Thus, where a statute gave a probate court power to decide the location of telegraph and telephone lines in cities in case of inability of the council and company to agree as to such location, it is not in any sense an appeal, the council not being given any power to direct in what mode the lines of the telephone company should be constructed in the streets of the municipality, its sole province being to come to an agreement with the company in regard to the mode of using the streets by the company. *City of Zanesville v. Zanesville Telegraph & Telephone Co.*, 59 N. E. 781, 785, 64 Ohio St. 67.

#### **Trial de novo authorized.**

An appeal is a civil-law process, and removes a cause entirely subjecting the law and fact to a review and retrial. *United States v. Goodwin*, 11 U. S. (7 Cranch) 108, 110, 3 L. Ed. 284; *Capital Traction Co. v. Hof*, 19 Sup. Ct. 580, 504, 174 U. S. 1, 43 L. Ed. 873; *In re Kirby* (U. S.) 84 Fed. 606, 608; *United States v. Coe*, 15 Sup. Ct. 16, 18, 155 U. S. 76, 39 L. Ed. 76; *Dower v. Richards*, 14 Sup. Ct. 452, 454, 151 U. S. 658, 38 L. Ed. 305; *Wiscart v. Dauchy*, 3 U. S. (3 Dall.) 321, 327, 1 L. Ed. 619; *Dutcher v. Culver*, 23

*Minn.* 415, 416; *In re Murdock*, 24 Mass. (7 Pick.) 303, 320; *Wagener v. Kirven*, 25 S. E. 130, 132, 47 S. C. 347.

Code 1873, § 831, providing that appeals may be taken from boards of equalization to the circuit court, and that the question of liability to assessment shall be justly and equitably determined, means that the whole matter shall be examined and tried de novo. "Wherever an appeal is authorized by a statute, unless otherwise restricted, the proceeding in all cases is anew, and in order to determine the very merits of the matters in dispute." *Grimes v. City of Burlington*, 37 N. W. 106, 107, 74 Iowa, 123.

The legal signification of an "appeal," unless the context otherwise manifests, means an appellate process which opens the former judgment and verdict, and sends the case to a higher court for trial de novo upon the same facts, or new facts, regardless of the former trial, and such is its meaning in Const. art. 8, § 28, providing that appeals shall be allowed from the judgment of justices of the peace in such manner as may be prescribed by law. *Richmond v. Henderson*, 37 S. E. 653, 660, 48 W. Va. 339.

The prima facie and more proper meaning of an appeal is a process continuing the same suit in order to obtain a rehearing in the appellate court, wherein new evidence may be allowed and a new trial as if never tried, as in appeals from justices; and hence its use in a statute authorizing appeals from the assessments by a county court to the circuit court indicates that the matter is of the same nature as in the county court, and hence not a judicial proceeding. *Mackin v. Taylor County Court*, 18 S. E. 632, 635, 38 W. Va. 338.

In the second section of the act providing for "appeals" from justices' courts, special provision is made for a trial de novo; and in section 19, making provision for revision of the judgment of county courts in criminal cases, an appeal is provided to the circuit court without bill of exceptions, writ of error, or supersedeas. Held that, on an appeal from the county court to the circuit court in civil cases, the trial in the circuit court is not de novo, the word "appeal" not having been used in its technical sense. *Lyles v. Barnes*, 40 Miss. 608, 609.

"Appeals," in reference to actions at law, though expressed by a term originally derived from the civil law, are purely creatures of statutory law, and consequently our various statutes must be construed together to determine correctly the import of the term in any given statute. It does not import an unqualified trial de novo when used in the statute providing for the removal of cases from the probate to the circuit court. It does, however, by the affirmative provisions of the statute, import such trial when used in the

statutes providing for the removal of cases from the courts of justices of the peace to the circuit courts. It has, then, no uniform import as to the mode of trial, whatever may have been its technical import in the civil law, from whence it is derived. *Carnall v. Crawford County*, 11 Ark. (6 Eng.) 604, 622.

#### Writ of error distinguished.

A writ of error is a proceeding known alone to the courts of common law, while an appeal is known alone to courts of chancery and admiralty. *Stevens v. Baker*, 1 Wash. T. 315, 320; *Loveless v. Ransom* (U. S.) 109 Fed. 391, 392, 48 C. C. A. 434.

By a writ of error only questions of law are brought up for review, as in actions of common law, while by an appeal, except when specially provided otherwise, the entire case, on both law and facts, is brought up for review. *Cunningham v. Neagle*, 10 Sup. Ct. 658, 661, 135 U. S. 1, 34 L. Ed. 55.

An appeal in an action at law under our system partakes somewhat of the nature of a writ of error, which in most cases was a matter of right at common law; but with us it depends wholly upon statutes granting that right, and not upon any principle of common law. *City of Portland v. Gaston*, 63 Pac. 1051, 38 Or. 533.

The word "appeal," as used in Const. art. 8, § 28, providing that appeals shall be allowed from the judgment of justices in such manner as may be prescribed by law, is not used in the sense of "writ of error" or "certiorari," but meant such an appeal as would permit a new trial in the appellate court. *Michaelson v. Cautley*, 32 S. E. 170, 171, 45 W. Va. 533.

"Appeal," as used in a statute providing that from final decrees in a United States District Court in causes of admiralty and maritime jurisdiction, where the amount in dispute exceeds the sum of \$300, exclusive of costs, an appeal shall be allowed to the next Circuit Court to be held in such district, means a process of civil-law origin, and removes a cause entirely, subjecting the fact as well as the law to a review and retrial; while a writ of error is a process of common law, and removes nothing for re-examination but the law. *Wiscart v. Dauchy*, 3 U. S. (3 Dall.) 321, 324, 1 L. Ed. 619.

One of the distinctive differences between hearing of a case on appeal and on writ of error is that under the former the appellate tribunal may review the whole case, and all the questions both of fact and of law presented therein, while in the latter it is confined to a review of such errors of law as may be pointed out in the record; and such was the use of the word "appeal" in Const. 1868, but under Const. 1895, art. 5, § 4, providing that the Supreme Court shall have appellate jurisdiction only in cases of

chancery, and on such appeals shall review the findings of fact as well as the law, except in chancery cases, where the facts are settled by a jury and the verdict is not set aside, the court is not required to review the trial judge's findings of fact on conflicting evidence. *Land Mortgage Investment & Agency Co. v. Faulkner* (S. C.) 24 S. E. 288, 290.

The term "appeal" is in several states used in very different senses, and has to a great extent in statutes and decisions lost its distinctive meaning, having become a generic term for all forms of rehearing, or else nearly or quite synonymous with "error" or "new trial." An appeal is a process of civil-law origin, and removes a cause entirely, subjecting the forms as well as the law to a review and retrial. It is in fact granting a new trial upon the same issue in a higher court. In Nebraska there is a clear distinction between proceedings by petition in error and appeal. In an appeal the hearing in the appellate court may be said to be a trial *de novo*, a retrial of the same issue on the same record, subject, however, to the rule in regard to questions of fact that the Supreme Court, though trying the case on appeal, will not disturb the finding of the district court based on conflicting evidence, unless such finding is clearly wrong. *Western Cornice & Mfg. Works v. Leavenworth*, 72 N. W. 592, 594, 52 Neb. 418.

The word "appeal" is sometimes used broadly, and denotes the general nature of appellate jurisdiction, and in that sense may include a writ of error, and so a writ of error may, in a broad sense, include an appeal. But the one word has its origin in the civil law, and the other in the common law. The distinction between them has generally been maintained in practice, and is generally recognized by statute, hence Laws 1895, c. 215, providing that no appeal can be taken to the Supreme Court when the amount involved, excluding costs, is less than \$100, does not apply to writs of error. *Bumbalek v. Peehl*, 70 N. W. 71, 95 Wis. 127.

"The word 'appeal' comes from the civil law, and the nature and operation of an appeal, in its technical sense, cannot be the subject of doubt in the proceedings of courts governed by that law. It is sometimes, indeed, used in legal language to denote the nature of appellate jurisdiction as distinguished from original jurisdiction, without any regard to the particular mode by which a cause is transmitted to a superior jurisdiction. In this sense it is used by Blackstone (3 Bl. Comm. 56), where he speaks of the court of exchequer chamber as a court that hath no jurisdiction, but is only a court of appeal to correct the errors of other jurisdictions. Now it is well known that this court determines causes brought from the courts of common law, not by way of appeal, but by writs of error. So also the

House of Peers is considered by the same elegant writer as a supreme court of appeal of the empire. Appeal (*appellatio* in the civil law) is defined "*ab inferioris judicis sententia ad superiorem prorocare*"—the removal of a cause from the sentence of an inferior to a supreme judge (Calvin. *Lex. "Appellatio"*; Shep. *Abr. "Appeal"*); or, as Blackstone has expressed it (4 Bl. Comm. 312), a complaint to a superior court of an injustice done by an inferior one. Calvinus in his *Lexicon* has collected the definitions given by many learned civilians, but they all resolve themselves into the above. Each of these definitions accurately states the meaning, but not the mode of prosecution or effect, of an appeal. The remedy by appeal, as known and practiced in England, is in a great measure confined (for I speak not of summary proceedings before magistrates, or appeals of death or robbery) to causes of equity, ecclesiastical, and admiralty jurisdiction, in all of which no jury intervenes. In the courts possessing these respective jurisdictions, the judge is in general the sole arbiter of fact and of law, and the mode of proceeding is borrowed almost exclusively from the civil law. It is undoubtedly true that, in courts proceeding according to the course of the civil law, an appeal from an inferior to a superior tribunal removes the whole proceedings, and usually, though not invariably, opens the facts as well as the law to the re-examination. In courts of equity in England it is otherwise, for Blackstone (3 Bl. Comm. 455), speaking on this subject, says 'it is a practice unknown to our law, though constantly followed by the spiritual courts, when a superior, in reviewing the sentence of an inferior, to examine the justice of the former decree by evidence that was never produced below.' And in the appellate courts in England, in proceedings according to the course of the common law, writs of error are the modes by which these courts exercise their jurisdiction, and, the facts once settled by a jury, are, while the judgment remains in force, forever conclusive upon the parties." *United States v. Wonson* (U. S.) 28 Fed. Cas. 745, 747, 748.

#### Writ of error included.

"Appeal," as used in Comp. Laws N. M. § 2206, providing that in case of appeal in civil suits, if the judgment of the appellate court be against the appellant, it shall be rendered against him and his securities in the appeal bond, applies to causes in the Supreme Court on writ of error. *Dold v. Robertson*, 9 Pac. 302, 304, 3 N. M. (Gild.) 520.

Act Jan., 1827, § 82, providing that appeals from the circuit courts to the Supreme Court shall be allowed in all cases where the judgment or decree appealed from be final and shall amount, exclusive of costs, to the sum of \$20, should be construed to mean all cases brought into the Supreme Court where

the judgment was less than \$20, without regard to the name of the process by which it was brought in the Supreme Court. The term "appeal" implies removal of a cause for a rehearing upon the facts as well as the law, and a proceeding in error is in truth an appeal from the decision of an inferior to a superior tribunal. The object of the Legislature was to prevent the supervision of all cases in the Supreme Court where judgment was less than the sum of \$20, and includes the bringing up of a case by a writ of error. *Clark v. Ross*, 1 Ill. (Breese) 334.

The word "appeal" within the meaning of chapter 4700, § 23, of the Laws approved June, 1899, authorizing appeals from judgments, orders, and decrees of inferior courts in all suits and cases brought under the provisions of the act, is used in its popular, broadest, and most comprehensive sense, and signifies any and all appropriate appellate proceedings provided by law for reviewing judgments of law, orders and decrees in equity, and other reviewable orders, judgments, or decrees, whether by writ of error or by the appeal proper, in its strictest technical sense. The purpose was not to add to, modify, or change any of the recognized and differentiated modes of procedure by which cases at law and in equity are, respectively, transferred for review from inferior to superior courts, except in the one particular of the return day of such appellate proceedings, whether by writ of error or by technical appeal, when applied to cases falling within the provision of the acts. *State v. Jacksonville Terminal Co.*, 27 South. 221, 223, 41 Fla. 363.

"Appeal" signifies merely the removal of a case from an inferior to a superior jurisdiction, and any question of fact or law, or both, may be the subject of appeal, or the whole facts or the whole case. It is indeed now the substitute for a writ of error. It is the method by which all the mistakes in the judgment of inferior jurisdiction are rectified, except when otherwise specially provided. *People v. Justices of Marine Court* (N. Y.) 11 How. Prac. 400, 401.

#### APPEAL BOND.

"Appeal bond," as used in 2 Rev. St. 1876, p. 623, providing that in all cases where an appeal shall be taken from a justice of the peace to the circuit court, and the "appeal bond" filed in such case, etc., includes a recognizance given for the purpose of effecting an appeal from a justice of the peace in a criminal case. *State v. Richards*, 77 Ind. 101, 102.

"An appeal bond" is the bond given on taking an appeal, by which the appellant binds himself to pay damages and costs if he fails to prosecute the appeal with effect. By the common law a writ of error, without any security, was of itself a supersedeas of

execution from the time of its allowance or recognition by the court to which it was directed. A presentation of the writ issuing from the superior court stopped all further proceedings, except such as were incidental to a compliance with its command to certify the record, but as writs of error came to be sued out for the purpose of delay, various acts of Parliament were passed requiring certain security in order that the writ might operate as a supersedeas. Several statutes were passed relating to the subject of security for costs, which in effect required that bond be given conditioned to pay the amount of the original judgment and the costs and damages occasioned by the delay of execution in case the judgment should be affirmed, and in case of dower and ejectment a bond was required to secure such costs, damages, and money as should be awarded after the affirmance of the judgment for mesne profits and waste pending the affirmance. *Omaha Hotel Co. v. Kountze*, 2 Sup. Ct. 911, 914, 107 U. S. 378, 27 L. Ed. 609.

#### APPEAL TAKEN.

See "Taken."

#### APPEALABLE INTEREST.

An appealable interest exists when the judgment or decree so affects a party or privy to the record that he would derive a substantial benefit from its modification or reversal. Consequently, on a motion to dismiss an appeal on the ground that the appellants are without an appealable interest, the question is not whether on the merits they are entitled to a reversal from the order appealed from, but it is whether the record shows that they are in the attitude of parties claiming a substantial right defeated by the order. A bidder at a judicial sale whose bid has been accepted may appeal from an order setting the sale aside. *Penn Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co.*, 71 N. W. 279, 280, 51 Neb. 659.

#### APPEAR.

"Appear," as used in Civ. Code, § 672, providing that if a nonresident alien takes by succession he must appear and claim the property within five years from the time of succession, does not mean that the alien must appear in person, but the appearance may be made by an attorney or by an assignee. *Carrasco v. State*, 7 Pac. 766, 767, 67 Cal. 385; *State v. Smith*, 12 Pac. 121, 123, 70 Cal. 153.

##### As appear in person.

The only sense in which the word "appear" is used by all classes of people in general is to appear in person, to exhibit one's

self so as to be visible, and every dictionary shows that this is also its grammatical sense, and such has been held to be its legal sense. *Beawfage's Case*, 10 Co. 100, 101. And it is so used in a will providing for the payment of a certain sum to testator's brother, provided he should "appear within six years from my decease with sufficient proof," etc. *Campbell v. McDonald (Pa.)* 10 Watta, 179, 182.

##### As be made manifest.

"Appear," as used in Const. 1890, art. 15, § 273, providing that "if it shall appear" that a majority of the electors voting at a certain election shall have voted for a proposed constitutional amendment it shall become a part of the constitution, means "if it should be made manifest or evident," "if it should be the fact," etc., and whether or not it has so appeared or is a fact is a judicial question determinable by the courts. *State v. Powell (Miss.)* 27 South. 927, 929, 48 L. R. A. 652.

A statute providing that service of a summons may be published when it "appears by affidavit" that the defendant cannot be found within the state, means that such legal evidence going to establish the fact of defendant's nonresidence must be given as would be received in the ordinary course of judicial proceedings, and not conclusions, opinions, or hearsay. The affidavit must contain a statement of the facts and circumstances on which the applicant bases his belief, and must be so full that the officer to whom it is presented may find from the evidence contained in it that the facts existed. *Mackubin v. Smith*, 5 Minn. 367, 370, (Gil. 296).

"Appear," as used in Rev. St. c. 62, § 21, giving a distributive share to a child or grandchild where the testator has omitted to provide for such child or grandchild in his will, unless it shall "appear" that such omission was intentional, is broad enough to embrace any species of evidence properly tending to establish the fact that such was the intention, and parol evidence is admissible to show such intention. *Wilson v. Fosket*, 47 Mass. (6 Metc.) 400, 404, 39 Am. Dec. 736.

##### As clear to the comprehension.

"The word 'appear' or 'appearing' is one frequently used in judicial proceedings as meaning 'clear to the comprehension' when applied to matters of opinion or reasoning, and 'satisfactorily or legally known, or made known,' when used in reference to facts of evidence." *Gorham v. Luckett*, 45 Ky. (6 B. Mon.) 146, 165.

##### As come into court.

"Appear," as used in a recognizance, and in which the accused undertakes to "appear," means that he will attend until the

proceedings are legally terminated, and is not used in its limited sense, so that it is satisfied by a single appearance for the professed purpose of trial, although a trial might in the end be evaded. *State Treasurer v. Woodward*, 7 Vt. 529, 532.

"Appear," when used to designate the act of any person with reference to any action pending, means to come into court as a party to the suit, and hence a defendant who employed an attorney to defend the action, who appeared on the record as attorney for the defendant, was a witness on the trial, but no notice was given that she defended or appeared as a party or acted as such, and neither the court nor the plaintiff knew that she had any connection with the defense except as a witness, she did not "appear" in the action. *Schroeder v. Lahrman*, 28 Minn. 87, 88, 1 N. W. 801, 802.

"Appear," as used in a bond conditioned that the defendant in an action shall "appear" before the district court on the first day of the next term to answer the complaint in said cause alleged against him, implies that the defendant is to appear for the purposes of a trial of the charges made against him, and hence it is not enough for the defendant to be in court for the first day and then slip off without leave, in order to comply with the conditions of the bond. *Glasgow v. State*, 21 Pac. 253, 41 Kan. 383.

"Appearance," is defined as a coming in to court as a party to a suit, whether as plaintiff or defendant; the formal proceeding by which the defendant submits himself to the jurisdiction of the court. So that the use of the word "appear" in a statute providing that boards of directors of irrigation districts may sue, appear, and defend in person or by attorneys, and in the name of such districts, implies that such irrigation districts may be sued as well as sue. *Boehmer v. Big Rock Creek Irr. Dist.*, 48 Pac. 908, 911, 117 Cal. 19.

"Appeared," as used in a return of a justice of the peace to a writ of certiorari reciting that the parties "appeared," in the absence of any qualification, means a general appearance. *Cron v. Krones*, 17 Wis. 401, 403.

"Appears," as used in Code, § 72, providing that a defendant "appears" in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice or appears for him, does not mean that the mere corporal presence of the defendant or his agent at the place of trial shall constitute an appearance of the defendant, but that there must be some act performed, and that the defendant must answer, demur, or give the plaintiff written notice of appearance. *McCoy v. Bell*, 20 Pac. 595, 598, 1 Wash. St. 504.

#### Purport distinguished.

Gen. St. 1878, c. 73, § 82, provides that in actions brought by the indorsee of a promissory note, possession of the note shall be prima facie evidence that the same was indorsed by the persons by whom it purports to be indorsed. Section 90 provides that an indorsement of money received on a promissory note, which "appears" to have been made when it was against the interest of the holder to make it, is prima facie evidence of the facts therein contained. In commenting on these sections, the court said that "the use of the words 'appears to have been made,' rather than the word 'purports,' significantly indicates that the former words were not used as synonyms with the latter, but were intended to convey an altogether different idea," and construed the section as meaning that the indorsement was prima facie evidence only "when it was made to appear, by other evidence, that the indorsement was made when it was against the interest of the holder." *Young v. Perkins*, 12 N. W. 515, 517, 29 Minn. 173, 175.

#### As remain within reach of court.

The word "appear" in a bail bond, requiring the principal in the bond to appear, means that the principal shall remain within the reach of the process of the court. *Harwood v. Robertson* (S. C.) 2 Hill, 336, 338.

#### View implied.

An order for stopping a highway as unnecessary, stating that having upon view found, and it "appearing" to us, did not imply that the justices acted on any other information than their own view. *Rex v. Inhabitants of Milverton*, 5 Adol. & E. 841.

An order of justices for the closing of a highway, which recited that "we having viewed," "and it appearing to us that such highway is unnecessary," does not imply that it was made upon the view of the justices, and the order is insufficient. *Queen v. Jones*, 12 Adol. & E. 684, 685.

### APPEARANCE.

See "General Appearance"; "Special Appearance"; "Voluntary Appearance."

Where a paper, which has been voluntarily executed by the defendants in a suit pending and therein filed, contains a recital, "we hereby enter our appearance to said cause," such phrase signifies that they make an appearance for every necessary purpose of the cause. *Mutual Nat. Bank of New Orleans v. Moore* (La.) 24 South. 304, 306.

The "appearance" of parties is no longer, as formerly, by actual appearance in court, either by themselves or their attorneys, but it must be remembered an appearance of this kind is still supposed and exists in contem-

plation of law. The appearance is effected on the part of the defendant, where he is not arrested, by making certain formal entries in the proper office of the court, expressing his appearance. *Salina Nat. Bank v. Prescott*, 57 Pac. 121, 122, 60 Kan. 400.

In order to constitute an appearance in the legal sense of the term, there must be some substantial act done by the defendant which constitutes him a party to the suit. *Murphy v. Williams*, 1 Ark. (1 Pike) 376, 384.

"An appearance formerly signified the defendants filing a common or special bill. 1 Jacob's L. Dict. The appearance is effected on the part of a defendant, when he is not arrested, by his making certain formal entries in the proper office of the court expressing his appearance, or, in case of arrest, by giving bail to the action." *Scott v. Hull*, 14 Ind. 136, 137 (quoting 1 Bouv. L. Dict.).

A party enters his appearance if he does any act from which it may be presumed that he acknowledged the jurisdiction of the court. *Barbour v. Newkirk*, 83 Ky. 529, 532.

"Appearance," in law, means the coming in of a defendant in answer to a writ, summons, etc. An "appearance" waives all defects in service of process, and cannot be set aside, if general, unless induced by fraud or mistake. *Allen v. Coates*, 29 Minn. 46, 11 N. W. 132.

Appearance is the process by which a person against whom a suit has been commenced submits himself to the jurisdiction of the court. *Flint v. Comly*, 49 Atl. 1044, 1045, 95 Me. 251.

An appearance is the formal proceeding by which a defendant submits himself to the jurisdiction of the court; the prescribed mode of complying with the exigency of the process. *Crawford v. Vinton*, 62 N. W. 988, 989, 102 Mich. 83.

An "appearance" is the first act of the defendant in court, and is triable by the record, which is verity. It is the formal act by which a person against whom the suit has been commenced enters and submits himself to the jurisdiction of the court in person or by attorney. "Appearance" has the meaning of being present in court, and at common law "appearance" and "pleading" were perfectly segregated, for there could be no pleading till appearance was perfected; but now in practice appearance is generally followed connectively by some plea. *Groves v. County Court of Grant County*, 26 S. E. 400, 464, 42 W. Va. 587.

#### Answer or demurrer.

"Appearance" means the coming into court as a party to a suit, whether as plaintiff or defendant, and hence a general demurrer by defendant constitutes an appearance.

*Thompson v. Michigan Mut. Ben. Ass'n*, 1 W. 247, 248, 52 Mich. 522.

Appearance "means being present at court, though, in common parlance, appearing for the defendant in an action or suit is sometimes regarded as nearly synonymous with 'answering thereto.' 'Answer,' in its proper sense, is to be distinguished from 'appearance,' in that 'answer' properly means a counter statement of facts in the course of pleading; a confutation of what the other party has alleged. When 'answer' is spoken of in legal proceedings in civil cases, it generally implies something which is written." *Larrabee v. Larrabee*, 33 Me. 100, 102.

A defendant appears in an action when he answers, demurs, or gives plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. *Rev. St. Utah 1898*, § 3334.

#### As continued appearance.

Where a bond is given on an adjournment of an examination in a bastardy case, conditioned for the "appearance" of the party charged at the adjourned day, the word "appearance" means not a temporary appearance merely, but a continued "appearance" and attendance until the examination and subsequent proceedings are finally closed. *People v. Jayne* (N. Y.) 27 Barb. 58, 61.

#### Motion or notice thereof.

"Appearance" is the first act of the defendant in court, and is either voluntary or compulsory. A mere motion in court to dissolve an injunction granted in a case is not that formal entry of appearance which will authorize the complainant to take a pro confesso against the party making the motion. *Chewning v. Nichols* (Miss.) 1 Smedes & M. Ch. 122.

An appearance of defendant in court for the purpose of objecting by motion to the jurisdiction of the court over his person is not an appearance in the action, though where he also asks to have the cause dismissed on the ground that the court has no jurisdiction over the subject-matter of the suit, which motion is not well founded, it is an appearance equivalent to a service of summons. *Elliott v. Lawhead*, 1 N. E. 577, 580, 43 Ohio St. 171.

The giving notice by an attorney, on behalf of defendant, to plaintiff's attorney, of a motion before a court commissioner to dissolve an attachment issued in the case on the ground that it was irregularly issued, was not a general appearance in the case authorizing the clerk to enter judgment by default. *Glidden v. Packard*, 28 Cal. 649, 651.

#### As personal appearance.

"Appearance," as used in *Rev. St. 1858*, c. 120, § 45, providing that, on return of a

process duly served, a justice of the peace shall wait one hour after the time specified in such process for the "appearance" of the parties, unless they sooner appear, does not mean a formal appearance in the action to be entered in the docket of the justice, but a personal "appearance" of the parties before the justice. *Brandies v. Robinson*, 45 Wis. 464, 465.

**Plea in abatement.**

An appearance is a submission to the jurisdiction of the court, in obedience or in answer to process. The consequence resulting from an appearance made may be limited by the steps taken or the pleadings interposed subsequently. If these refer to, and are for the purpose of vacating an irregular service of process, or for taking advantage of defects of process, the appearance will not, on error or appeal, be deemed a general appearance curing such defects. A plea, especially a plea in abatement, when final judgment can be entered thereon, is of necessity an appearance. *Grigg v. Gilmer*, 54 Ala. 425, 430.

**Prayer for appeal after judgment.**

An "appearance," to conclude a defendant from taking advantage of any defect in the service or return of a writ, is not equivalent to a prayer for an appeal after a judgment by default. "By praying the appeal he did not appear in the action." *Rose v. Ford*, 2 Ark. (2 Pike) 26, 29.

**Request for continuance.**

"Appearance," when used to designate the act of any person with reference to an action pending, means to come into the court as a party to the suit. The actual presence of the party is not required to constitute an "appearance." He may appear by his attorney or his agent, and, where a party made a written request within the hour to have a case in justice court held open for a certain time, it is an "appearance," and gives the court jurisdiction to act. *Wagner v. Kellogg*, 52 N. W. 1017, 92 Mich. 616.

**Signing of recognizance.**

The word "appearance," in Civ. Code Proc. § 2458, providing that in order to entitle the judgment creditor to maintain supplementary proceedings the judgment must have been rendered upon the judgment debtor's appearance or by a personal service of the summons upon him, means voluntary submission to the jurisdiction, in whatever form manifested, and, after entry of judgment on a forfeited recognizance, such proceedings may be instituted though defendant was not served with summons, the signing of a recognizance being equivalent to a voluntary appearance. *People v. Cowan*, 41 N. E. 26, 146 N. Y. 348.

**Unauthorized appearance.**

"Appearance," as used in Code Civ. Proc. § 108, wherein a "voluntary appearance" is made equivalent to personal service of the summons on a defendant, means the appearance of such defendant in person, or by an attorney authorized so to do, and hence, where an attorney without any authority appeared for a defendant, who was not served with summons and who had no knowledge or notice of the action, the court had no jurisdiction. *Williams v. Neth*, 31 N. W. 630, 632, 4 Dak. 360.

**APPEARANCE BY ATTORNEY.**

"Appearance by attorney" and "appearance by counsel" in a cause are distinctly different, the former being the substitution of a legal agent for the personal attendance of the suitor, the latter the attendance of an advocate without whose aid neither the party attending nor his attorney in his stead could safely proceed; and an appearance by attorney does not supersede the appearance by counsel. *Mercer v. Watson* (Pa.) 1 Watts, 330, 331.

**APPEARANCE DAY.**

The words "default day" in a statute requiring application for a jury trial to be made on default day, and the words "appearance day" as used in another provision fixing the second day of the term as appearance day, are synonymous. *Cruger v. McCracken* (Tex.) 26 S. W. 282, 283.

When a scire facias against special bail is returnable at rules on the first Monday of the month, the return day is the appearance day, as an appearance may then be entered at rules. *Branch v. Webb* (Va.) 7 Leigh, 371, 379.

**APPEARANCE OF DANGER.**

"Appearance of danger" sufficient to justify homicide in self-defense is an appearance to the mind of the party committing the homicide, and not to the mind of the jury after hearing all the evidence and ascertaining the real facts, many of which might or could not be known to the slayer at the time of the killing. Each juror must place himself in the position of the defendant at the time of the homicide, and determine from all the facts, as they appeared to the defendant at the time of the killing, whether his apprehension or fear of death or serious bodily harm was reasonable. *Watkins v. United States*, 41 S. W. 1044, 1046, 1 Ind. T. 364.

**APPEARANCE TERM.**

"Appearance term," as used in Code, § 2742, providing that to entitle a party to a



trial de novo in the Supreme Court a motion therefor must be made at the "appearance term" in writing, does not mean the first term after legal service has been made, but means that term when it first becomes apparent there is any issue of fact for trial and determination. *Vinsant v. Vinsant*, 47 Iowa, 594, 596.

## APPELLANT.

An appellant is the party or person who takes an appeal. *Jones v. Quantrell*, 9 Pac. 418, 419, 2 Idaho (Hasb.) 153.

The party appealing is known as the appellant, and the adverse party as the respondent. Cr. Code, N. Y. 1903, § 516.

## APPELLATE.

The distinguishing characteristic of "appellate" power is the authority to examine and correct errors. *Commonwealth v. Simpson* (Pa.) 2 Grant, Cas. 438, 439.

The word "appellate" does not include such power of review as is exercised by the Secretary of the Interior or the Commissioner of the Land Office over the action of inferior land officers. This is "supervisory" power, rather than appellate. *Hestres v. Brennan*, 50 Cal. 211, 217.

## APPELLATE COURT.

"Appellate court," as used in a bond conditioned to perform the judgment rendered by the "appellate court," meant the judgment rendered by any court to which an appeal was taken, without regard whether it was the Supreme Court or the Court of Civil Appeals. *Prewitt v. Day*, 23 S. W. 982, 983, 86 Tex. 166.

The term "appellate court" includes the Supreme Court or Court of Civil Appeals having jurisdiction of a cause on appeal or writ of error. Rev. St. Tex. 1895, art. 1386.

"Appellate courts," as used in the bankruptcy act, shall include the Circuit Courts of Appeals of the United States, the Supreme Courts of the territories, and the Supreme Court of the United States. U. S. Comp. St. 1901, p. 3418.

## APPELLATE JURISDICTION.

"Appellate jurisdiction" is the power vested in a superior tribunal to review and revise the jurisdiction of an inferior tribunal. *State ex rel. Williams v. Anthony*, 65 Mo. App. 543, 552.

"Appellate jurisdiction" is defined to be the power and authority conferred upon the Supreme Court to hear and determine causes which have been tried in inferior courts

(Bouv. Dict.). *City of Brownsville v. Basse*, 43 Tex. 440, 449.

"Appellate jurisdiction" is the power to take cognizance of a review of proceedings had in an inferior court, irrespective of the manner in which they are brought up, whether by appeal or by writ of error. *State v. Baker*, 19 Fla. 19, 26.

"Appellate jurisdiction" embraces the right to review the final judgments of the courts of original jurisdiction, or, in other words, the right to reverse, affirm, or modify them, and to enforce by some mandatory process the judgment of the appellate tribunal. *In re Jessup's Estate*, 22 Pac. 1028, 1030, 81 Cal. 408, 6 L. R. A. 594.

"Appellate jurisdiction," strictly speaking, is exercised by revising the actions of inferior courts and remanding the cause for the rendition and execution of the proper judgment. *Dodds v. Duncan*, 80 Tenn. (12 Lea) 731, 734.

The jurisdiction which the court is asked to exercise on an application for a writ of habeas corpus, as distinguished between "original" and "appellate" jurisdictions, is clearly "appellate." It is the revision of a decision of an inferior court by which a citizen has been committed to jail. The question brought forward in a habeas corpus is always distinct from that which is involved in the case itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts. The decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature. *Ex parte Bollman*, 8 U. S. (8 Cranch) 75, 101, 2 L. Ed. 554.

"Appellate jurisdiction," as used in Const. art. 16, § 2, declaring that the Supreme Court shall have original jurisdiction in such remedial cases as may be prescribed by law, and "appellate jurisdiction" in all cases both in law and equity, defines the nature of the jurisdiction conferred, but does not embrace the mode in which the jurisdiction shall be exercised. *Tierney v. Dodge*, 9 Minn. 166 (Gil. 153, 156, 157).

"Appellate jurisdiction," as used in Const. 1870, art. 6, § 2, providing that the Supreme Court shall have original jurisdiction in cases relating to the revenue, in mandamus, and habeas corpus, and "appellate jurisdiction" in all other cases, is used in contradistinction to "original jurisdiction," and was intended to invest the Supreme Court with supervisory power only, except where original jurisdiction

is expressly given. *People v. City of Chicago*, 62 N. E. 196, 193 Ill. 577.

"Appellate jurisdiction," as used in Const. art. 7, § 3, providing that the Supreme Court, except in cases otherwise provided in this Constitution, shall have "appellate jurisdiction" only, which shall be coextensive with the state, but in no case removed to the Supreme Court shall a trial by jury be allowed, and the Supreme Court shall have a general superintending power over all inferior courts, should be construed as limiting the appellate power spoken of to appeals taken from the judgments and orders of such courts as are recognized and established by the Constitution and the laws, and cannot be extended to the acts or decisions of officers or persons not acting as a court. "Appellate jurisdiction spoken of in the Constitution is that kind of appellate jurisdiction which had theretofore been exercised by the highest judicial tribunals of the respective states, and not an unlimited appellate jurisdiction over any matter or thing arising either in courts or out of courts which the wisdom or folly of any future Legislature might see fit to confer or impose upon it. The appellate jurisdiction should be limited to the judgment and orders made by the courts of the state, and orders made by judges or other officers out of court cannot be the subject of review in the first instance in the Supreme Court." *Hubbell v. McCourt*, 44 Wis. 584, 587.

**Power to direct subsequent action included.**

"Appellate jurisdiction" is the cognizance which a superior court takes of a cause removed to it by appeal or writ of error from a decision of an inferior tribunal. The power of the appellate court necessarily includes the power not only to reverse a judgment, but also to control and direct the subsequent action of the subordinate court. *Maxson v. Superior Court of Madera County*, 57 Pac. 379, 381. 124 Cal. 468.

**Power to render appropriate judgment included.**

The statute providing that the Supreme Court shall have appellate jurisdiction over all manner of pleas, complaints, motions, causes, and controversies which may be brought before it, etc., gives it authority to render such judgment as it may conclude appropriate. And this power is made more apparent by the subsequent clause of the section, providing that, when judgment or decree of the court below in civil cases shall be reversed, the Supreme Court shall render judgment or decree as the court below should have done, "except when it is necessary that some matter of fact be ascertained, or, from uncertainty as to the damages to be assessed or the matter to be decided, it is necessary to remand the case to the district

court." It is committed to the judgment of the Supreme Court to determine whether there is any uncertainty as to the damages or other matter, or additional facts to be ascertained to enable the court to pronounce such judgment as should have been rendered in the court below. *City of Brownsville v. Basse*, 43 Tex. 440, 449.

**Power to review facts included.**

The term "appeal" necessarily involves the idea of a review of the facts as well as the law, so that a constitution requiring a supreme court on appeals and cases in chancery to review the findings of fact only requires in specific terms what was necessarily implied by the general terms "appellate jurisdiction." *Wagener v. Kirven*, 25 S. E. 130, 132, 47 S. C. 347.

**Power to try de novo included.**

The expression "appellate jurisdiction," as used in Const. art. 6, § 6, providing that the district court shall have appellate jurisdiction in cases arising in justices' courts and in such other inferior tribunals as may be established by law, is not to be construed in its narrow and limited meaning, such as to retry and determine something that has already been tried in some other tribunal, but is to be construed in a broad and comprehensible sense, so as to confer jurisdiction upon the district courts to hear cases on appeal there either in the strictest sense, which would require a trial de novo, or to review them as law cases are reviewed at common law. *Cavanaugh v. Wright*, 2 Nev. 166, 168.

**Power to use necessary writs included.**

The term "appellate jurisdiction" implies all the power and instrumentalities necessary to make effective the ultimate relief sought. This follows from the grant itself, without other express provision, for it is an established doctrine that one of the essential attributes of appellate jurisdiction, and one of the inherent powers of an appellate court, is the right to make use of all the writs known to the common law, and, if necessary, to invent new writs or proceedings in order to suitably exercise the jurisdiction conferred. *Finlen v. Heinze*, 69 Pac. 829, 833, 27 Mont. 107.

**Prior decision implied.**

"Appellate jurisdiction," as used in Const. art. 3, § 10, providing that the Supreme Court shall have such "appellate jurisdiction" as may be provided by law, means to revise and correct the proceedings in a cause already instituted, and necessarily implies that the subject-matter has already been instituted and acted on by some other court whose judgment or proceedings are to be revised. The fact that there has been a decision, however, is not sufficient, but there must have been a decision by a court clothed with ju-

dicial authority and acting in a judicial capacity. The tribunal from which an appeal lies need not be called a "court," but it must be one having the attributes of a court—a tribunal where justice is judicially administered. *Auditor of State v. Atchison, T. & S. F. R. Co.*, 6 Kan. 500, 505, 7 Am. Rep. 575.

It is the essential criterion of "appellate jurisdiction" that it revises and corrects the proceedings in a case already instituted, and does not create that cause. Therefore, though mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is in effect the same as to sustain an original action for that paper, and seems not to belong to appellate, but to original, jurisdiction. *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 175, 2 L. Ed. 60.

#### APPELLATE TERM.

The name "appellate term" is purely an arbitrary designation, applicable to the term of the Supreme Court which hears appeals from inferior and local courts, apparently justified by the rules and regulations pertaining to such appeals. *Curtin v. Metropolitan St. Ry. Co.*, 49 N. Y. Supp. 668, 22 Misc. Rep. 586.

#### APPENDAGE.

An "appendage" is something added to a principal or greater thing, though not necessary to it. *State v. Fertig*, 30 N. W. 633, 70 Iowa, 272; *Hemme v. School Dist. No. 4*, 1 Pac. 104, 107, 30 Kan. 377.

An "appendage" is something added, attached, or annexed; a concomitant. *Hemme v. School District No. 4*, 1 Pac. 104, 107, 30 Kan. 377; *In re Bozeman*, 22 Pac. 628, 630, 42 Kan. 451.

An "appendage" is something added; is an accessory to or the subordinate part of another thing. *State Treasurer v. Somerville & E. R. Co.*, 28 N. J. Law (4 Dutch.) 21, 26.

##### To saloon.

A back room, between which and a saloon there was a third room, used as a kitchen and for the purpose of storing liquors, was properly denominated an "appendage" of the saloon. *State v. Fertig*, 30 N. W. 633, 70 Iowa, 272.

##### To school house.

"Appendage," as used in a statute requiring the district board to provide the necessary "appendages" for schoolhouses, was intended in a broad and comprehensive sense, and would include a well. *Hemme v. School District No. 4*, 1 Pac. 104, 107, 30 Kan. 377. The word as so used includes a lightning rod and a fence and a well, and all improvements necessary to the conduct of the school.

*In re Bozeman*, 22 Pac. 628, 630, 42 Kan. 451. "Appendages" likewise means school apparatus, such as blackboards, outline maps, mathematical charts, etc. *School Dist. No. 17, Chase County, v. Swayze*, 29 Kan. 211, 216. The term refers to things connected with the building or designed to render it suitable for use as a schoolhouse, and does not include a stereoscope, since, however available or useful a stereoscope may be in a schoolhouse, it can in no proper sense be called an "appendage" for a schoolhouse. *School Dist. No. 29, Bourbon County, v. Perkins*, 21 Kan. 536, 537. The word as so used does not mean simply school appendages to be used inside the building, nor can it be limited to such articles as brooms, pails, cups, etc., but must be construed in a broader sense to include fuel, fences, and necessary outhouses. *Creager v. School Dist. No. 9*, 28 N. W. 794, 795, 62 Mich. 101.

##### To railroad.

"Appendages," as used in the charter of a railroad, requiring the filing of a statement as soon as the road with its "appendages" shall be finished so as to be used, is to be construed as only meaning the real estate belonging to the company, and not to include personal property of the company. *State Treasurer v. Somerville & E. R. Co.*, 28 N. J. Law (4 Dutch.) 21, 26.

#### APPENDANT.

See "Common Appendant"; "Powers Appendant."

"An appendant is a thing used with and related to or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant." *Lucus v. Bishop*, 83 Tenn. (15 Lea) 165, 167, 54 Am. Rep. 440; *Leonard v. White*, 7 Mass. 6, 8, 5 Am. Dec. 19; *Meek v. Breckenridge*, 29 Ohio St. 642, 648 (citing *Coke*, Litt. 121).

An "appendant" is that which beyond memory has belonged to another thing more worthy. One thing is said to be "appendant" when it has been immemorially connected with another. *New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190, 192, 14 Am. Dec. 346.

##### Appurtenance distinguished.

"Appendants" are by prescription, as distinguished from appurtenances, which are by grant, or which may arise from use. *Jackson v. Striker*, 1 Johns. Cas. 284, 291.

An appendant is that which beyond memory has belonged to another thing more worthy, and which agrees with that to which it is related in its nature and quality; and an appurtenant is that the commencement of which may be known. *Leonard v. White*, 7 Mass. 6, 8, 5 Am. Dec. 19.

## APPERTAIN.

A mortgage by a railroad of engines, tenders, and cars, etc., and all other personal property in any way belonging or "appertaining" to the railroad, did not include canal boats used by the railroad company in connection with its transportation line. *Parish v. Wheeler*, 22 N. Y. 404, 513.

Under a written contract to pay a certain proportion of the net profits after deducting expenses that "appertain" to the goods themselves, the expenses of clerk hire, advertising, and taxes may be deducted from the gross amount, these expenses being such as "appertain" to the goods themselves. *Foster v. Goddard* (U. S.) 9 Fed. Cas. 534, 541.

### Adjoin distinguished.

"Appertaining," as used in the expression "all lands thereto appertaining," is not synonymous with the word "adjoining." As descriptive words in a deed, "adjoining" usually imports contiguity, and "appertaining" use, occupancy. One thing may appertain to another without adjoining or touching it. Proof that pieces of land adjoined would not be proof that one appertained to the other; neither in literal meaning nor as used in deeds are they equivalent. *Miller v. Mann*, 55 Vt. 475-478.

### As belong to.

"Appertaining" means belonging, having relation or incident to something else. Houses and buildings pass in a grant as "appertaining" to the land conveyed, as does a right of common if such right belonged to the estate sold, and that by virtue of the single word "appertaining" inserted in the deed. *Governor of Missouri, to Use of McClenahan, v. McNair*, 1 Mo. 302, 305.

### As peculiar to.

The constitutional provision that the probate court shall have jurisdiction of business "appertaining" to minors means business peculiar to minors, and does not include any case on any subject in which minors happen to be interested, and therefore does not include the partition of land among minors. *Herndon v. Moore*, 18 S. C. 339, 351.

## APPLIANCE.

See "Best Known Appliances"; "Suitable Appliances."

An "appliance" is anything brought into use as a means to effect some end. *Honaker v. Board of Education*, 24 S. E. 544, 545, 42 W. Va. 170, 82 L. R. A. 413, 57 Am. St. Rep. 847.

A joist which workmen are placing in a building does not come within the term "appliances." *Griffiths v. New Jersey & N. Y.*

R. Co., 25 N. Y. Supp. 812, 813, 5 Misc. Rep. 320.

The term "appliance," within the meaning of section 8 of the Illinois Laws of 1899, regulating the practice of medicine, which provides that any itinerant vendor of any drug, nostrum, ointment, or "appliance" of any kind intended for the treatment of diseases or injuries, who shall by any writing or printing or any other method profess to the public to cure or treat diseases or deformities by any drug, nostrum, or "appliance," shall pay a license, etc., means an appliance employed in an attempt to practice medicine or to administer medicine or other remedies as a cure for diseases. *People v. Lehr*, 93 Ill. App. 505, 509.

### Books.

A fire policy on the furniture, chairs, gas apparatus, pictures, paintings, instruments, appliances, and material incidental to a dental office does not cover dental books. The word "appliances" is very comprehensive in its meaning, but it has never been so broadened and expanded as to comprehend books, and the close conjunction in which it is used with the word "material" shows clearly that it has reference to mechanical appliances, in connection with which the word is generally used. *American Fire Ins. Co. of New York v. Bell* (Tex.) 75 S. W. 319, 321.

### Horses.

In a chattel mortgage covering fixtures, furniture, and appliances used in carrying on a grocery store, the term "appliances" was an indefinite term, which, under the circumstances, must be limited to such things as were requisite and necessary for carrying on a grocery business, and hence did not include horses, wagons, and harnesses, though the same had been previously employed by the mortgagor to convey the goods sold from the store to customers. *Van Patten v. Leonard*, 8 N. W. 334, 337, 55 Iowa, 520.

### Persons.

"Appliances," as used in Const. art. 9, § 15, providing that "knowledge by any employé injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them," includes not only inanimate machinery, and tools and apparatus, but also the living men or persons needed to operate the machinery. *Bodie v. Charleston & W. C. Ry. Co.*, 39 S. E. 715, 719, 61 S. C. 463.

Within the rule requiring an employer to furnish safe implements and "appliances" for doing the work, the term embraces not only machinery, premises, and all the implements of every kind used in and about the

business, but also the persons employed to operate them, and the master must furnish a sufficient number of persons competent to perform the labor safely. *Johnson v. Ashland Water Co.*, 37 N. W. 823, 825, 71 Wis. 553, 5 Am. St. Rep. 243.

## APPLICABLE.

"Applicable," as used in reference to the adoption of the common law in the United States as far as it is "applicable," means "applicable to the habits and condition of our society, and in harmony with the genius, spirit, and objects of our institutions." "No distinction is made between what is applicable to the nature of our political institutions, and to the genius of our republican form of government, and to our constitution, and what is applicable to our wants, habits, and necessities," for what is applicable to our wants, habits, and necessities as a community or state must necessarily, to some extent, be determined from the nature and genius of our government and institutions; or, in other words, to determine whether a particular principle harmonizes with the spirit of our institutions, we must look to the habits and the condition of the society which has created and lives under those institutions. A principle or rule which tends to provide for and protect our rights and wants would harmonize with that form of government or those institutions which have grown up under it. *Wagner v. Bissell*, 3 Iowa (3 Clarke) 396, 402.

A general law is applicable, in the constitutional sense, where the entire people in the state have an interest in the subject, such as the regulation of interest, the statutes of frauds and limitations, etc.; but where only a portion of the people are affected, as in locating a county seat, it will depend upon the facts and circumstances of each particular case whether such a law would be applicable. *Evans v. Job*, 8 Nev. 322, 334.

Money applicable to the payment of a legacy "means money which the legatee is entitled to have applied in payment, and imports that there shall be no debts or other obligations having preference over the legacy to prevent the proper appropriation in the hands of the administrators to its payment, or delay its recovery by the legatee." *Webster v. American Bible Soc.*, 33 N. E. 297, 299, 50 Ohio St. 1.

## APPLICABILITY.

A charge instructing the jury that they are the judges of the "applicability" of the law as given them in a charge in a criminal prosecution would include the power to judge not only as to how the law stated should be applied to the facts, but as to whether or not

it applied at all, and would involve the right to disregard the charge as inapplicable, and hence is erroneous. *Ford v. State* (Tenn.) 47 S. W. 703, 705.

## APPLICANT.

"Applicant," as used in the attachment act (Rev. Laws, p. 361), requiring an affidavit for an appeal to be made by the applicant for the writ, is to be construed as being synonymous with "creditor." *New Brunswick Steamboat & Canal Transp. Co. v. Baldwin*, 14 N. J. Law (2 J. S. Green) 440, 441. And also his agent or attorney, in case he resides outside the state. *Trenton Banking Co. v. Haverstick*, 11 N. J. Law (6 Halst.) 171, 173.

## APPLICATION.

See "Summary Application."

### For appeal.

Gen. St. 1878, c. 53, declared that for the purpose of effecting an appeal to the district court from an order of a probate court an application for such appeal should be filed in the probate court. Held, that the word "application" as there used meant "notice," and that the filing of a notice of appeal in the probate court was a sufficient application. *Lake v. Albert*, 37 Minn. 453, 35 N. W. 177.

### For appraisement of damages.

An "application," within the meaning of a statute providing that if any owner of land taken for a ditch, for the preservation of a highway, shall feel aggrieved, he may apply to the supervisors of the town, who shall appoint three electors to appraise the damages, does not include a mere claim for damages filed by a landowner with the supervisors, which contains no intimation that he desires that appraisers be appointed, and therefore such claim does not give the supervisors jurisdiction to appoint electors to appraise the damages. *State v. Town of Leon*, 32 N. W. 228, 229, 68 Wis. 502.

### For insurance.

"A letter requesting the issuing of a policy may be regarded as an application therefor." *Scheffer v. National Life Ins. Co.*, 25 Minn. 534, 538.

An application for a policy includes a paper headed "Application," containing a series of questions to be addressed to the person whose life is proposed to be insured, and probably also includes the paper attached thereto, and headed "To be answered by the party for whose benefit the insurance is desired," but another printed paper thereto attached, headed "Questions to be answered by the medical examiner for the company" is not a part of the application. *Higbee v.*

Guardian Mut. Life Ins. Co. of New York (N. Y.) 66 Barb. 462, 476.

An application for insurance is the representations which a party makes of his property when he applies for insurance. *Cowan v. Phenix Ins. Co.*, 20 Pac. 408, 411, 78 Cal. 181.

#### For patent.

An application for a patent "includes the paper or some written paper and its presentation to the commissioner." *Henry v. Frankestown Soap-Stone Co.* (U. S.) 2 Fed. 78, 81.

#### For stay of judgment.

"Application," as used in 4 & 5 Wm. IV, c. 62, § 27, providing that judgment from execution shall not be stayed unless the party "intending to apply for such rule" shall be bound by recognizance "to make and prosecute such application as aforesaid," refers to the application for a rule to show cause, as authorized by section 26 of the act. *Haworth v. Ormerod*, 6 Adol. & E. 300, 307.

#### For tax deed.

Rev. St. § 1175, provides that when land sold for taxes has not been occupied for at least 30 days "at any time within the six months immediately preceding the time when the tax deed upon such sale shall be applied for," no tax deed shall be issued on the certificate except on proof filed, with such officer, whose duty it is to issue such deed, that the land was not so occupied. Held, that the making and filing with the proper officer of an affidavit of the nonoccupancy of the land would constitute an "application" without further acts, within the meaning of the section above quoted. *Mead v. Nelson*, 8 N. W. 895, 897, 52 Wis. 402.

#### For vacant lands.

"Applications" for vacant lands in Pennsylvania after the death of William Penn have been called "the expression of a wish to hold lands at or near a certain spot, but, not being followed up by due diligence, all pretensions of title under them cease, and abandonment of claim is presumed. They were the inceptions of right, but of themselves conferred no title to any definite tract." *Biddle's Lessee v. Dougal* (Pa.) 5 Bin. 142, 151.

### APPLICATION OF PAYMENTS.

"Application of payments" is where a debtor, on paying money to a creditor to whom he owes several debts, directs to which debt the payment shall be applied; and, in order to constitute an application of payments, the debtor must exercise his option when he makes the payment, since after the money has ceased to be his it is no longer subject to his control. *Bank of California v. Webb*, 94 N. Y. 467, 472.

### APPLY.

Act Cong. Feb. 4, 1887, providing for recovery of damages against persons who shall "apply" a design secured by letters patent, does not apply to all infringers. One who innocently infringes is not within its provisions. The design could not be applied, within the meaning of the act, without knowledge of the design. *Schofield v. Dunlop* (U. S.) 42 Fed. 323, 326.

Where a will devised real estate to a trustee, to apply the rents and profits to the support of testator's son, the word "apply" did not give the trustee authority to mortgage any part of the land so devised. And in connection with a further provision, that if the income proves insufficient, and it becomes necessary to apply the real estate to the support of the son, he is authorized to sell and convey it, clearly he is not given authority to mortgage. *Potter v. Hodgman*, 80 N. Y. Supp. 1056, 1057, 81 App. Div. 233.

#### As pay over.

"Apply," as used in a statute authorizing a trustee to receive the rents and profits of lands, and "apply" them to the use of any person, means the act of applying, and includes any act of the trustee by which the trust fund is applied for the benefit of the cestui que trust, whether expressly directed by the donor or permitted according to the discretion of the trustee; and hence a will creating a trust to receive rents and profits of land and pay them over to the beneficiary is valid. *Leggett v. Perkins*, 2 N. Y. (2 Comst.) 297, 309.

"Applied," as used in a will directing that a specific portion of rents, issues, and profits shall be "applied" to the education and support of testator's children during their minority, is substantially equivalent to "paid over." *Moorehouse v. Hutchinson*, 2 N. Y. Supp. 215, 217.

In Rev. Laws, p. 177, § 12, providing that if an administration bond shall be forfeited the moneys recovered upon such bond shall be "applied" towards making good the damages sustained by any one in performing the said condition, "applied" is synonymous with the word "paid." *Williamson v. Snook*, 10 N. J. Law (5 Halst.) 65, 67.

In a will providing that the trustees shall "apply" the income of the testator's estate to his child during his minority, and that after it should arrive at the age of 21 years the trustees should pay over such income to the child quarterly, "apply" is synonymous with "pay over," and they substantially mean the same thing; one phrase referring to the minority of the child, and the other applying only when it should have arrived at full age. *Moore v. Hegeman*, 72 N. Y. 376, 384.

"Apply," as used in a devise authorizing a trustee to receive rents and profits, and ap-

ply them to the use of a certain person, does not mean to pay over such rents and profits. *Hawley v. James* (N. Y.) 16 Wend. 61, 266.

#### **Promise to pay imported.**

In an instrument acknowledging the receipt of a deed, "in consideration of which I am to apply the payment thereof to a" certain note made by the grantors to a third party, the word "apply" precludes the conclusion that there was a direct or absolute promise to pay the note. The utmost that can be conceded is that the writing binds the maker thereof to apply the value of the land to the payment of the note. *Freed v. Mills*, 120 Ind. 27, 22 N. E. 86.

#### **APPLY ON ACCOUNT.**

The words "apply on the account" are equivalent to the words "settlement of account," as used in a letter inclosing a check in settlement of account. *Widner v. Western Union Telegraph Co.*, 16 N. W. 653, 654, 51 Mich. 291.

### **APPOINT—APPOINTMENT.**

See "Executive Appointment"; "Illusory Appointment"; "Provisional Appointment."

See "Duly Appointed."

"Appointment" is defined to be the designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust. *State ex rel. Nicholls v. City of New Orleans*, 6 South. 592, 597, 41 La. Ann. 156.

"Appointment" implies the conferring of the dignity by the act of one or more individuals having power to select the person appointed. *Wickersham v. Brittan*, 28 Pac. 792, 793, 93 Cal. 84, 15 L. R. A. 106.

"Where the selection of an officer is referred to the Governor or other functionary, it is called an appointment." *Speed v. Crawford*, 60 Ky. (3 Metc.) 207, 210.

"Appointment" is the exercise of the right to designate the person or persons who shall be entitled to enjoy the use of property. *Brandies v. Cochrane*, 5 Sup. Ct. 194, 197, 112 U. S. 344, 28 L. Ed. 760.

It is held that the term "appoint" in a will is never used to convey one's absolute estate. *Heinemann v. De Wolf* (R. I.) 55 Atl. 707, 709.

When the common council of a city is designated as the "appointing power," the term is to be understood in its usual, ordinary, and popular sense, and the authority is to be exercised in the ordinary manner, according to the procedure governing legislative or deliberative bodies. *Rathbone v. Wirth*, 45 N. E. 15, 25, 150 N. Y. 459, 34 L. R. A. 408.

"Appointed," as used in Rev. St. c. 138, § 10, authorizing the court of probate to require additional bond of sureties of any guardian appointed or approved of by them when they think proper, and in case of neglect or refusal to give such additional bond to remove such guardian, is not used in a strict technical sense, to apply only to guardians appointed or approved by the court, but also includes guardians appointed by testamentary act. *McPhillips v. McPhillips*, 9 R. I. 536, 540.

#### **As bequeath.**

The words, "I appoint A. my legatee of a sum specified or of a residue of my estate," when used in a will, carries to him a sum specified of the residue as though the more formal and usual words "I bequeath" had been used. *Wyman v. Woodbury*, 83 N. Y. Supp. 217, 220, 86 Hun. 277.

#### **Contract distinguished.**

The appointment to a public office for a definite term, and the acceptance of such office, bear no analogy to a contract made between the government and an individual. In the latter the terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the consent of the other. In the former both the rights and privileges, as well as the duties, of the appointee are prescribed by the government, and not by agreement of parties. *Uffert v. Vogt*, 47 Atl. 225, 226, 65 N. J. Law. 377.

The "appointment to a public office" is not a contract the impairment of the obligation of which is forbidden by the federal Constitution. *Butler v. Pennsylvania*, 51 U. S. (10 How.) 402, 13 L. Ed. 472. An appointment to office is not a contract, nor is the office or its prospective emoluments the property of the incumbent. *Kenny v. Hudspeth*, 36 Atl. 662, 59 N. J. Law. 320.

#### **As designate.**

"Appointed" means named or designated for or assigned to an office. *Brown v. O'Connell*, 36 Conn. 432, 447, 4 Am. Rep. 89.

The word "appoint," as used in by-laws of a corporation authorizing the officers to appoint, remove, and fix the compensation of employes, when used in connection with an office, designates or nominates a person to fill the position to a point to which the power is given. Of itself the mere power of appointment does not include a power to fix the term for which the person is appointed. The general use of the word is applied simply to the authority to designate a person to fill a position. And a power to appoint could not include either a power to fix the term or a power to fix the compensation to be paid to the person appointed. Hence, under such power, officers have not the right to make a

contract for life employment with an employe. *Carney v. New York Life Ins. Co.*, 45 N. Y. Supp. 1103, 1104, 19 App. Div. 160.

#### Discretion implied.

"The choice of a person for a civil office constitutes the essence of the appointment, and the selection must be the discretionary act of the officer clothed with the power of appointment." The power of appointment contemplates the exercise of judgment and discretion in the appointing power as to whom he shall appoint, and responsibility for the person so selected, and to secure this it must be the independent and untrammelled act of the appointing officer. The officer clothed with the power of appointment must select the persons to be appointed. *People v. Mosher*, 61 N. Y. Supp. 452, 454, 45 App. Div. 68.

"Appointment" implies the exercise of judgment and will. The decisions of this and other courts, state and federal, as to the meaning of the word "appointment," and what constitutes an appointment under the law, are to the effect that the choice of a person to fill an office constitutes the essence of an appointment; that the selection must be the discretionary act of the officer or board clothed with the power of appointment; and that, while he or it may listen to the recommendations or advice of others, yet the selection must be his or its act, which has never been regarded or held to be ministerial. *People v. Mosher*, 163 N. Y. 32, 40, 57 N. E. 88, 90, 79 Am. St. Rep. 552.

#### As elect.

The word "appoint," as used in Const. art. 2, § 1, declaring that each state shall appoint, in such manner as the Legislature may direct, a number of electors, etc., while not the most appropriate word to describe the result of a popular election, is sufficiently comprehensive to cover that mode, and was manifestly used as conveying the broadest powers of determination. *McPherson v. Blacker*, 13 Sup. Ct. 3, 7, 146 U. S. 1, 86 L. Ed. 869.

The word "appointed," in Code Civ. Proc. § 2071, providing that where a board consisting of more than three is created by law, with a president, who is "appointed pursuant to law," service of a writ of mandamus to the board may be made on such president, is not used in a narrow or technical sense, and is not limited to an executive appointment, but means a chairman or presiding officer for whom the law has made provision; that is, one who holds his position, not by the mere courtesy of his fellow members, but either under direct legislative mandate, or by selection under legislative requirement, and includes a president who is elected as well as one who is appointed. *Pierce v. Gug-*

*genheimer*, 60 N. Y. Supp. 703, 703, 44 App. Div. 399.

The word "election," in the strict sense, undoubtedly means the choice of an officer in the exercise of which all the qualified electors have an opportunity to participate; while the word "appointment" is understood to mean the selection, by one or more persons who have been commissioned for that purpose, of another, who by virtue of the choice represents or may exercise some authority over the persons delegating the power to make the appointment. In *People v. Langdon*, 8 Cal. 1, it was insisted that the words "elected" and "appointed," as used in a section of the California Constitution, were not equivalent expressions of the meaning intended to be imported by the framers of that instrument, but the court said much stress is laid upon the word "appoint" as used in this section. This is mere hypercriticism. The word "appoint" was probably used as a more comprehensive term, to convey the idea of a mode of constituting or designating an officer with public election or otherwise. In fact, the words "elect" and "appoint" seem to be regarded as synonymous by the convention. The word "elect" simply means to pick out, to select from among a number, or to make choice of, and is synonymous with the words "choose," "prefer," "select," and was evidently used in this sense in the Constitution; and the word "elect," as used in Const. art. 15, § 1, declaring that all officers shall hold their office until their successors are elected and qualified, is not limited to offices which are filled by an election of the people as contradistinguished to those to which appointment is made by the Legislature. *State v. Compson*, 54 Pac. 349, 351, 34 Or. 25.

"Discriminating authorities sanction the use of the word 'appointed' in a sense which includes the notion of election by a body as well as selection by an individual, and also the use of the word 'elected' as applied to those who are chosen by the votes of a body limited in numbers. By way of authoritative definitions, we have the following: *Bouvier's Law Dictionary*: 'Appointment. The designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust; election; choice; selection. The selection of one person from a specified class to discharge certain duties in a state, corporation, or society.' *Century Dictionary*: 'Appoint. To allot, set apart, or designate; nominate or authoritatively assign—as for use, or to a post or office.' 'Elect. To pick out; select from among a number; to select for an office or employment by a majority or plurality of votes; choose by ballot or any similar method—as to elect a representative or a senator; to elect a president or mayor.' In this connection, an election of an archbishop by the monks of a certain convent is instanced as a proper



use of the verb to elect. Under these definitions the distinction seems to be that election signified the act of choosing where several participate in the selection. 'Appointment' relates to the bestowal of the office upon the person selected, whether the choosing be the act of one or of many. Where the choice rests in the sole discretion of an individual, the usual authoritative evidence that a selection has been definitely made is in the act of bestowal; hence in such cases the word 'appointment' has come to include the function of selection, as well as the function of authoritatively designating the person selected. That the functions are distinct, however, appears when we come to consider those cases where one has the exclusive function of selection, but the appointment is subject to the approval of others. For instance, the governor nominates, and, with the advice and consent of the senate, appoints, certain officers. But where the power of making an appointment resides in a numerous body the exercise of the power necessitates a previous agreement, by majority of voices or otherwise, with respect to the person to be chosen, and the choice so made is an election; after which the person selected receives the appointment, and can properly be said to be appointed, although he is the choice of many. Under our system of government the most familiar example of election is that which is participated in by the people at large. At the same time it requires the use of the phrase 'popular election,' or 'election by the people,' to clearly express the thought." *Reid v. Gorsuch*, 51 Atl. 457, 459, 67 N. J. Law, 396.

"Appointment," as used in statutes generally, means the designation of a person to hold an office or trust by an individual or a limited number of individuals to whom the power of selection has been delegated. The word "election" is properly applied to the choice of an officer by the votes of those on whom the law has conferred the right of election of such officers. *State v. Squire*, 89 Ohio St. 197, 199.

"From the word 'appointment' we understand that the duties of the appointee are for others than those by whom he is appointed. As distinguished from an election, an appointment is generally made by one person, or by a limited number, acting with delegated powers. The appointment to a public office is made by one or more possessing delegated powers, as distinguished from election, where the right is exercised by many." *Wickersham v. Brittan*, 15 L. R. A. 106, 108, 28 Pac. 792, 793, 98 Cal. 34.

In the popular sense an "election" is a choice which several persons collectively make of a person to fill an office or position, while an "appointment" is a choice for such office or position by some single officer or person. Where a police judge was selected by

the several members of the city council it was not inappropriate to say that he was elected. *State v. Williams*, 58 Pac. 476, 477, 60 Kan. 837.

"Appointment," as used in Const. art. 5, § 18, providing that in case a vacancy happens in any office, the appointment of which is vested in the General Assembly, that the Governor shall fill such vacancy by appointment, which shall expire when his successor has been elected and qualified, is synonymous with the term "elected." It means an election by the General Assembly. *State v. Harrison*, 16 N. E. 884, 888, 113 Ind. 434, 3 Am. St. Rep. 663.

#### As executive act.

The power of appointment to office is held to be intrinsically executive, and, although the power of appointing their own clerks is often vested in courts, still the nature of the power is not changed, it being as much executive when exercised by the court as by the Governor. *Pratt v. Breckinridge*, 65 S. W. 136, 137, 112 Ky. 1 (citing *Taylor v. Commonwealth*, 26 Ky. [3 J. J. Marsh.] 401).

"Appointment to office" is in the nature of an executive act. Apart from the purpose of the appointment, it is an exercise of executive power. Though the Constitution provided for certain elective and legislative appointments, except in the cases specified, appointment to office is an exercise of executive power, unless used as a means appropriate to the exercise of powers granted to another department, and when so used it is not the exercise of executive power within the meaning of the Constitution. *Appeal of Norwalk St. Ry. Co.*, 37 Atl. 1080, 1083, 69 Conn. 576, 39 L. R. A. 794.

#### Promotion distinguished.

"Appointment," as used in New York Laws 1884, c. 410, § 4, requiring that honorably discharged soldiers shall be preferred for "appointment" in the civil service of the state, means appointment strictly, and does not include promotion, "a promotion being the advancement of an official or employé to a higher position who had previously been appointed to one of an inferior degree." *In re McGuire*, 2 N. Y. Supp. 760, 762, 50 Hun, 203.

#### License to practice law.

The term "appointed" excludes the idea of a popular election, and refers the office or trust to some other source. Every officer not elected may well be said to be appointed. A license or certificate from three judges, as required by law, to a resident lawyer, admitting him or authorizing him to practice in any of the courts of the state, is an appointment. *Ex parte Faulkner*, 1 W. Va. 269, 299.

The admission of an attorney under the provisions of the Constitution in force in

1860 is not an appointment. In *re Graduates* (N. Y.) 11 Abb. Prac. 301, 336.

#### **As selected according to law.**

Where a city charter provided that all officers shall hold their offices until their successors are "elected or appointed," the term "elected or appointed" means selected in the manner provided by law to hold the office, and, when a confirmation is necessary by the city council, the appointment is not completed until such confirmation. *State v. Daggett*, 68 Pac. 340, 346, 28 Wash. 1.

#### **When complete.**

When a person has been nominated to an office by the President and confirmed by the Senate, and his commission has been signed by the President and the seal of the United States affixed thereto, his appointment is complete, and the transmission of the commission to the officer is not essential to his investiture to the office, and if by an inadvertence or accident it should fail to reach him his possession of the office is as lawful as if the commission were in his custody, since the commission of appointment is merely evidence of the appointment and qualification which constitutes the appointee's title, and it may be proved by other evidence. *United States v. Le Baron*, 60 U. S. (19 How.) 73, 78, 15 L. Ed. 525.

An appointment is complete when the appointee was nominated by the President and confirmed by the Senate, and the giving of a bond is a mere ministerial act for the security of the government, and not a condition precedent to the appointee's authority to act. *United States v. Bradley*, 35 U. S. (10 Pet.) 843, 864, 9 L. Ed. 448.

The word "appointment," as used in reference to the appointment of an administrator, may generally signify "the actual installment in the administrative office." *Wells v. Applegate*, 10 Or. 519, 520.

The words "appointment" and "election" represent different tenures. The people elect; the Governor or other functionary appoints. Section 1 of the statutes concerning offices and officers provides that there shall be elected or appointed, as hereinafter declared, the following officers, etc., and the other provisions of the act use the term "election" as applied to the action of the people in choosing officers, and the term "appointment" as applied to the action of whatever officer or board is vested with the power to fill the given vacancy. Where the officer is chosen by the people he takes by virtue of his election. Where the office from any cause becomes vacant before the expiration of the term, and it is filled by the choice of the Governor or some other public functionary, the officer chosen takes by virtue of his appointment. The appointment to office by the board of supervisors is not complete until the person appointed has received a certificate of his elec-

tion under the seal of the board, signed by proper officers of the board; and therefore an appointment made by a majority of the board may be revoked at any time before such certificate is issued, and no person may be appointed. *Conger v. Gilmer*, 32 Cal. 75, 78.

The phrases "after date of appointment" and "from such date," in Rev. St. § 1556 [U. S. Comp. St. 1901, p. 1067], relative to the annual pay of assistant surgeons in the navy, and providing for increases thereof after the expiration of so many years after date of appointment, or "from such date," refers not to the original entry of the officer into the service as an assistant surgeon, but to the notification by the Secretary of the Navy that he has passed his examination for promotion to the grade of surgeon. *United States v. Moore*, 95 U. S. 760, 761, 24 L. Ed. 588.

#### **APPOINTED OFFICERS.**

"Appointed officers," as used in Const. art. 6, § 4, providing that appointed officers, other than judges of the courts of record, etc., may be removed at the pleasure of the appointing power, construed to include municipal as well as state or county officers. *Houseman v. Commonwealth*, 100 Pa. 222, 230.

#### **APPOINTED SERVICES.**

"Appointed services," as used in Act 1882, c. 22, providing for the appointment of officers of registration of voters, and imposing upon them the performance of certain services for which they were to receive a certain per diem for the days of "appointed services," does not mean only the sittings of the officers for the registration of the names of persons qualified to exercise the elective franchise, but means the other services which the Legislature has prescribed for them to perform, for they are "appointed services," entitling the commissioners to per diem therefor. *Byninger v. Keating*, 60 Md. 334, 335.

#### **APPOINTING POWER.**

The phrase "appointing power," as used in Const. art. 2, § 27, providing "that the election and appointment of all officers, and the filling of all vacancies not otherwise provided for by this Constitution or the Constitution of the United States, shall be made in such manner as may be directed by law, but no appointing power shall be exercised by the General Assembly except as prescribed in this Constitution, and in the election of United States Senators," etc., is one of no ambiguous signification. When employed in reference to matters pertaining to government, or to the distribution of the powers of government, it means the power of appointment to office,—the power to select and indicate by name individuals to hold of-

rice, and to discharge the duties and exercise the powers of officers. *State v. Kenyon*, 7 Ohio St. 546, 556.

## APPORTION.

The word "apportion" means to divide, to assign in just proportion, to distribute among two or more, a just part or share to each. *Fisher v. Charter Oak Life Ins. Co.* (N. Y.) 14 Abb. N. C. 32, 36.

"Apportion," as used in Act Feb. 1832, incorporating the Brooklyn Bank, naming commissioners to open books, receive subscriptions to the capital stock, and making it their duty to distribute the stock among the subscribers thereto, and, in case there should be subscriptions to more than the amount of such stock, to "apportion the same among" the subscribers thereto, in such a manner as a majority of them shall deem most advantageous to the interests of the institution, does not require that every subscriber should receive some stock, as such construction would interfere with the power given the commissioners. *Clarke v. Brooklyn Bank* (N. Y.) 1 Edw. Ch. 361, 363.

In Act March 26, 1813 (Sess. 36, c. 80), incorporating a bank, and appointing commissioners to "apportion" an excess of shares "among" the several subscribers, as they shall judge discreet and proper, the shares subscribed for greatly exceeding the number limited to be subscribed for, "apportion" means to assign to each subscriber or give him such portion as the commissioners should deem meet. *Haight v. Day* (N. Y.) 1 Johns. Ch. 18, 20.

"Apportion" means simply to divide, and does not necessarily mean to divide equally. Thus, it was held that, in view of the fact that a city council was authorized to "apportion" the cost of the sewer according to the actual cost of labor or material expended in constructing along the lateral of the lot assessed, the city council was justified in making an unequal apportionment according to the actual expense. *Jones v. Holzapfel*, 68 Pac. 511, 515, 11 Okl. 405.

The word "apportion," as used in an act of the Legislature for the incorporation of a bank, and appointing certain commissioners to receive subscriptions, and directing them to apportion the excess of shares among the several subscribers as they shall deem discreet and proper, means to assign to each subscriber or give him such portion as the commissioners shall deem meet. *Haight v. Day* (N. Y.) 1 Johns. Ch. 18, 22.

In an action against connecting carriers for damages sustained by delay in shipping cattle, an instruction which in effect directed the jury to first find the whole amount of the damage done by all of the defendants, and then "apportion" it among them accord-

ing to and in proportion to their respective liability as indicated by instructions already given, the use of the word "apportion" did not render the instruction objectionable on the ground that it authorized the jury to fix the liability of each according to an arbitrary rule, and not according to the evidence, especially when read with other instructions that the jury should "apportion" against each defendant only the damage that it had caused, and should not apportion against one the damage caused by another. In discussing the use of the word the court remarks that, if there is a misuse of words, the sense in which they were employed is evident to any ordinary mind, and is the same as if the word "assess" or "find" had been used according to the more general custom. *Gulf, C. & S. F. R. Co. v. Cushney*, 67 S. W. 77, 78, 95 Tex. 309.

## APPORTIONMENT.

Apportionment is the only method of determining the amounts which each of several parties interested in an estate shall pay towards the removal of an incumbrance on the whole. It is the only method of ascertaining the damages in case of a breach of the covenant of seisin as to a part only of the premises conveyed. *Kickland v. Menasha Wooden-Ware Co.*, 31 N. W. 471, 475, 68 Wis. 34, 60 Am. Rep. 831.

### Of rent.

"Apportionment" is defined as a division or partition of a rent or common, or a making of it into parts. This may be by the act of the law or the act of the parties. *Swint v. McClintock*, 38 Atl. 1021, 1022, 184 Pa. 202, 63 Am. St. Rep. 791, 41 Wkly. Notes Cas. 491, 493.

Apportionment of rent does not mean abatement of it, because, though rent may be apportioned, the tenant still remains liable to pay the whole of it, but in different parts to different persons, except where he has purchased or acquired the reversion of part of the demised premises. *Gluck v. City of Baltimore*, 32 Atl. 515, 516, 31 Md. 315, 43 Am. St. Rep. 515.

### Of tax.

The apportionment of a tax consists in a selection of the subjects to be taxed, and in laying down the rule by which to measure the contribution which each of these subjects shall make to the tax. "Apportionment" is therefore a matter of legislation. This definition only applies to ordinary taxation, which is found in the revenue laws of the states where the various subjects of taxation are classified, and the right of taxation upon each class is fixed, and has no application to special assessments for local improvements, where the property to be taxed belongs entirely to one class. Apportionment, in the

case of a tax of the latter class, is purely clerical, and may be performed by a board endowed solely with executive functions. *Barfield v. Gleason*, 63 S. W. 964, 971, 111 Ky. 491 (citing *Broadway Baptist Church v. McAttee*, 71 Ky. [8 Bush] 508, and *Loeser v. Redd*, 77 Ky. [14 Bush] 18).

## APPRAISE.

To "appraise" is to estimate value, and such is the duty of arbitrators appointed to ascertain and appraise "the sound value of and the loss upon the property damaged," and it requires the arbitrators to make an appraisement, and not to hear evidence. *Vincent v. German Ins. Co.*, 94 N. W. 458, 460, 120 Iowa, 272.

## APPRAISAL.

See "Existing Appraisal."

Arbitration distinguished, see "Arbitration."

An "appraisal" of property signifies the valuation of it or an estimation of its value. In a statute requiring the selectmen to appraise all taxable property "at its full and true value in money," the words "full and true in money" gave no added meaning to the word "appraisal." *Cochesio Mfg. Co. v. Town of Strafford*, 51 N. H. 455, 482.

## APPRAISED VALUE.

The term "appraised value," as used in *Wag. St. p. 88, § 35*, allowing the widow to choose additional personal property, not exceeding the "appraised value" of \$400, were only designed as a means of valuation in case the widow chose specific articles. *Cummings v. Cummings*, 51 Mo. 261, 264.

"Appraised value," as used in the revenue acts, means the value of the goods as estimated by the appraisers, either according to the actual cost, actual value, or market value, as the case may be, exclusive of charges. *Grinnel v. Lawrence* (U. S.) 11 Fed. Cas. 54, 56; *Wilson v. Maxwell* (U. S.) 30 Fed. Cas. 147, 149.

## APPRAISEMENT.

See "Due Appraisement."

Award distinguished, see "Award."

An "appraisement" of real property offered at judicial sale is to be treated as a summary proceeding to fix a minimum price on property to be sold, and that only fraud or irregularities taking away the power of the appraisers to act in it, or in some way affecting the substantial rights of the defendant, will vitiate it. *David Adler & Sons Clothing Co. v. Hellman* (Neb.) 95 N. W. 467, 468.

## APPRAISER.

See "General Appraisers"; "Merchant Appraiser."

An "appraiser" is not an officer of the probate court. He is simply an officer appointed by that court to appraise the goods and chattels, rights and credits, of the deceased that shall have come to the knowledge of the administrator, and to make return thereof under oath to such court. *Fairbanks v. Mann*, 34 Atl. 1112, 1113, 19 R. I. 499.

"Appraisers," as used in an act appointing certain persons having the duties of commissioners, but designating them as appraisers, is to be construed not as any official or technical appellation, but rather as descriptive of the duties which they were commissioned to perform. *State v. Morris Canal & Banking Co.*, 14 N. J. Law (2 J. S. Green) 411, 437.

An act of the Legislature appropriating a sum of money for the purchase of certain relics to be paid on the certificate of three persons named, that the relics are in their opinion genuine, and that it is desirable in their judgment that they should be placed in the museum of the state library, is not a provision for arbitration to determine controversies between individuals, or in matters of private concern, in which all of the appraisers are required to act, but was an appointment of "appraisers" to act between an individual and the state, and is a matter of public concern, in which a majority act as the whole, when all have met. *People v. Nichols*, 52 N. Y. 478, 482, 11 Am. Rep. 734.

The term "appraiser," as used in leases providing for appraisement of the property, a fixed percentage whereof is to be the rent, imports a disinterested person. *Pool v. Hennessey*, 39 Iowa, 192, 195, 18 Am. Rep. 44.

## APPRAISERS AT LARGE.

The term "appraisers at large" is the name generally used to designate the appraisers appointed under Act Cong. March 8, 1851, directing that four appraisers should be appointed to afford aid and assistance in the appraisement of merchandise imported. *Gibb v. Washington* (U. S.) 10 Fed. Cas. 288, 289.

## APPRECIABLE.

"Appreciable," as used in a statement that an "appreciable" part of a proposed railroad was to be in the public highways, means a substantial part of it. *New England R. Co. v. Central Ry. & Electric Co.*, 36 Atl. 1061, 69 Conn. 47.

## APPRECIABLY.

"Appreciably," as used in the West Virginia cases holding that the court should not

strike out the evidence where it "appreciably" tends to sustain the party's action or defense, means that the evidence must be such as would forbid the court from setting the verdict aside. If the evidence is so weak as not to carry the case in favor of him who bears the burden of proof, so that the verdict based upon that evidence ought to be set aside, the court commits no error in sustaining a motion to exclude, because after verdict the same question comes to the court on a motion for a new trial. *Ketterman v. Dry Fork R. Co.*, 37 S. E. 683, 687, 48 W. Va. 606.

## APPRECIATE.

The word "appreciate" is defined by lexicographers to mean to be fully aware of or alive to the value, importance, or worth of; see the full import of. *Standard Dictionary*: To be fully conscious of; to be aware of; detect; perceive the nature or effect of. There is a distinction between knowledge of defects and knowledge of the risks resulting from such defects. *Illinois Steel Co. v. Ryska*, 65 N. E. 734, 735, 200 Ill. 280.

In a suit to contest the validity of a will, the court instructed that though the testator had a morbid prejudice against a son-in-law, amounting to an insane delusion, that would not in itself invalidate the will provided such insane delusion did not prevent the testator from understanding and "appreciating" his relation to those who had a claim on his bounty. If the insane delusion did not prevent the testator from understanding and appreciating his relation to his daughter, then it must have been, first, that he knew that she was not responsible, and ought not be held responsible, for anything that her husband did or said; and, second, that he was able to estimate justly (for in this connection that is the sense of appreciation) his relation towards her. Having full knowledge and full capacity to reason, there is left no place for delusion to operate. *Brace v. Black*, 17 N. E. 66, 68, 125 Ill. 33.

## APPREHEND.

"Apprehend," as used in the statement that one must have reasonable ground to "apprehend" danger in order to justify taking life in self-defense, is not synonymous with "fear," but with "belief." "The party assailed need not fear the threatened danger. It is sufficient if he believes in good faith that there is actual danger, and that he will suffer bodily harm if he does not resist." *Trogdon v. State*, 32 N. E. 725, 727, 133 Ind. 1.

Where the court said, "My duty is to give you in charge the rule of law by which I 'apprehend' you are to be governed in

the decision of this case," he meant "understand, conceive, believe." *Golden v. State*, 25 Ga. 527, 531.

## APPREHENSION.

The word "apprehension" means the seizure, taking, or arresting of a person on a criminal charge, the term "apprehension" being applied exclusively to criminal cases as distinguished from the word "arrest," which is applied to both civil and criminal cases. *Hogan v. Stopplet*, 53 N. E. 604, 606, 179 Ill. 150, 44 L. R. A. 809. See, also, *Montgomery County v. Robinson*, 85 Ill. 174, 176.

"Apprehension of attack," as used in Code, § 3775, prohibiting the carrying of a concealed weapon except by a person having a well-grounded apprehension of attack, means reasonable ground to believe that an assault is about to be committed on him, and does not include a case of an "apprehension" on the part of an officer that a criminal known by him to be armed will resist arrest to the extent of taking life, on the officer's approach to arrest him. Such resistance is more a defense than an attack or assault. *Reach v. State*, 11 South. 414, 415, 94 Ala. 113.

## APPRENTICE.

Laborer distinguished, see "Laborer."

The term "apprentice" is derived from the word "apprendre," to learn. *Hopewell v. Amwell*, 3 N. J. Law (2 Penning.) 422, 425.

An "apprentice" is one bound by indenture with his own consent or by agreement of friends to serve in a trade. *Commonwealth v. St. German (Pa.)* 1 Browne, 24, 25.

"Apprentice" means in the law a learner of a trade, but learners under indentures are distinguished from those without, so that the former acquire a settlement and the latter none. *Overseers of North Brunswick Tp. v. Overseers of Franklin Tp.*, 16 N. J. Law (1 Har.) 535, 537.

"Apprentices are persons bound to a master to learn some art or trade." *Phelps v. Pittsburgh, C. & St. L. Ry. Co.*, 99 Pa. 108, 113.

An "apprentice" is a young person bound by indenture to a tradesman or artificer who, upon certain covenants, is to teach him his mystery or trade. *Lyon v. Whitmore*, 3 N. J. Law (2 Penning.) 845, 846; *Hopewell Tp. v. Amwell Tp.*, 3 N. J. Law (2 Penning.) 422, 425.

It is true apprentices are not confined to tradesmen or artificers. Husbandmen may take apprentices, but in doing it they cove-

nant to learn them the art and mystery of husbandry. It is essential to every legal indenture of apprenticeship that the master or mistress must engage or covenant to learn the apprentice some trade, art, or mystery. It is that which distinguishes it from menial service. To constitute an apprenticeship something is to be learned. It is the characteristic mark of the service to be performed, and there can be no apprenticeship without it. *Hopewell Tp. v. Amwell Tp.*, 3 N. J. Law (2 Penning.) 422, 425.

"Apprentice," as used in Rev. St. c. 113, making it the duty of the supervisors or superintendents of the poor to bind orphans or minors, otherwise likely to become chargeable to the public, as "apprentices" to some respectable householder of the county by written indenture, binding such minor to serve as an "apprentice," means binding to serve in some specific profession, trade, or employment. In *re Goodenough*, 19 Wis. 274, 276.

An agreement that a son should work for a blacksmith for three years for wages to be paid to the father, and that the blacksmith was to teach the boy and employ him in and about the trade of a blacksmith, was insufficient to constitute the boy an "apprentice." *Lyon v. Whitmore*, 3 N. J. Law (2 Penning.) 845, 846.

A contract by which a mother agrees that her minor son shall labor for a fixed period at stipulated wages, the employer reserving the right to discharge him if he should be found incompetent or unsatisfactory, does not become an indenture of "apprentice" merely by being so styled by the parties. *Dwyer v. Rathbone*, 5 N. Y. Supp. 505, 52 Hun, 615.

#### APPRENTICESHIP.

An "apprenticeship" is a contract to create the relation of master and apprentice, and can be effected only by deed. *Squire v. Whipple*, 1 Vt. 69, 71.

"Apprenticeship," as used in a statute providing that pilots, in addition to the qualification now required by law, shall hereafter be required to serve a regular "apprenticeship" of two years, means regular, faithful, and active service under a competent pilot, with a purpose to secure knowledge and skill as a pilot, but an actual binding out is not necessary. *State v. Jones*, 16 Fla. 306, 318.

#### APPRISED.

In the cases of *Ableman v. Booth* and *United States v. Same* (decided together) 62 U. S. (21 How.) 506, 16 L. Ed. 169, Chief Justice Taney said: "If the return is made as to a writ of habeas corpus, and the state judge or court is judicially apprised that the party is

in custody under the authority of the United States, they can proceed no further; in other words, he cannot then discharge the prisoner." He concedes that a return is to be made, and that the judge or officer must, in addition, be judicially apprised of the facts which terminate his jurisdiction. But how "judicially apprised"? Clearly, by legal proof of those facts, if the return is traversed or denied; for a judge or court, as such, and in respect to the facts in controversy in such cases, can know nothing judicially; can be judicially apprised, or judicially informed, of nothing except by the admission of the parties, or by legal proof in the due course of legal proceedings. It is possible that in the selection of the term "apprised" the Chief Justice had in mind the technical definition of that word when derived from the French "apprised," and meaning the ordinance by which the sentence of superior judge is declared to an inferior. In *re Reynolds* (U. S.) 20 Fed. Cas. 592, 603 (citing *Webst. Dict. [Folio Springfield, 1865]*).

#### APPROACHES.

##### Of a bridge or viaduct.

As a part of a bridge, see "Bridge."

"Approaches" of a bridge are whatever is necessary to connect the bridge with the public roads or streets, either at the end thereof, or to make such roads or streets conform to the grade of the bridge. *Kearney Tp. v. Ballantine*, 23 Atl. 821, 822, 54 N. J. Law (25 Vroom) 194; *Whitcher v. City of Somerville*, 138 Mass. 454, 455.

An ordinance authorizing a railroad company to construct a viaduct, provided that it should maintain and keep in repair the "approaches" thereto, includes the retaining walls, the filling with dirt, and the paving and roadway on the viaduct. *McFarlane v. City of Chicago*, 57 N. E. 12, 14, 185 Ill. 242.

"Approaches," as used in Pub. St. c. 112, § 128, providing that where a highway in a city is lowered for the purpose of having a railroad pass over it by means of a bridge the railroad company shall be liable for any injury arising from a defect in the bridge or its "approaches," means the ways at the ends of it which are a part of the bridge itself and appendages to it. *Whitcher v. City of Somerville*, 138 Mass. 454, 455.

The term "approaches," as used in Laws 1895, c. 968, authorizing the city of New York to construct an approach from the Harlem river, and to acquire title to the land necessary for the construction of the bridge and its approaches, is applied not only to the physical structures immediately connected with the roadway of the bridge, but to those contiguous and converging streets and avenues, through and over which the public are to gain access to the bridge. In *re Har-*

Iem River Bridge, 66 N. E. 584, 586, 174 N. Y. 28.

#### Of a dock.

An approach of a dock "must mean that portion of the frontage of the dock which a vessel must pass through to reach the same, even bow on. This is a legitimate way of approach, so that, the bow being fastened to the dock, the stern of the vessel would be carried by the tide alongside of the dock." *McCaldin v. Parke*, 21 N. Y. Supp. 277, 278, 66 Hun, 323.

#### To railroad crossing.

As part of crossing, see "Crossing."

"Approaches," as used in 2 Starr & C. (Ill. Ann. St. p. 1937), providing that all railroad corporations shall construct railway crossings and the "approaches" thereto, etc., approaches has a common meaning, and signifies the embankment or bridges or grades or structures of any sort on each side of the railroad at the crossing which serve as the passageway for approaching the crossing. *City of Bloomington v. Illinois Cent. R. Co.*, 39 N. E. 478, 480, 154 Ill. 539. The term "approach" means a structure of some sort necessary to reach the railroad track from the common surface. It does not signify an ordinary sidewalk. It may be an embankment or approach or whatever is required for the purpose at a particular place. *City of Bloomington v. Illinois Cent. R. Co.*, 49 Ill. App. 129, 133. The word is to be given its ordinary meaning. It is common knowledge what an approach is to a bridge on a highway. It is simply that prepared or made condition on each side of the bridge that makes a safe, easy, and convenient way to get across the bridge. The words "approaches thereto" within their respective rights of way are words of limitation rather than of extension. They mean that in no event, as a statutory duty, as to highways laid out over railroads already established were such approaches to the railroad crossing to be extended beyond the limits of the right of way, although to make such highways passable it might be necessary that such approaches should be extended beyond such limits. *Town of O'Fallon v. Ohio & M. Ry. Co.*, 45 Ill. App. 572, 578.

#### APPROACHING.

"Approaching," as used in Rev. St. c. 17, § 23, providing that persons engaged in blasting rocks shall, before each explosion, give seasonable notice thereof, so that all persons or teams "approaching" shall have time to retire to a safe distance, is equivalent to "in proximity to the place of explosion within the limits of danger." *Wadsworth v. Marshall*, 34 Atl. 80, 81, 88 Me. 263, 32 L. R. A. 588.

#### APPROBATION.

"Approbation" means sanction, consent, concurrence. As used in Gen. St. § 2708, providing that the selectmen of any town may, with its "approbation," by a writing signed by them, discontinue any highway, the word does not imply that the approbation of the town must be expressed before the discontinuance is made, but the term "approbation" may as well apply to a consent or acquiescence given subsequently. *Welton v. Town of Thomastown*, 24 Atl. 333, 61 Conn. 397.

#### APPROPRIATE—APPROPRIATION.

See "Instrument of Appropriation";

"There is Hereby Appropriated."

Otherwise appropriated, see "Otherwise."

"The word 'appropriate' means 'to set apart for' or 'assign to' a particular person or use in exclusion of all others." (Law) To alienate. *State v. Sioux City & P. R. Co.*, 7 Neb. 357, 373 (quoting *Webst. Dict.*); *State v. Derham*, 39 S. E. 379, 381, 61 S. C. 258.

To "appropriate" "is to allot, assign, set apart, apply in any way to the use of a particular person or thing for a particular purpose." *State v. Bordelon*, 6 La. Ann. 68, 69; *Woodward v. Reynolds*, 19 Atl. 511, 512, 58 Conn. 486.

To "appropriate" "is derived from the Latin *ad* and *proprius*, and means to take as one's own by exclusive right. A thing cannot be appropriated to the use of any one person as long as any one else is allowed the use of it also." *United States v. Nicholson* (U. S.) 12 Fed. 522, 524.

To "appropriate" is to make a thing one's own; to make it the subject of property; to exercise dominion over the object to the extent and for the purpose of making it subserve one's own proper use or pleasure. *Wulzen v. Board of Sup'rs of City and County of San Francisco*, 35 Pac. 353, 356, 101 Cal. 15, 40 Am. St. Rep. 17.

"Appropriate" is defined as the "taking from another to one's self, with or without violence; to take to one's self to the exclusion of all others." The appropriation of money with the intent to deprive the owner thereof, and to commit a crime, and the retaining and keeping of it after the appropriation, is in effect an appropriation to one's self. Such is the meaning of the term in an indictment charging that the defendant did wrongfully, unlawfully, and feloniously appropriate, secrete, withhold, take, steal, and carry away certain property with intent to deprive the owner thereof, and to appropriate the same to defendant's use. *People v. Lammererts*, 58 N. E. 22, 24, 164 N. Y. 137.

"Appropriation" "means a designation to a particular exclusive use, and in a will indi-

cates an intention to set apart certain property for a specific object." *Whitehead v. Gibbons*, 10 N. J. Eq. (2 Stockt.) 230, 235.

**As conveyance of title.**

"The word 'appropriation' may be understood in different senses. It may mean a selection on the part of the vendor where he has a right to choose the article which he is to supply in performance of his contract, and the contract will show when the word is used in that sense. Or the word may mean that both parties have agreed that a certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case. For the purpose of illustrating this position, suppose a carriage is ordered to be built at a coach maker's; he may make any one he pleases, and if it agree with the order the party is bound to accept it. Now, suppose that at some period subsequent to the order a further bargain is entered into between this party and the coach builder, by which it is agreed that a particular carriage shall be delivered, it would depend upon circumstances whether the property passes, or whether merely the original contract is altered from one which would have been satisfied by the delivery of any carriage answering the terms of the contract into another contract to supply the particular carriage, which in the Roman law was called 'obligatio certi corporis,' where the person is bound to deliver a particular chattel, but where the property does not pass, as it never did by the Roman law, until actual delivery, though the property after the contract remained at the risk of the vendee, and if lost, without any fault in the vendor, the vendee, and not the vendor, was a sufferer. The law of England is different. Here property does not pass until there is a bargain with respect to a specific article, and everything is done which, according to the intention of the parties to the bargain, was necessary to transfer the property to it. Appropriation may also be used in another sense, viz., where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it." *Walt v. Baker*, 2 Exch. 1, 8.

**As an equitable assignment.**

"Appropriation," as used in the rule that to constitute an equitable assignment of a particular fund in payment of a debt there must be some appropriation of the fund, may mean "either the giving of an order on the fund, or transferring it in such a manner that the holder would be authorized to pay it to the creditor directly without the intervention of the debtor." *Hoyt v. Story* (N. Y.) 3 Barb. 262, 264.

**Every mode of transfer included.**

"Appropriate," as used in Declaration of Rights, providing that whenever the public

exigencies required that the property of any individual should be "appropriated" to public uses he shall receive a reasonable compensation therefor, embraces every mode by which property may be applied to the use of the public, and whatever exists or public necessity demands may be appropriated. *Boston & L. R. Corp. v. Salem & L. R. Co.*, 68 Mass. (2 Gray) 1, 35.

**Power to hold implied.**

A will providing that the testator's property, real and personal, should be "appropriated" by his executor in such a manner as would best promote the happiness of testator's wife and children, clearly implies that the executor is to hold that which he is directed to appropriate, and means that the executor should hold and administer the estate until final distribution. *Blake v. Dexter*, 66 Mass. (12 Cush.) 559, 568.

**Reservation distinguished.**

"Appropriation," as used in speaking of the appropriation of land or money by the United States, "implies a setting apart or application to some particular use." It is distinguished from "reservation," which does not imply an absolute disposition in all cases, but the mere withholding from some other disposition, such as sale, etc. *Jackson v. Wilcox*, 2 Ill. (1 Scam.) 344, 359.

**By army or navy.**

"Appropriation," as used in Act July 4, 1864 (13 Stat. 381), providing that the jurisdiction of the court of claims shall not extend to or include any claim against the United States growing out of the destruction or "appropriation" of or damage to property by the army or navy, or any part of the army or navy, engaged in the suppression of the Rebellion, from the commencement to the close thereof, means the taking of property for the use of the army and navy in the exercise of military power, which existed and belonged within the state of war, and which are generally confined to an enemy's country. To appropriate is to take from another to one's self, with or without violence, and hence the taking and occupying of a hotel outside the enemy country for a military hospital, agreeing to pay therefor a specified rent, was not an "appropriation" of such hotel for the use of the army and navy, so as to give the court of claims jurisdiction of an action to recover the rental and for other damages to the building. *Waters v. United States*, 4 Ct. Cl. 389, 393. It includes "all taking and using of property by the army or navy in the course of the war not authorized by contract with the government. The use may be permanent or temporary, and it may result in the destruction of or mere injury to the property. If the right to the property or to its use is not obtained by a valid contract with the government, the taking or use of it is an 'appropriation,' within the meaning of



the act of Congress. The manner of the appropriation, whether made by force or upon the consent of the owner, does not affect the question of jurisdiction." *Filior v. United States*, 76 U. S. (9 Wall.) 45, 48, 19 L. Ed. 549.

Where the United States, under a military emergency during the Rebellion, took into its service certain officered and manned steamers for temporary use, the officers acting for the government not intending to appropriate them, nor even their services, but did intend to compel the captains and crews of the steamers to perform the services needed, and to pay a reasonable compensation for such services, and the property, after such services were rendered, was returned to the exclusive possession and control of its owners, there was no such "appropriation of the property" as brought the case within the act of July 4, 1861, which enacts "that the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States, growing out of the 'appropriation of property' by the army or navy engaged in the suppression of the Rebellion." *United States v. Russell*, 80 U. S. (13 Wall.) 623, 624, 20 L. Ed. 474.

#### APPROPRIATE DEPARTMENT.

"Appropriate department," as used in Act June 1, 1885, art. 7 (P. L. 45), providing that the city controller should not suffer the appropriation for one item of expense to be drawn upon for any other purpose, or by any department other than that for which the appropriation was specifically made, except on transfers made by the ordinance of councils, article 6 providing that no money should be drawn from the city treasury except by due process of law, or upon warrants signed by the head of the "appropriate department," means the department to which the appropriation is made, and whose head is to draw the warrants. It includes all officials charged with duties pertaining to the city government, for whose expenses the city is obliged to provide. *Bailey v. City of Philadelphia*, 31 Atl. 925, 927, 167 Pa. 569, 46 Am. St. Rep. 691.

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In an instruction in an action stating that, if an employe did not perform his "appropriate duties," he becomes liable for any direct damages his employer may sustain thereby, the term "appropriate duties" means duties which he has undertaken to perform—duties that he has agreed to perform. *Brown v. Burr*, 28 Atl. 828, 831, 160 Pa. 458.

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lawful to designate on the official ballots the political party by which each list is nominated by an "appropriate" emblem or design, such as a flag, eagle, rooster, or other device, etc., does not necessarily mean suggestive of the political doctrines which the organization advocates, but is rather used in the sense of "proper." *Kratzer v. Allen*, 50 Pac. 209, 10 Colo. App. 492.

#### APPROPRIATE LEGISLATION.

"Appropriate," as used in the thirteenth and fourteenth amendments to the United States Constitution, means legislation contemplated to make the amendments fully effective; that is, legislation adapted to carry out the objects the legislators had in view. And whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power, and hence Act Cong. March 1, 1875, c. 114, § 4, 18 Stat. pt. 3, p. 336 [U. S. Comp. St. 1901, p. 1281], enacting that no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for services as grand or petit juror in any court of the United States or of any state on account of race, color, or any previous condition of servitude, and any officer or other person charged with any duty in the selection of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and fined not more than \$5,000, was "appropriate legislation." *Ex parte Virginia*, 100 U. S. 339, 344, 25 L. Ed. 676. The word as so used is equivalent to "necessary and proper." *People v. Washington*, 36 Cal. 658, 669.

The "appropriate legislation" by which Congress may enforce the right of citizens to exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude, authorizes Congress to do no more than interfere when the discrimination is on account of such conditions, and to provide for the punishment of such discriminations. Therefore an act of Congress purporting to deal with such subject, which provided that the elector, in order to be entitled to vote, should only be required to state in his affidavit that he had been wrongfully prevented by the officer from qualifying, with no words of limitation as to the cause of such prevention, and which further provided for the punishment of all persons who by force, bribery, etc., hinder, delay, etc., any person from qualifying or voting, was too broad, and not appropriate legislation to prevent unlawful discrimination. *United States v. Reese*, 92 U. S. 214, 218, 23 L. Ed. 563.

**APPROPRIATION BILL.**

In determining whether a bill appropriating money for the erection of a capital building was an "appropriation bill" or not, it was contended that, if an unrestricted meaning be given to the word "appropriation," all bills providing for the appropriation of money, however incidental, are appropriation bills. This, however, is not necessarily conceded. It is true that all general appropriation bills provide money for certain purposes, ordinarily for the expenses of the government and public institutions, and incidentally may provide for the application of the appropriation, and specify the purchase of materials required in running the same, and how it shall be done; yet such incidental specifications do not deprive the appropriation bill of its nature as general, and it was held that the act in question, which provides money to be used by a board already existing, with matured powers to proceed, constitutes an appropriation bill. *State v. Rogers*, 64 Pac. 515, 516, 24 Wash. 417.

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See "Unappropriated."

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The definition of the term "appropriate" is "to consign to some particular purpose or use; to set apart for some use." In this sense, therefore, "to be appropriated," in Rev. St. § 1464, authorizing township trustees to acquire lands for cemetery purposes, and providing that no lands shall "be appropriated" on which there are any houses, barns, stables, or other buildings, etc., means to be devoted to some purpose or use. *Henry v. Trustees of Perry Tp.*, 80 N. E. 1122, 1124, 48 Ohio St. 671, 677.

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act of Congress or by order of the President, or which may have been "appropriated" for any purpose whatever, or for the use of the United States, or either of the states in which they may be situated, the term "appropriated" means set apart or applied to some particular use by virtue of law; that is, under the authority of an act of Congress, and not by any other power. *Jackson v. Wilcox*, 2 Ill. (1 Scam.) 344, 360.

Rev. St. § 1464, authorizes township trustees to acquire by purchase or appropriation lands for cemetery purposes. Held, that the word "appropriate" is used in the ordinary sense of "devoted to some purpose or use." *Henry v. Trustees of Perry Tp.*, 30 N. E. 1122, 1124, 48 Ohio St. 671.

#### Unlawful occupancy distinguished.

The term as used in the pre-emption law was defined by the Supreme Court of Illinois in the case of *Jackson v. Wilcox*, 2 Ill. (1 Scam.) 344. In its opinion the court says, "we take it for granted that there can be neither a reservation nor an appropriation of the public domain for any purpose whatever without the express authority of the law," and, later, "It is in our judgment entirely useless to discuss the precise meaning of the term appropriated in its general and extended sense, because its meaning and application in the manner it has been used in the pre-emption law cannot, we think, admit of a doubt. It means nothing more in the sense in which it is used than an application of the lands to some specific use or purpose by virtue of law, and not by any other power." A mere occupancy of land at the time it was listed to a state under Act Cong. June 16, 1880, which granted lands from unappropriated lands, did not constitute an appropriation as against a subsequent purchaser from the state. *Springer v. Clopath*, 65 Pac. 804, 26 Nev. 183.

#### As use of power of eminent domain.

Const. art. 12, § 11, providing that no foreign corporation shall have power to "condemn or appropriate" property, means that such corporation cannot use the power of eminent domain to acquire property for its uses. *St. Louis & S. F. R. Co. v. Foltz* (U. S.) 52 Fed. 627, 629.

#### APPROPRIATION OF PAYMENTS.

"Appropriation of payments" is the application of a payment to one of several debts, and where payments are made by a debtor without instructions as to which of several debts shall be credited therewith, and there is no agreement as to how the same shall be applied, but the course of dealings between the parties has authorized the creditor to rely on a tacit understanding that payments are applied most beneficially for him, the law will apply them accordingly,

though the creditor neglects so to do. *Gwin v. McLean*, 62 Miss. 121, 124.

Appropriation of payments is the application of a payment to the liquidation of a particular debt. When a debtor makes a payment to one to whom he is indebted on more than one demand, the debtor may insist on a credit on one of the particular demands, and unless he gets it may withhold the money; and so, if the debtor performs labor for a creditor, he may agree that the price of that labor shall go to his credit on a particular demand; and in either case the creditor cannot change the destination of the money or labor without the consent of the debtor. If nothing is said or agreed beforehand as to which debt the payment is to be applied, he, the creditor, may apply it to either at his option; but even then, after so applying it to one debt, if the application is known and agreed to by the debtor, the creditor cannot thereafter change it without the consent of the debtor. *Martin v. Draher* (Pa.) 5 Watts, 544, 545. Appropriation, where a debtor has failed to signify where he wishes the payment applied, is a right which must be exercised by the creditor within a reasonable time after the payment, and the right must be evidenced by the performance of some act indicative of an intention to appropriate. Where neither has exercised the right of appropriation, the law presumes in ordinary credit cases that the debtor intended to pay in a way which at the time was most to his advantage. *Harker v. Conrad* (Pa.) 12 Serg. & R. 301, 304, 14 Am. Dec. 691.

It is the general rule that when money is paid generally, without any appropriation, it ought to be applied to the first items in the account; but the rule is subject to this qualification: that when there are distinct demands, one against persons in partnership, and another against only one of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual: that would be allowing the creditor to pay the debt of one person with the money of others. *Thompson v. Brown*, 1 Moody & M. 40, 41.

Defendant, being indebted, gave his creditors a mortgage, and also accepted bills of exchange drawn by them. They assigned such bills to plaintiff, and also delivered to him the mortgage, but without an assignment. Defendant afterwards paid plaintiff a certain sum and took his receipt therefor "on account, without prejudice to the claim we have upon any securities we hold." The court held that the payment was on account generally, and was applicable to any existing demand; but that the only legal demand which plaintiff held was the bills, and that the payment could not be appropriated as a payment on the mortgage, as to which plain-

tiff's title was merely equitable. *Birch v. Tebbutt*, 2 Starkie, 74, 75.

### APPROPRIATION OF PUBLIC MONEY.

See "Specific Appropriation."

"Appropriation" is the setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and for no other. *State v. Moore*, 69 N. W. 373, 376, 50 Neb. 88, 61 Am. St. Rep. 538 (citing *Ristine v. State*, 20 Ind. 328; *Clayton v. Berry*, 27 Ark. 129; *Stratton v. Green*, 45 Cal. 149; *State v. La Grave*, 41 Pac. 1075, 23 Nev. 25, 62 Am. St. Rep. 764; *State v. Wallichs*, 12 Neb. 407, 11 N. W. 860; *State v. Wallichs*, 16 Neb. 679, 21 N. W. 397; *Proll v. Dunn*, 22 Pac. 143, 145, 80 Cal. 220).

To appropriate means to allot, assign, set apart, or apply to a particular use or purpose. An "appropriation," in the sense of the Constitution, means the setting apart a portion of the public funds for a public purpose, and there must be money placed in the fund applicable to the designated purpose to constitute an appropriation. *State v. La Grave*, 41 Pac. 1075, 1076, 23 Nev. 25, 62 Am. St. Rep. 764.

To "appropriate" means to set apart; to assign to a particular use. As used in Act Tenn. Feb. 6, 1895, authorizing the county courts of the respective counties of the state to "appropriate" money for the purpose of providing a county exhibit at a certain exposition, it means that the county court shall have power, out of the fund arising from taxes assessed for general county purposes, to set apart or assign such sum of money as should be deemed prudent and necessary. *Felton v. Hamilton County (U. S.)* 97 Fed. 823, 824, 38 C. C. A. 432.

"Appropriation" is defined by Webster to be the act of setting apart or assigning to a particular use. Chitty says it is the application of the payment of a sum of money by a debtor to a creditor to one of several debts which are due from the former to the latter. The expression in the Constitution of the state, "appropriated by law," means the act of the Legislature setting apart or assigning to a particular use a certain sum of money to be used in the payment of the debts or dues from the state to its creditors. The people have said in their sovereign capacity that no money shall be paid out of the treasury until their representatives by solemn enactment have assigned and set apart the public revenues of the state for specific purposes. *Clayton v. Berry*, 27 Ark. 129, 131.

#### As authority to pay.

"Appropriation," as used with regard to a general fund in the state treasury, "is

an authority from the Legislature, given at the proper time and in the legal form, to the proper officers, to apply sums of money out of that which may be in the treasury in a given year to specified objects or demands against the state. An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the Auditor is authorized to draw his warrant on an appropriation, and the Treasurer is authorized to pay such warrant if he has appropriated money in the treasury." *State v. Kenney*, 24 Pac. 96, 98, 9 Mont. 389.

As applied to the general fund in the treasury of a state, "appropriation" is defined to be an authority from the Legislature, given at the proper time and in legal form, to the proper officer, to supply sums of money out of that which may be in the treasury in a given year for specific objects or demands against the state. *State v. Lindsley*, 3 Wash. St. 125, 126, 27 Pac. 1019; *State v. King*, 67 S. W. 812, 813, 103 Tenn. 271; *Ristine v. State*, 20 Ind. 328, 331; *Shattuck v. Kincaid*, 49 Pac. 758, 760, 31 Or. 379.

An "appropriation" of money to a specific object is an authority to the proper officers to pay the money because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant if he has appropriated money in the treasury. *Proll v. Dunn*, 22 Pac. 143, 145, 80 Cal. 220.

#### Constitutional provision.

Where the Constitution fixes the salary of an officer, and provides that the auditor shall draw warrants on the state quarterly therefor, to be paid out of all funds not otherwise appropriated, it is an appropriation of the amount necessary to pay such salary, and no legislative act is necessary. *State v. Weston*, 4 Neb. 216, 217.

Const. art. 5, § 34, declaring that no money shall be paid out of the treasury except on "appropriations made by law," does not refer exclusively to appropriations made by the State Legislature, but includes also appropriations made by the Constitution itself, as, for instance, under Const. art. 7, § 4, declaring that certain state officers shall receive a certain sum as compensation, the salaries of the officers enumerated are required to be paid though the Legislature has made no appropriation therefor, since the constitutional provision that the salaries shall be paid of itself constitutes "an appropriation made by law." *State v. Hickman*, 23 Pac. 740, 741, 742, 9 Mont. 370, 8 L. R. A. 403.

#### Creation of salaried office.

The act of 1899, as amended by Acts 1901, c. 67, creating the office of shop and factory inspector, and providing that the salary of said inspector shall be \$1,200 per an-

num, payable monthly on warrant of comptroller, as other salaries are paid, is in and of itself an appropriation by law, so that Const. art. 2, § 24, providing that no money shall be drawn from the treasury but in consequence of "appropriations" made by law, and Shannon's Code, § 287, providing that no money shall be paid from the treasury unless the law under which it is claimed expressly directs payment, do not justify the comptroller in refusing to issue warrants for such salary on the ground that no appropriation had been made therefor. *State v. King*, 67 S. W. 812, 813, 108 Tenn. 271.

#### **As designation of amount and fund.**

Nothing more is requisite to the legislative appropriation of money than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury. The constitutional provision that no money shall be drawn from the treasury but in consequence of appropriations made in law means only that no money shall be drawn except in pursuance of law. *People v. Brooks*, 16 Cal. 11, 28.

#### **As payment.**

Const. art. 6, § 3, provides that no money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution. Article 8, § 16, declares that no appropriation of lands, money, or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state. Held, that the word "appropriation," as there used, means something more than a gift or donation, but also includes a payment to any sectarian school for services rendered to the state, and therefore precluded the state officers from auditing claims of such schools for services. *Synod of Dakota v. State*, 50 N. W. 632, 635, 2 S. D. 866, 14 L. R. A. 418.

#### **As promise to pay.**

"Appropriation," as used in Const. art. 10, § 3, providing that no money shall be drawn from the state treasury but in pursuance of "appropriations" made by law, means authority from the Treasurer, given at the proper time, and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury in a given year to a specified object or demand against the state. "An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the Auditor is authorized to draw his warrant upon an 'appropriation,' and the Treasurer is authorized to pay such warrant if he had appropriated money in the treasury. Such an 'appropriation' may be prospective; that is, it may be made in one year of the

revenues to accrue in another or future years, the law being so framed as to address itself to such future revenue; so a direction to pay money out of the treasury upon a given claim or for a given object may, by implication, include in the direction an appropriation. But the pledge of the faith of the state that revenues shall be provided in the future, and applied to the discharge of given claims against the states, does not authorize the officers of the state, without further legislative direction, to apply the general fund in the treasury to the payment of those claims; it is not an appropriation of the money in the general fund." "A promise by the government to pay money is not an appropriation. A duty on the part of the Legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. The pledge of the faith of the state is not an appropriation of money with which to redeem the pledge. Usage of paying money, in the absence of an appropriation, cannot make an appropriation for future payment." *Ristine v. State*, 20 Ind. 323, 331.

#### **Technical words not necessary.**

The use of the words "out of any moneys in the treasury not otherwise appropriated" are not necessary to make an appropriation operative. *Proll v. Dunn*, 22 Pac. 143, 145, 80 Cal. 220.

The use of technical words in a statute making an appropriation is not necessary. There may be an appropriation of public money without in any manner designating the act as an "appropriation." A direction to a proper officer or officers to pay money out of the treasury, or for a given object, may by implication be held to be an appropriation of a sufficient amount of money to make the required payments. *Campbell v. State Soldiers' & Sailors' Monument Com'rs*, 18 N. E. 33, 34, 115 Ind. 591.

No particular expression or set form of words is requisite or necessary to the accomplishment of the purpose, and the appropriation may be for one year, or from the revenues to accrue in another or future years. *Shattuck v. Kincaid*, 49 Pac. 758, 760, 31 Or. 379.

Though no money can be rightfully drawn from the treasury of the state except under an "appropriation" made by law, such appropriation may be made impliedly as well as expressly, and in general as well as in specific terms. The use of technical words in a statute making an appropriation of public money is unnecessary. There may be an appropriation without in any manner designating the act as an appropriation. A direction to the proper officer to pay money out of the treasury on a given claim or class of claims or for a given object may by implication be held an appropriation of a sufficient amount

to make the required payments. *Henderson v. Indiana State Board of Agriculture*, 28 N. E. 127, 130, 129 Ind. 92.

### APPROPRIATION OF WATER.

#### See "Prior Appropriation."

"To constitute a valid appropriation of water, three elements must always exist: (1) An intent to apply it to some beneficial use existing at the time or contemplated in the future; (2) a diversion from the natural channel by means of a ditch, canal, or other structure; (3) an application of it within a reasonable time to some useful industry." *Low v. Rizer*, 37 Pac. 82, 84, 25 Or. 551.

The Supreme Court of California defines the word "appropriation" as follows: "The intent to take, accompanied by some open physical demonstration of the intent, and for some valuable use" (*McDonald v. Bear River & Auburn Water & Mining Co.*, 13 Cal. 220); and the Supreme Court of Colorado, quoting, approves this definition: "When the individual, by some open physical demonstration, indicates an intent to take for valuable or beneficial use, and through such demonstration ultimately succeeds in applying the water to the use designed, there is such an appropriation." While diversion must of necessity take place before the water is actually applied to the irrigation of the soil, the appropriation, in legal contemplation, made within the act evidencing the intent, is performed. Of course, such initial act must be followed up with reasonable diligence, and the purpose must be consummated without unnecessary delay. *Clough v. Wing* (Ariz.) 17 Pac. 453, 457 (citing *Larimer Company R. Co. v. People*, 8 Colo. 614, 9 Pac. 794).

In order to constitute a valid "appropriation" of water, there must be an actual diversion of the same, with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time. *Walsh v. Wallace*, 67 Pac. 914, 917, 26 Nev. 299; *Combs v. Agricultural Ditch Co.*, 28 Pac. 966, 967, 17 Colo. 146, 31 Am. St. Rep. 275; *Longmire v. Smith*, 67 Pac. 246, 249, 26 Wash. 439, 58 L. R. A. 308.

"Appropriation," as applied to water rights, is often loosely used by the authorities, and in general it is used with reference to a claim to the use of the water of a public stream from the time of the inception of the right, at all the intermediate stages, and down to the time when the last act is accomplished by which the right is finally and completely secured. An appropriation proper is not made until there has been an actual application of the water claimed to some beneficial purpose or some useful industry. All rights acquired prior to this time, at whatever step in the process, amounts simply to a claim of an appropriation, but they are

none the less rights and privileges which may be asserted and maintained against all persons not entitled to priority in rights and privileges of a like nature. *Nevada Ditch Co. v. Bennet*, 45 Pac. 472, 479, 30 Or. 59, 60 Am. St. Rep. 777; *Hague v. Nephi Irr. Co.*, 52 Pac. 765, 16 Utah, 421, 41 L. R. A. 811, 67 Am. St. Rep. 634; *Ft. Morgan Land & Canal Co. v. South Platte Ditch Co.*, 30 Pac. 1032, 1033, 18 Colo. 1, 36 Am. St. Rep. 259.

Const. art. 16, § 5, provides that every natural stream not heretofore appropriated is hereby declared to be the property of the public, and the same is subject to "appropriation," will be construed to mean the successful application of the water to the beneficial use and design; and the method of carrying the same, or making such application, is immaterial. *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 21 Pac. 1028, 13 Colo. 111, 4 L. R. A. 767.

"Appropriation of water consists in the intention, accompanied by reasonable diligence, to use the water for the purposes originally contemplated at the time of its diversion. The right of appropriation, as defined by the best authorities, is not controlled by the location of the stream with reference to the premises which are irrigated; and the further fact that the point of diversion may have been at times changed does not affect the right. The right to use the water is the essence of appropriation. The means by which it is done are incidental. *Offield v. Ish*, 57 Pac. 809, 810, 21 Wash. 277.

To constitute a legal appropriation, the water diverted must be applied within a reasonable time to some beneficial use; that is to say, that diversion ripens into a valid appropriation only when the water is utilized by the consumer, though the priority of such appropriation may date, proper diligence having been used, from the commencement of the canal or ditch. *Wheeler v. Northern Colorado Irr. Co.*, 17 Pac. 487, 489, 490, 11 Colo. 582, 3 Am. St. Rep. 608.

"Appropriation," as used in connection with the taking of water for public purposes, means to take to one's self, as one's own; to take; a prior appropriation means a prior taking. To constitute an appropriation of this kind there must be an actual intent to take, presently or in the near future, and that intent must be manifestly carried out by suitable acts. *New Haven Water Co. v. Borough of Wallingford*, 44 Atl. 235, 239, 72 Conn. 293.

An appropriation of water is the intent to take, accompanied by some open physical demonstration of the intent, and for some valuable use. Such definition is applicable to appropriations of water; that is to say, that when the individual, by some open physical demonstration, indicates an intent to take for a valuable or beneficial use, and through such demonstration ultimately suc-



ceeds in applying the water to the use designed, there is an appropriation. *Larimer County Reservoir Co. v. People*, 9 Pac. 794, 796, 8 Colo. 614.

The true test of appropriation of water in its legal sense is the "successful application of water to the beneficial use desired; the method of diverting it, or carrying it, or making the application being wholly immaterial. It is not even necessary that ditches be used. Thus, if a dike or other contrivance will sufficient to turn the water from the stream and moisten the land sought to be cultivated, it is sufficient, although no ditch be needed or constructed. *McCall v. Porter*, 70 Pac. 820, 822, 42 Or. 49 (citing *Long*, Irr. § 49).

The taking of water from an irrigation ditch which did not belong to the taker, though an appropriation in the sense in which any wrongful taking of property is an appropriation, was not an appropriation within the meaning of the law regulating the water rights on the public domain. *Goldsmith v. Newhouse* (Colo.) 72 Pac. 809.

#### Conversion distinguished.

A mere conversion of water from a stream does not constitute an "appropriation" recognized by the Constitution of the state. To make it such, there must be an application of the water to a beneficial use. And in case of irrigation it must be applied to the land, to make the appropriation complete. *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 45 Pac. 444, 447, 22 Colo. 513, 55 Am. St. Rep. 149.

#### As distribute.

In a broad sense, to "appropriate" is to make one's own, to make it a subject of property, and is often used in the sense of denoting the acquisition of property and a right of exclusive enjoyment in those things which before were without an owner or were public juris; but it is also used in the sense of prescribing money or property to a particular use, as to appropriate money to a designated purpose, to appropriate land to grazing or fruit or other purpose. It is also used in the sense of "to distribute." Where water is designed, set apart, and devoted to purposes of sale, rental, or distribution, it is appropriated to those uses or some of them, and becomes subject to public use within the provision of the statute that the use of all water appropriated for sale, rental, or distribution is thereby declared to be a public use, and subject to the control of the state. *Merrill v. Southside Irr. Co.*, 44 Pac. 720, 722, 112 Cal. 426.

#### APPROPRIATOR.

Appropriators are diverters of the waters of a stream. *Lux v. Haggin*, 10 Pac. 674, 786, 69 Cal. 255.

An "appropriator," using this term in its full and absolute sense, so as to include both a diversion and an application, both of which are essential to the completion of a title to water, acquires a right of property in that which he has appropriated. It is a right in one sense absolute, and in another qualified, at least qualified as to its rights with respect to third persons. The title to the waters of a state always remain in a measurable sense in the people. An appropriator may acquire title, but that title is necessarily subject to many conditions. *Suffolk Gold Min. & Mill. Co. v. Miguel Consol. Min. & Mill. Co.*, 48 Pac. 823, 830, 9 Colo. App. 407.

#### APPROVAL

An act which passes both Houses of the Legislature, and which contains an emergency clause providing that it shall take effect "from and after its approval by the Governor," but which the Governor never approves, but vetoes, and is then passed by both Houses of the Legislature by the necessary majority, takes effect and is in force from and after its passage. *Biggs v. McBride*, 21 Pac. 878, 879, 17 Or. 640, 5 L. R. A. 115.

#### APPROVE

"Approve," as used in a city charter requiring the mayor of the city to "approve" the vote, resolution, order, etc., of the common council in order to render it operative, means that such approval must be in writing. *New York & N. E. R. Co. v. City of Waterbury*, 10 Atl. 162, 163, 55 Conn. 19.

A board of directors may "approve" a surety on a bond of an employé by vote or by tacit and implied assent. The assent may be more difficult to prove by parol evidence than if it were reduced to writing, but it is not a sufficient reason for declaring the assent inoperative. The approval is a matter of discretion, and, that discretion once being exercised, it is of very little consequence whether a written minute of the vote be made or not. All that the bank is interested in is that there shall be an approval, and it matters not whether that fact is established by a direct record or by acts of the directors which recognize its prior existence. *Bank of United States v. Dandridge*, 25 U. S. (12 Wheat.) 64, 83, 6 L. Ed. 552.

One of the conditions of a fire policy issued by the Ontario & Livingston Mutual Insurance Company was that, in case the assured should make any other insurance on the same property, and should not with all reasonable diligence give notice thereof to the company, and have the same indorsed on the policy, or otherwise "acknowledged" and "approved" by them in writing, the policy should cease and be of no further effect.

Within a few months afterwards the insured effected a further insurance in another company on the property, at the same time forwarding a written notice of the fact to the secretary of the Ontario & Livingston Mutual Insurance Company; and on the next day the insured received a letter from the secretary in these words: "I have received your notice of additional insurance." Held, in an action on the policy, that the letter imported both an acknowledgment and an approval in writing, within the meaning of the condition as to further insurance, and that the plaintiff was therefore entitled to recover. *Potter v. Ontario & L. Mut. Ins. Co. (N. Y.)* 5 Hill, 147, 149.

#### **Determination or discretion implied.**

"Approve" means "to pronounce good; think or judge well of; admit the propriety or excellence of; be pleased with; commend"; and as used in Pol. Code, § 17, providing that all contracts made by the state furnishing board must be "approved" by the Governor or State Treasurer, means more than merely ministerial approval. They must exercise judicial discretion. *State v. Smith*, 57 Pac. 449, 451, 23 Mont. 44.

"Approved," as used in Pol. Code, § 3456, providing that money collected upon an assessment for the reclamation of swamp and overflowed lands shall be paid into the county treasury and paid out for the work of reclamation, upon the warrants of the trustees of the reclamation district, "approved" by the board of supervisors of the county, should be construed to mean that the board of supervisors should have a discretion in the approval of such warrant, and not that they should be bound to indorse as "approved" every warrant drawn by the trustees of a district. "The word 'approved' does not *ex vi termini* necessarily import the exercise of discretion. However, when an approval of a distinct officer is made necessary to validate or consummate the act of another, it is the intention of the Legislature that he should be vested with the option to sanction officially or disapprove the act submitted to him, which involves the idea of discretion and adjudication. Yet such presumed intention is not conclusive, and if it clearly appears from the nature of the act or from the express language of the context that the word 'approved' is used in a more limited sense, and imposes a mere ministerial or clerical duty, the court will so hold." *Cosner v. Colusa County Sup'rs*, 58 Cal. 274, 275.

As used in Act 1798, providing that the chancellor should "approve" a decree of the orphans' court for the sale of the lands of a ward, "approve" implies a revisory proceeding, as the term is only appropriate to such an act, and the statute clearly contemplates a previous decree by the orphans' court to receive the approbation of the chan-

cellor. *Thaw v. Ritchie (D. C.)* 5 Mackay, 200, 225.

A policy of insurance providing that applications, if "approved," shall bear date on the reception of the application, does not reserve to the company the arbitrary right of setting aside at their pleasure any contract that their agents may make, no matter how fair it may be, or how strictly it may comply with their terms of insurance or with their directions to their agents, and the phrase refers simply to their right to defend themselves against fraud and mistake, so as not to bind themselves by ratifying the contract by the issuing of the policy. *Palm v. Medina County Mut. Fire Ins. Co.*, 20 Ohio, 529, 538.

"Approve," as used in Laws, § 5845, providing that the board of education shall levy tax in support of schools, which levy shall be "approved," etc., means to accept as good or sufficient for the purposes intended, and does not vest any discretion with the city council to determine whether such levy is proper. *Board of Education of City of Kingfisher v. City of Kingfisher*, 48 Pac. 103, 105, 5 Okl. 82.

A provision in the by-laws of an insurance order, requiring that all proofs of death or disability benefits shall be "approved" by the subordinate council to which the claim belongs, is directory as to the mode of preparing proofs for those who are to act upon the claim, and does not give the subordinate council the right to reject the claim itself. *Albert v. Order of Chosen Friends (U. S.)* 34 Fed. 721, 724.

#### **As equitable assignment of bill.**

To "approve a bill" is one thing, to order it to be paid out of a particular fund is quite a different thing. The approving of a claim does not make it operate as an equitable assignment. *Flaherty v. Atlantic Lumber Co.*, 44 Atl. 186, 190, 58 N. J. Eq. 407.

#### **APPROVE OF.**

The words "approve of" and "consent to" do not, singly or combined, express the idea of contribution to or procurement of a felonious act, for a person may be present and heartily approve of an act after it is done without being at all willing to or capable of aiding or advising or procuring it to be done, especially if it be felonious; or he may consent in the sense of offering no resistance to the commission of the act, or the slightest contribution to it of his own will; and therefore it is erroneous in a homicide case to instruct that, if defendant did in some manifest manner approve of or consent to the killing of deceased by another, he would be guilty of the crime. *True v. Commonwealth*, 14 S. W. 684, 685, 90 Ky. 651; *Omer v. Commonwealth*, 25 S. W. 594, 596, 95 Ky. 353.

**APPROVED.**

Written beneath an account, with the signature of the highway supervisor subscribed in his official capacity, the word "approve" is an official certification of the account, and identifies it as that of the supervisor, and is equivalent to marking it "O. K." or "correct," which is usually recognized as a certification in ordinary business affairs. *State v. Gee*, 42 Pac. 7, 9, 28 Or. 100.

"Approved," as indorsed on an official bond by the Secretary of the Interior, merely imports that the bond is deemed a sufficient security to be accepted, and does not necessarily constitute a direction that the bond was to be accepted in lieu of an existing bond, and that the existing bond was to be discharged. *United States v. Haynes* (U. S.) 26 Fed. Cas. 238, 239.

"Approved" is a proper word to apply to the act of the Governor in affixing his signature to an act of the Legislature. *Chumaseo v. Potts*, 2 Mont. 242, 285.

The word "approved," on an application for the incorporation of a borough, indorsed thereon by the foreman of the grand jury, with his signature attached thereto, does not show the necessary action of the grand jury within the meaning of a statute providing for the submission of such application to the grand jury, and directing, if a majority thereof shall find that the conditions have been complied with, and shall believe it expedient to grant the prayer of the application, they shall certify the same to the court. In re *Incorporation of Summit Borough*, 7 Atl. 219, 220, 114 Pa. 362.

**APPROVED BILL OR PAPER.**

A contract for the sale of goods requiring payment by an "approved bill" means a bill to which there was no reasonable objection, and which ought to be approved. To allow the seller in an arbitrary manner to repudiate the bill would be to enable him, according to his interest or caprice, to annul a contract by which the purchaser was absolutely bound. *Hodgson v. Davies*, 2 Camp. 530, 532.

Where an auctioneer's sale was for "approved indorsed paper," such phrase meant paper which should be approved, and not such as might be in fact approved by the seller. *Guler v. Page* (Pa.) 4 Serg. & R. 1.

**APPROVED SECURITY.**

Webster gives as one of the definitions of "approve" "to make or show to be worthy of approbation or acceptance," and it has such meaning in a contract providing that the purchaser of certain goods shall give a note with approved security. *Sweeney v. Vaughn*, 29 S. W. 903, 94 Tenn. (10 Pickle) 434 (citing

*Hodgson v. Davies*, 2 Camp. 530; *Andis v. Personett*, 9 N. E. 101, 108 Ind. 202).

"Approved security," in the authority given an officer to sell property on approved security, means any security satisfactory to the officers having the power to approve it. *Platter v. County of Elkhart*, 2 N. E. 544, 556, 103 Ind. 380.

The "approved security" which an executor must take when he sells property of the estate on credit, under Code Civ. Proc. § 2717, is national and state bonds and mortgages on real estate, although in other portions of the Code it means a bond or undertaking with one or more sureties. In re *Woodbury*, 35 N. Y. Supp. 485, 488, 13 Misc. Rep. 474.

**APPROVEMENT.**

"Approval," at common law, was a species of confession. When a person indicted of treason or felony was arraigned he might confess the charge before plea, plead an appeal, or accuse another as his accomplice of the same crime in order to obtain his pardon. Such approval was only allowed in capital offenses, and was equivalent to indictment, as the appellee was equally required to answer to the charge; and, if proved guilty, the judgment of the law was against him, and the approver so called was entitled to his pardon; on the other hand, if the appellee was acquitted, the judgment was that the approver should be condemned. *Whiskey Cases*, 99 U. S. 594, 599, 25 L. Ed. 399; *Gray v. People*, 26 Ill. (16 Peck) 344, 346 (citing 4 Bl. Comm. 267).

"Approval" was an ancient method by which a felon turned state's evidence. The course was for the culprit to confess the truth of the charge against him, and, on being sworn, to reveal all the treason and felonies within his knowledge, and to enter before a coroner his appeal against all his partners in crime who were within the realm. The criminal thus confessing was called an "approver," or, in Latin, "probator," and the person implicated was styled the "appellee." By this confession and appeal the approver put it in the discretion of the court either to give judgment and award the execution against him, or to respite him until a conviction of his partners in guilt; and if it was deemed advisable to admit him as an approver, and then if, upon being sworn, he made a full and true disclosure, and also convicted the appellee, either by his oath or on wager of battle, the King, ex merito justitiæ, pardoned him as for life. This practice, with its conditions that the appellee could claim a trial by battle and that grace to the approver should be abandoned on his conviction of his associate in crime, was plainly at variance with modern sentiments and habits, and for that reason the practice

passed out of use; but as the purpose it served was of value to judicial administration, it was inevitable, in the ordinary development of the law, that some equivalent should take its place, which equivalent was the modern practice of an implied pledge that the court would recommend the criminal who made the confession, and was accepted as a witness, to the royal clemency. But such an implied pledge is not a legal right, but a ground for an equitable claim only, so that under no circumstances can it supply matter of a plea in bar, or otherwise constitute a basis of a defense. *State v. Graham*, 41 N. J. Law (12 Vroom) 15, 16, 32 Am. Rep. 174.

### APPROVER.

An "approver" is one who confesses himself guilty of a felony, and accuses others of the same crime to save himself from punishment. *Myers v. People*, 26 Ill. (16 Peck) 173, 176; *Gray v. People*, Id. 344, 346 (citing 4 Bl. Comm. 267); *Rex v. Rudd*, 1 Cowp. 331, 334.

Where a culprit indicted for treason or felony confessed the truth of the charge, and, upon being sworn, revealed all the treasons and felonies within his knowledge, and entered before a coroner his appeal against all his partners in crime who were within the realm, the criminal thus confessing was called the "approver," or, in Latin, "probator," and the person implicated was styled the "appellee," and, where he made a full and true disclosure and convicted the appellee, the king pardoned him as to his life. *State v. Graham*, 41 N. J. Law (12 Vroom) 15, 16, 32 Am. Rep. 174.

### APPROXIMATE—APPROXIMATELY.

"Approximate," as used in an instruction relating to an implied power of an agent that the creation of the agency carries with it the power to do all those things which are necessary, proper, and usual to be done in order to effectuate the purpose of the agency, and "embraces all the approximate means necessary to accomplish the desired ends," tended to restrict the use of such words, and its use, instead of the more suitable word "appropriate," did not render the instruction erroneous. *Riverview Land Co. v. Dance*, 35 S. E. 720, 721, 98 Va. 239.

The word "approximately" simply means "nearly" or "closely"; so that in an action for damages for trespassing stock, where plaintiff had been prevented from completing the partition fence, an instruction that if the defendants prevented plaintiff from building the fence on the line, or approximately so, was erroneous, as permitting the building of the fence on defendants' land. *Oliver v. Hutchinson*, 69 Pac. 139, 140, 41 Or. 443.

The words "approximately" and "proximately" are not synonymous, but closely allied in meaning. The use of the former in an instruction that one who is injured by the negligence of another cannot recover damages therefor if the injured party by his own negligence or willful wrong "approximately" contributed to the injury, so that it would not have happened but for his own fault, could not have misled the jury. *Pledger v. Chicago, B. & Q. R. Co.* (Neb.) 95 N. W. 1057, 1060.

### APPROXIMATE CAUSE.

See "Proximate Cause."

### APPURTENANCE—APPURTENANT.

See "Common Appurtenant."

An appurtenance is a thing belonging to another thing as principal, and which passes as incident to the principal thing. *Meek v. Breckenridge*, 29 Ohio St. 642, 648; *New York Cent. R. Co. v. Buffalo & N. Y. & E. R. Co.* (N. Y.) 49 Barb. 501, 504; *Ogden v. Jennings* (N. Y.) 66 Barb. 301, 307; *Investment Co. of Philadelphia v. Ohio & N. W. Ry. Co.* (U. S.) 41 Fed. 378, 380; *Scheel v. Alhambra Min. Co.* (U. S.) 79 Fed. 821, 823; *Harris v. Elliott*, 35 U. S. (10 Pet.) 25, 54, 9 L. Ed. 333; *Humphreys v. McKissock*, 11 Sup. Ct. 779, 781, 140 U. S. 304, 35 L. Ed. 473; *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207, 210; *Scheidt v. Belz*, 4 Ill. App. (4 Bradw.) 431, 437; *Riddle v. Littlefield*, 53 N. H. 503, 508, 16 Am. Rep. 388; *Rutherford v. Wabash R. Co.*, 48 S. W. 921, 924, 147 Mo. 441; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 60, 24 Am. Rep. 719; *Newport Illuminating Co. v. Assessors of Taxes of Newport*, 36 Atl. 426, 429, 19 R. I. 632, 36 L. R. A. 266; *Badger Lumber Co. v. Marion Water Supply, Electric Light & Power Co.*, 48 Kan. 182, 184, 29 Pac. 476, 15 L. R. A. 652, 30 Am. St. Rep. 301; *Johnson v. Nasworthy* (Tex.) 16 S. W. 758, 759, 4 Willson, Civ. Cas. Ct. App. § 107; *City of Lincoln v. Lincoln St. Ry. Co.* (Neb.) 93 N. W. 766, 772.

An "appurtenance" is that which belongs to another thing, but which has not belonged to it immemorially. *Empire Land & Coal Co. v. County Treasurer*, 28 Pac. 482, 484, 1 Colo. App. 205; *Farmer v. Ukiah Water Co.*, 56 Cal. 11, 14; *New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190, 192, 14 Am. Dec. 346.

An appurtenance is something attached to the realty. *Brush Electric Co. v. Warwick Electric Mfg. Co.*, 6 Ohio Dec. 475, 478.

Webster gives as the first meaning of "appurtenance" "that which belongs to something else; an adjunct; an appendage; as small buildings are the appurtenances of a

mansion." *Carpenter v. Leonard*, 5 Minn. 155, 168 (Gil. 119, 132).

The word "appurtenance," as used in section 1, c. 54, Comp. St., which provides for a lien on any house, mill, manufactory, or building or appurtenance, means appurtenance to the land, and not to some structure. *H. F. Cady Lumber Co. v. Greater America Exposition Co.* (Neb.) 93 N. W. 961, 962.

#### **Annexed distinguished.**

The word "appurtenant" signifies belonging to or pertaining to as of right. It is a word of broader signification than "annexed," which is defined by lexicographers to mean "joined at the end," "connected with," "affixed." *Dauphin County Treasurer v. St. Stephen's Church* (Pa.) 3 Phila. 189, 190.

"Appurtenant" denotes annexed or belonging to. *Empire Land & Canal Co. v. County Treasurer*; 28 Pac. 482, 484, 1 Colo. App. 205.

#### **Appendant distinguished.**

"Appendants" are by prescription, as distinguished from "appurtenances," which are by grant, or which may arise from use. *Jackson v. Striker* (N. Y.) 1 Johns. Cas. 284, 291.

"Appurtenant" agrees with the term "appendant" in nature and quality of its properties, but differs in that the commencement of the former is known, while the latter has belonged to the thing more worthy beyond the memory of man. *Leonard v. White*, 7 Mass. 6, 8, 5 Am. Dec. 19.

#### **In gross distinguished.**

"Whether an easement in a given case is appurtenant or in gross, is to be determined mainly by the nature of the right and the intention of the parties creating it. If it be in its nature an appropriate and usual adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land, and not an easement in gross, the rule for the construction of such grants being more favorable to the former than to the latter class. Though an easement, like a right of way, may be created by 'grant in gross,' as it is called, or attached to the person of the grantee, this is never presumed when it can fairly be construed to be appurtenant to some other estate, and, if it is in gross, it cannot extend beyond the life of the grantee, nor can it be granted over, being attached to the person of the grantee alone. The greater weight of authority supports the doctrine that easements in gross, properly so called, are not assignable or inheritable. If, however, a right to take soil, gravel, water from a spring, and the like from another's land

may properly be denominated an easement, then it is proper to say that an easement in gross—for such it might doubtless be constituted—might be both assignable and inheritable, for the rights enumerated are so far of the character of an estate or interest in the land itself that if granted to one in gross it is treated as an estate, and may therefore be one for life or of inheritance." *Cadwalader v. Bailey*, 23 Atl. 20, 21, 17 R. L. 495, 14 L. R. A. 300.

A grant in gross is never presumed when it can be clearly construed as appurtenant to some other estate. In order to declare a grant in gross appurtenant, there must be two distinct tenements—the dominant, to which the right belongs; and the servient, on which the burden or obligation rests. *Winston v. Johnson*, 45 N. W. 953, 959, 42 Minn. 398.

An easement is appurtenant, and not in gross, when it appears that it was granted for the benefit of the grantee's land. A right of way is appurtenant to the land of the grantee if so in fact, although not declared to be so in the deed. If the way leads to the grantee's land, and is useless except for use in connection with it, and after the grant was used solely for access to such land, it is appurtenant to it. Thus, where a right of way was granted by the owner of land on a highway to an adjoining owner who had no means of access to the highway, such right of way was an easement appurtenant to the adjoining owner's land, and not in gross. *Lidgerding v. Zignego*, 80 N. W. 360, 361, 77 Minn. 421, 77 Am. St. Rep. 677.

#### **Propriety of relation implied.**

The word "appurtenances" has a technical signification, when strictly employed in leases, for the purpose of including any easements or servitudes used or enjoyed with the demised premises. When the term is thus used in order to constitute an appurtenance, there must exist a propriety of relation between the principal or dominant subject and the necessary or adjunct, which is to be ascertained by considering whether they so agree in nature and quality as to be capable of union without incongruity. *Riddle v. Littleton*, 53 N. H. 503, 508, 16 Am. Rep. 388; *Newport Illuminating Co. v. Newport Tax Assessors*, 36 Atl. 426, 429, 19 R. I. 632, 36 L. R. A. 266.

#### **Thing incident implied.**

"Appurtenances," as used in a will granting a tract on which testator lived to his son, together with all the "appurtenances," could have no greater meaning than to comprehend things in the nature of things incident to the tract. *Helme v. Guy*, 6 N. C. 341, 342.

#### **Thing necessary implied.**

The word "appurtenant" will only carry with it easements and servitudes used and

enjoyed with the lands for whose benefit they were created, and even an easement will not pass unless it is necessary to the enjoyment of the thing granted. *Humphreys v. McKissock*, 11 Sup. Ct. 779, 781, 140 U. S. 304, 35 L. Ed. 473; *Ogden v. Jennings*, 62 N. Y. 528, 530 (cited and approved in *Griffiths v. Morrison*, 12 N. E. 580, 582, 106 N. Y. 165); *Newport Illuminating Co. v. Assessors of Taxes of Newport*, 36 Atl. 426, 429, 19 R. I. 632, 36 L. R. A. 266; *Whyte v. Builders' League of New York*, 52 N. Y. Supp. 65, 67, 23 Misc. Rep. 385 (citing *Griffiths v. Morrison*, 106 N. Y. 165, 12 N. E. 580); *In re Metropolitan Elevated Ry. Co.*, 2 N. Y. Supp. 278, 282; *Cleary v. Skiffich*, 65 Pac. 59, 63, 28 Colo. 362, 89 Am. St. Rep. 207; *Fond du Lac Water Co. v. City of Fond du Lac*, 52 N. W. 439, 442, 82 Wis. 322, 16 L. R. A. 581.

"Appurtenance," as used in a lease of a hotel and appurtenances, means such things as are actually and directly necessary to the enjoyment of the property; and hence a kettle situated on a lot, not included in the lease of the hotel, and not indispensable to its enjoyment, although a convenience to such property and used by the lessor in connection therewith, is not an appurtenance. *Barrett v. Bell*, 82 Mo. 110, 114, 52 Am. Rep. 361.

It is an established rule of conveyancing that the word "appurtenance" in the habendum of a deed will not be construed to convey anything except what was legally appurtenant to the land in the hands of the grantor, and therefore will not be extended so as to convey an easement of the land to another, which, by reason of not having ripened into a legal right, has not become legally attached to the premises conveyed, and unless accompanied by proper words describing it and showing the intention of the grantor to pass it. But when an easement, though not originally belonging to an estate, has become appurtenant to it, either by grant or prescription, a conveyance of that estate will carry with it such easement, whether mentioned in the deed or not, although it may not be necessary to the enjoyment of the estate by the grantee. *Cole v. Bradbury*, 29 Atl. 1097, 1098, 86 Me. 380.

"Appurtenant" denotes annexed or belonging to, but in law it denotes annexation which is of convenience merely, and not of necessity, and which may have its origin at any time, in both of which respects it is distinguished from "appendant." *Farmer v. Ukiah Water Co.*, 56 Cal. 11, 14.

"Appurtenances," as used in Gen. St. 1878, c. 90, § 1, giving a lien for constructing, altering or repairing houses, buildings, or "appurtenances," means structures which are necessary for the use and enjoyment of another building in the manner in which they are used, and does not include property used in a different branch of the same business

which may be carried on separately. *McDonald v. Minneapolis Lumber Co.*, 9 N. W. 765, 766, 28 Minn. 262.

An "appurtenance" is that only which is incidental or indispensable to the proper use of the premises demised, and a mere convenience does not create an appurtenance. A restaurant conducted by the lessor of an apartment in the same building is not such an incidental and indispensable appurtenance to the leased premises that its mismanagement or removal would constitute an infraction of the lease, the instrument itself being silent in regard thereto. *Gale v. Heckman*, 38 N. Y. Supp. 85, 86, 16 Misc. Rep. 376.

#### Thing of inferior nature implied.

An "appurtenance" is a thing used with and related or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant. *Jarvis v. Seele Milling Co.*, 50 N. E. 1044, 1045, 173 Ill. 192, 64 Am. St. Rep. 107; *Book v. West*, 69 Pac. 630, 632, 29 Wash. 70; *Riddle v. Littlefield*, 53 N. H. 503, 508, 16 Am. Rep. 388; *Snoddy v. Bolen*, 24 S. W. 142, 144, 122 Mo. 479; *Witte v. Quinn*, 38 Mo. App. 681, 692 (citing 3 Kent, Comm. 626); *Rutherford v. Wabash R. Co.*, 48 S. W. 921, 924, 147 Mo. 441; *Newport Illuminating Co. v. Assessors of Taxes of Newport*, 36 Atl. 426, 429, 19 R. I. 632, 36 L. R. A. 266; *Leonard v. White*, 7 Mass. 6, 8, 5 Am. Dec. 19; *Lucas v. Bishop*, 83 Tenn. (15 Lea) 165, 167, 54 Am. Rep. 440; *Woodhull v. Rosenthal*, 61 N. Y. 382, 390.

An appurtenance "is something belonging to, or pertaining to, something else which is its principal, and is not a part of the principal thing. A thing appurtenant must be of an inferior nature to the thing to which it is appurtenant." *Ballew v. State*, 9 S. W. 765, 766, 26 Tex. App. 483; *Bloom v. West*, 32 Pac. 846, 848, 3 Colo. App. 212.

"A mere easement may without express words pass as an incident to the principal object of the grant, but property of the same rank or kind as that conveyed in terms cannot be said to be an incident to the principal object of the grant." *Investment Co. of Philadelphia v. Ohio & N. W. R. Co.* (U. S.) 41 Fed. 378, 380.

The term "appurtenant" involves the idea of dependence, and includes easements and servitudes used and enjoyed with the lands for whose benefit they were created. *Humphreys v. McKissock*, 11 Sup. Ct. 779, 781, 140 U. S. 304, 35 L. Ed. 473.

#### Unity of title implied.

That which is claimed to be an "appurtenance" must not only be appendant in utility and fitness for use to the principal or dominant estate, but there must be a unity of title or right in the same person to both the superior estate and the appurtenances

claimed. The fact that the use of that which is claimed as an "appurtenance" is highly convenient or seemingly indispensable to the enjoyment of the premises conveyed, added to the further fact that the same was actually enjoyed by the grantor at the time of the conveyance, does not constitute a projection of the eaves of a building over the lands adjoining an "appurtenance," as the right to maintain and use it did not belong to him when the conveyance was made; the ownership of such right is indispensable. *Meek v. Breckenridge*, 29 Ohio St. 642, 648.

#### To bridge.

"Appurtenances," as used in a deed of trust by a bridge company, describing the property conveyed as the "bridge named, and also all and singular such pieces or parcels of land occupied by the railway track, culverts, approaches, trestles, and other structures thereon of said bridge company, together with the tenements, hereditaments, and 'appurtenances' to several lots, strips, pieces, and parcels of land belonging or of right appertaining thereto," does not pass such lots, the company owning them in fee. "One piece of land held in fee or lesser title cannot be appurtenant to another piece of land." Lord Coke, in his *Commentaries on Littleton*, p. 121, § 184, says: "A thing corporeal cannot be appended to a thing corporeal, nor a thing incorporeal to a thing incorporeal, but things incorporeal which lie in grant may be appended to things corporeal. Nothing can be properly appended or appurtenant to anything unless the principal or superior thing be of perpetual subsistence and continuous. Land cannot, therefore, be appurtenant to other land, but an incorporeal hereditament may. So of an easement which is appurtenant." It follows that the lots described in the deed did not and could not pass as "appurtenances" to the conveyance of the bridge, its approaches, tracks, culverts, and connections with other rights, etc. *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410, 418.

#### To buildings.

"Appurtenances," as used in the mechanic's lien law, giving a lien for constructing, altering, or repairing houses, buildings, or "appurtenances," means such structures as are necessary to the use and enjoyment of the premises, and includes buildings on the opposite side of the street from the main building, and designed to be used in connection therewith. *Carpenter v. Leonard*, 5 Minn. 155, 168 (Gil 119, 132).

Where a group of buildings on one's land, constituting his coal-mining plant, extended over the right of way of a railroad company by means of sheds and a chute over them located on the right of way, the mining buildings cannot be said to be appurtenant to them, within the provision of a lease of a right of way agreeing to hold a railroad com-

pany harmless from damages by fire to any building on the leased premises or their appurtenances. *Rutherford v. Wabash R. Co.*, 48 S. W. 921, 924, 147 Mo. 441.

"Appurtenant," as used in a policy of insurance covering "all the articles constituting the stock of a pork house and all articles contained within the building and appurtenant thereto," covers all within those buildings, without regard to the particular ownership of each or any article which was at the risk of the insured. *Aetna Ins. Co. v. Jackson*, 55 Ky. (16 B. Mon.) 242, 251.

"Appurtenant," as used in 1 Rev. Code, c. 147, § 16, declaring that the owner or occupier of any tavern shall be deemed to be the owner or occupier of every house and other place within the curtilage of the principal house, or in any wise "appurtenant thereto or at any time held therewith" cannot be taken in its literal sense, but must be construed to mean only such houses as are used in connection with the principal tavern for the convenience or accommodation of guests. *Commonwealth v. Sanders* (Va.) 5 Leigh, 751, 753.

"Appurtenances," as used in a mortgage of a brewhouse "with the appurtenances," means only such things as are a part of the realty belonging to outhouses, etc., and does not include trade fixtures and utensils and things which are not fixtures. *Ex parte Quincy*, 1 Atk. 477, 478.

An "appurtenance" signifies something belonging to another thing as principal, and which passes as incident to the principal thing. In accordance with this definition, where one by a bill of sale conveyed "all the fixtures and 'appurtenances' contained in a certain daguerreian room," all the loose movable articles of personal property in the daguerreian room, so far as they were necessary to the business carried on therein, passed to the purchaser under the term "appurtenances." *Pickrell v. Carson*, 8 Iowa (8 Clarke) 544, 551.

A tenant in an office building is entitled to have access through the door, halls, floors, and elevators, and the use of wash-basins and closet in order to enjoy the rooms he occupies, which conveniences are in the nature of "appurtenances." The word "appurtenances" received a broad and liberal meaning by the Court of Appeals in *Doyle v. Lord*, 64 N. Y. 432, 437, 21 Am. Rep. 629, where the court said: "That word would give him whatever was attached to or used with the premises and incident thereto, and convenient or essential to the beneficial use or enjoyment thereof." *Hall v. Irvin*, 79 N. Y. Supp. 614, 617, 78 App. Div. 107.

"Appurtenance," as used in a claim for a mechanic's lien for a debt contracted for work and labor done on a certain house by contract, made by the claimants within the

time limited, for and about the construction of the said building and "appurtenance" may mean a yard, an alley, a cistern, an ice-house, a smokehouse, or stable, or other outhouse distinct from the principal building mentioned in the claim, and hence the claim did not sufficiently specify the building on which the work was done so as to exclude work done or materials supplied for anything else. *Appeal of Barclay*, 13 Pa. (1 Harris) 495, 496.

#### Same—Heat.

The word "appurtenances" used in a lease will not be construed to include the furnishing of steam and forced air to the lessee. *Watkins v. Greene*, 46 Atl. 38, 22 R. I. 34.

#### Same—Land.

"Appurtenances," as used in a deed conveying a house and appurtenances, means land, and passes title to the garden, curtilage, and close adjoining the house. *Ammidown v. Bail*, 90 Mass. (8 Allen) 293, 295.

By a devise of a house cum pertinentiis only the garden and orchard will pass with it; but, by a devise of a house with the land appertaining thereto, the land usually occupied therewith will pass. Hence, where one devised land to his cousin, who should continue to live at his house and be at the charge of keeping the house, and the servants, and coach horses which the testator employed in plowing the ground, and spend the corn arising therefrom in the house, the land enjoyed with the house was held to pass to the cousin. *Blackborn v. Edgley*, 1 P. Wms. 600, 603.

If a man makes a feoffment of a house with the "appurtenances," nothing passes by the words "with the appurtenances" but the garden, curtilage, and close adjoining the house and on which the house is built, and no other land, though other land has been occupied with the house. In the time of Henry VIII it was usual to add these words, "and all lands, tenements and hereditaments appertaining to the said house, and being occupied, let or set with the same," and by these words the land used would pass with the house; but Lord Coke confirms Lord Hale, and says that, by the grant of a messuage or house, the orchard, garden, and curtilage will pass without the word "appurtenances," and an acre or more may pass by the name of a house, and by a devise of a messuage only, without the words "with the appurtenances." It was adjudged that the curtilage and garden would pass, but land at a distance, though used and occupied by the testator with the house, will not pass by such words. *Smith v. Martin*, 2 Saund. 401, notes.

#### Same—Sidewalk.

"Appurtenances," as used in Laws 1844, c. 339, § 1, giving a mechanic's lien for labor

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or materials furnished in building, altering, or repairing any house or other building, or "appurtenances" to any house or other building, "may perhaps include, without any forced construction, the yard and sidewalk" connected with a building in the process of erection. *McDermott v. Palmer*, 8 N. Y. (4 Seld.) 383, 387.

"Appurtenances," as used in a New York statute giving a lien upon the lot, building, and "appurtenances" for materials used for making improvements thereon, include a sidewalk in front of the premises. "The owner of a lot abutting on an avenue or street has not only an interest therein in common with the public at large, but also a special and peculiar interest, and we think it may be fairly held that a sidewalk in front of a building is an appurtenance thereto within the meaning of the lien law." *Kenney v. Apgar*, 93 N. Y. 539, 549.

#### Same—Water pipes.

"Appurtenances" are not necessarily of an incorporeal nature, but things corporeal may be appurtenant. If one has a house and land, and conveys water to the house by pipes through the land, and afterwards sells the house with the appurtenances to one, and the land to another, the pipes pass with the house, because they are necessary and quasi appendant thereto. *Jackson v. Striker* (N. Y.) 1 Johns. Cas. 284, 291.

#### Same—Well.

Under Gen. St. § 3018, authorizing a mechanic's lien for materials furnished and services rendered in the construction of a building, such a lien may be had for the construction of a well close to the back yard of a house for the use of its occupants, although it is not physically connected with the house, and was built after the construction of the house and under a separate contract. In discussing the meaning of the word "appurtenances" in the statute, the court says that the word was plainly meant to cover what might not otherwise have been deemed to have belonged to a building, and is an apt term to describe detached structures built as adjuncts to a building to further its convenient use and occupation. *Balch v. Chaffee*, 47 Atl. 327, 328, 73 Conn. 318, 84 Am. St. Rep. 155.

#### Same—Windmill.

"Appurtenances," within Comp. St. c. 54, § 353, authorizing the filing of a mechanic's lien for the erection of any building or appurtenances, etc., include any erection on the property appropriate to be used in pursuance of the business to which the property is applied, and therefore includes the erection of a windmill, with a tank and pump, etc., on a farm. *Phelps & Bigelow Wind-Mill Co. v. Shay*, 48 N. W. 896, 32 Neb. 19.



### To dredge.

An "appurtenance" is a thing used with and relating to or dependent on another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant; a thing belonging to another thing as principal, and which passes as incident to the principal thing. An appurtenant to a dredge must be something incident and needful in the work of dredging, and, where a pump had nothing to do with such work, it did not pass as appurtenant to the dredge in a conveyance of the dredge and its appurtenances. *Gullman v. Sharp*, 30 N. Y. Supp. 1036, 1038, 81 Hun, 462.

### To electric light plant.

Electric wires and poles connected with an electric light plant are not part of the realty, or "appurtenances" thereon, for the purpose of taxation, where some of the poles are on private property, and some were placed on the public highway under an ordinance which was subject to revocation. *Newport Illuminating Co. v. Newport Tax Assessors*, 36 Atl. 426, 429, 19 R. I. 632, 36 L. R. A. 266.

### To ferry.

"Appurtenances," as used in the return of levy by a sheriff, declaring that he had served the execution on defendant's interest in a ferry and the "appurtenances" was too general, vague, and indefinite to comprehend within its meaning any personal property as the subject of levy. *Munroe v. Thomas*, 5 Cal. 470, 471.

### To gas plant.

The word "appurtenant" has no inflexible meaning, but must be construed in connection with the nature and subject of the thing granted. A thing is appurtenant to something else only when it stands in the relation of an incident to a principal, and is necessarily connected in the use and enjoyment of the latter. Where parties to whom a valid franchise is granted to construct and operate a plant for furnishing gas to the people of the city, construct such plant, including pipes in the streets and all necessary appliances and equipments for so furnishing gas, and thereafter contract to sell such plant and to procure a transfer to the grantees a franchise authorizing the operation thereof, such contract is fully complied with by a deed conveying such plant with all the rights, privileges, and "appurtenances" thereunto belonging. *Lawrence v. Hennessy*, 65 S. W. 717, 719, 165 Mo. 659 (citing *Fitzpatrick v. Milk*, 24 Mo. App. 435; *Missouri Pac. Ry. Co. v. Maffitt*, 94 Mo. 56, 60, 6 S. W. 600; *Wilson v. Beckwith*, 22 S. W. 639, 642, 117 Mo. 61; *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473).

### To land.

A thing is deemed to be incidental or "appurtenant" to land when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air, or heat from or across the land of another. *Civ. Code Cal.* 1903, § 662; *Civ. Code Mont.* 1895, § 1078; *Mt. Carmel Fruit Co. v. Webster*, 73 Pac. 826, 828, 140 Cal. 183.

A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air, or heat from or across the land of another. Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are deemed to be affixed to the mine. *Rev. Codes N. D.* 1899, § 3273; *Civ. Code S. D.* 1903, § 189; *Rev. St. Okl.* 1903, § 4024.

The word "appurtenances," as used in the chapter relating to the conveyances of real estate, or in any instrument relating to real property, shall, unless otherwise qualified, mean all improvements, and every right, of whatever character, pertaining to the premises described. *Rev. St. Okl.* 1903, § 887.

Where a grantor devises real estate with its appurtenances, the word "appurtenances" includes all that is affixed, incidental, or appurtenant to the land. *West Coast Lumber Co. v. Apfeld*, 24 Pac. 993, 86 Cal. 335.

"Appurtenances," as used with reference to conveyances of realty, means and includes all rights to and interests in other property necessary for the full and free enjoyment of the property conveyed. *Jackson v. Trullinger*, 9 Or. 393, 398.

"Appurtenances," as used in a conveyance which, after describing the land intended to be conveyed, contained a clause, "with all the buildings, etc., and appurtenances," was sufficient to convey any appurtenance already existing, but not to create a new one. *Kenyon v. Nichols*, 1 R. I. 411, 413.

Where improvements are made on tide-lands intended to be used separate and distinct from the uplands, such improvements will not pass under a mortgage of lands appurtenant to the uplands. *Book v. West*, 69 Pac. 630, 632, 29 Wash. 70.

A deed conveying land and its appurtenances conveys only such things in the nature of fixtures as are appurtenant to the land itself. It does not convey the personal property or effects of the grantor, although they are situated upon the land at the time the conveyance takes effect. *City of Lincoln v.*

Lincoln St. Ry. Co. (Neb.) 93 N. W. 766, 772.

#### Same—Buildings.

An appurtenance is something which is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or water course, or of a passage for light, air, or heat from or across the land of another; and the grant of a piece of land with the appurtenances will carry the dwelling house and adjoining buildings, and also the orchard, garden, and curtilage. *McShane v. Carter*, 22 Pac. 178, 179, 80 Cal. 310.

#### Same—Easements.

The right to use private ways, reasonably necessary to the enjoyment of land, is an "appurtenance" of the land. *United States v. Harris* (U. S.) 26 Fed. Cas. 185, 191.

"Appurtenances," when used in a conveyance of a specific piece of land carved out of a larger piece owned by the grantor, and described by metes and bounds, was not sufficient to convey an easement to a right of way through the premises retained by the grantor, but only carried what was included within the boundaries conveyed. *Grant v. Chase*, 17 Mass. 443, 447, 9 Am. Dec. 161.

"Appurtenances," as used in a conveyance of a lot with all "appurtenances" thereunto belonging, included an easement, or a right of that nature, to have a house thereon rest partly on an adjoining lot. *Bramble v. Kingsbury*, 39 Ark. 131, 135.

A deed to realty with the "appurtenances" will not pass an easement of a stairway which was not erected when the conveyance was made nor referred to therein, but the grantor only conveys by deed as an "appurtenance" whatever he has the power to grant which is practically annexed to the granted premises at the time of the grant, and is necessary to their enjoyment in the condition of the estate at the time. *Peters v. Worth*, 64 S. W. 490, 492, 164 Mo. 431 (citing *Philbrick v. Ewing*, 97 Mass. 133; *Whiting v. Gaylord*, 66 Conn., loc. cit. 348, 34 Atl. 85, 50 Am. St. Rep. 87; *Brace v. Yale*, 86 Mass. [4 Allen] 393; *Decorah Woolen Mill Co. v. Greer*, 49 Iowa, loc. cit. 493; *Spaulding v. Abbot*, 55 N. H. 423).

Appurtenances include easements and servitudes used and enjoyed with the lands for the benefit of which they were created. *Fond du Lac Water Co. v. City of Fond du Lac*, 52 N. W. 439, 442, 82 Wis. 322, 16 L. R. A. 581; *Cleary v. Skiffich*, 65 Pac. 59, 63, 28 Colo. 362.

A deed conveying a described parcel of land with the "appurtenances" conveys to the grantee, as appurtenant to the land, the right to the free and unobstructed use and en-

joyment of an alley adjoining the property, which the grantor had laid out and set apart for such use, and the fee to which was at the time of the conveyance in the grantor. *Murphey v. Harker*, 41 S. E. 585, 115 Ga. 77.

A conveyance of land carries with it an easement of the right of way created under the agreement between plaintiff and his grantor of certain roads, and that the parties shall have free access upon it and use thereof. *Valentine v. Schreiber*, 38 N. Y. Supp. 417, 422, 3 App. Div. 235.

"An appurtenant easement is an incorporeal right which, as the term implies, is attached to and belongs with some greater or superior right; something annexed to another thing, more worthy, and which passes as an incident to it. It is a species of what the civil law calls 'servitude.' It is incapable of existence separate and apart from the particular lands to which it is annexed, there being nothing for it to act upon. It is essential to the existence of an easement of this kind that there be two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests." *Cadwalader v. Bailey*, 23 Atl. 20, 21, 17 R. I. 495, 14 L. R. A. 300.

Ways are said to be appendant or appurtenant when they are incident to an estate, one terminus being on the land of the party claiming. *Louisville & N. R. Co. v. Koelle*, 104 Ill. 455, 461.

A way is appurtenant to other lands when it is created for the convenience of their occupation, without respect to the ownership or number of occupants. In such case the right of way passes with the dominant estate as an incident thereto. *Shields v. Titus*, 22 N. E. 717, 720, 46 Ohio St. 528.

"Ways are appurtenant when they are incident to an estate, one terminus being on the land of another, inhere in the land, concern the premises, and are essentially necessary to their enjoyment. They are in the nature of covenants running with the land, must respect the thing granted, and concern the land or estate conveyed. A private right or easement running to a person's farm or residence over the land of another, which had been used continuously and uninterruptedly, under claim of right to and as the owners of such right of way and easements for 35 years by him and those under whom he claimed as owners of the farm, is one appurtenant to the land, and would pass as such with a conveyance of the farm. It is an interest in the land or right of way." *Sanxay v. Hunger*, 42 Ind. 44, 48.

#### Same—Easements not in existence.

"Appurtenance," as used in a deed conveying privileges and appurtenances, would include an appurtenant way if in existence. *Blakeman v. Blakeman*, 39 Conn. 320, 325.

The operation of the word "appurtenances" in conveyances is uniformly confined to an existing right, and is not understood as creating a new one. Accordingly, where land was sold to and from which the owner had been accustomed to pass by a certain path over other land belonging to him, no right of way passed under the word "appurtenances" occurring in the deed, for until the time of the sale it was impossible for any right of way as an easement to exist in favor of the land so sold. *Stuyvesant v. Woodruff*, 21 N. J. Law (1 Zab.) 133, 151, 57 Am. Dec. 156.

"Appurtenances," as used in a conveyance of certain property, together with all the "privileges and appurtenances" thereunto belonging, was not sufficient to create a new easement, though they might be sufficient to pass a right of way in actual existence, and are not equivalent to the words "all rights of way hereafter used or heretofore used." *Gayetty v. Bethune*, 14 Mass. 49, 53, 7 Am. Dec. 188.

#### Same—Land.

"A thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal." *New York Cent. R. Co. v. Buffalo & N. Y. & E. R. Co.* (N. Y.) 49 Barb. 501, 504; *Harris v. Elliott*, 35 U. S. (10 Pet.) 25, 54, 9 L. Ed. 333; *In re Metropolitan Elevated Ry. Co.*, 2 N. Y. Supp. 278, 282; *Investment Co. of Philadelphia v. Ohio & N. W. Ry. Co.* (U. S.) 41 Fed. 378, 380. According to this rule, land cannot be appurtenant to land. *New York Cent. R. Co. v. Buffalo & N. Y. & E. R. Co.* (N. Y.) 49 Barb. 501, 504; *Woodhull v. Rosenthal*, 61 N. Y. 382, 390; *In re Metropolitan Elevated Ry. Co.*, 2 N. Y. Supp. 278, 282; *Harris v. Elliott*, 35 U. S. (10 Pet.) 25, 54, 9 L. Ed. 333; *Humphreys v. McKissock*, 11 Sup. Ct. 779, 781, 140 U. S. 304, 35 L. Ed. 473; *Griffiths v. Morrison*, 36 Hun. 337, 338; *Investment Co. of Philadelphia v. Ohio & N. W. Ry. Co.* (U. S.) 41 Fed. 378, 380; *Wilson v. Beckwith*, 117 Mo. 61, 74, 22 S. W. 639. "It is, however, doubtless true that the word is frequently used in a more enlarged and comprehensive sense, and when it can be gathered from all the attendant circumstances that it was so understood and used by the parties, a corresponding effect should be given to it in the interpretation of a contract." *Frey v. Drahos*, 6 Neb. 1, 10, 29 Am. Rep. 353.

On a strict and technical definition of the word "appurtenant," there is room for contention whether one tract of land could be appurtenant to another tract or the family homestead thereon, when the tracts are owned by different persons, but under Const. 1868, art. 2, § 32, defining the family homestead as consisting of the dwelling house, outbuildings, and land appurtenant, it cannot be said, as a matter of law, that a 30-acre tract belonging to the head of the family

could not be appurtenant to the family homestead, even though the dwelling house might be situated on an adjoining tract belonging to the wife of the head of the family. *McClenaghan v. McEachern*, 25 S. E. 296, 297, 47 S. O. 446.

The word "appurtenant" necessarily involves the idea that the owner of a dominant tenement has some legal right in the premises appurtenant to it, so that a tract of 30 acres, adjoining the homestead of a family, which is owned by the husband, and while the homestead is owned by the wife, cannot be said to be appurtenant to the homestead, even though the husband cultivates it, so as to exempt it as a part of the homestead. *McClenaghan v. McEachern*, 34 S. E. 627, 628, 56 S. O. 350.

Where the word "appurtenances" is used in a will, it will not be strictly construed where it is apparent that such use was not intended by the testator, and hence the word may carry a fee in lands appurtenant to lands devised, though, strictly speaking, land cannot be appurtenant to land. *Otis v. Smith*, 26 Mass. (9 Pick.) 293, 296.

"Appurtenance," as used in conveyances, passes nothing but the land, and such things as belong thereto and are part of the realty. Therefore, when a conveyance is of a piece of land, defined by boundaries, with "appurtenances," other land not included in boundaries will not pass as appurtenant to the grant. All that can be claimed as embraced in the word "appurtenances" are easements and servitudes necessary to the enjoyment of the land conveyed. *Snoddy v. Bolen*, 24 S. W. 142, 144, 122 Mo. 479, 24 L. R. A. 507.

The term "appurtenances," in a deed of certain described land and appurtenances, will not pass title in land laid out or dedicated to a highway, or any other land. *Hoboken Land & Improvement Co. v. Kerrigan*, 31 N. J. Law (2 Vroom) 13, 16.

Loc. Act Dec. 11, 1855, provided that the state issue bonds to a railroad company, that the company should signify its acceptance by filing a receipt therefor, and that when recorded in the office of the Secretary of State each certificate of acceptance should be a mortgage of the road, and every point and section thereof, and its appurtenances. Previously the state had granted to the railroad company lands granted to the state by Congress, and had provided that the company might sell the lands and issue those bonds, secured by mortgages of the land. Held, that the word "appurtenances" did not cover the lands so granted by the state. *Wilson v. Beckwith*, 117 Mo. 61, 74, 22 S. W. 639.

#### Same—Personal property.

"Appurtenances," as used in a deed of trust of certain real estate conveying all and

singular the tenements, hereditaments, and "appurtenances" thereto belonging or in anywise appertaining, means things belonging to another thing as principal, and which pass as incident to the principal thing. "The term as used in the conveyance passes nothing but the land, and such things as belong thereto and are part of the realty," and does not embrace personal property therein. *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 60, 24 Am. Rep. 719.

"Appurtenances" does not include personal property which was totally disconnected with the devised premises. *Scheidt v. Belz*, 4 Ill. App. (4 Bradw.) 431, 487.

Technically, property tangible and corporeal, capable of sale or transfer, and of use in any other place, cannot be regarded as appurtenant to land. *Bloom v. West*, 32 Pac. 846, 848, 3 Colo. App. 212.

#### Same—Water rights.

"Appurtenances," as used in a will devising to testator's wife his homestead, with the "appurtenances," containing about fourteen and one-half acres of upland, exclusive of the water grant, means "the rights and privileges of a nature inferior to the fee of the upland. The water grant was a right and privilege of a nature inferior to the fee of the upland, and passes under the term 'appurtenances.'" *Wetmore v. Peck* (N. Y.) 66 How. Prac. 54, 55.

The term "appurtenance" in a conveyance of land containing a pond, supplied by conduits from other land owned by the grantor and land which he had formerly owned, was held not to include the right of continuing to take water from the tract of land which he had formerly owned, though the grantor afterward repurchased such land. *Spencer v. Kilmer*, 45 N. E. 865, 866, 151 N. Y. 390.

The term "appurtenant" does not mean, and never meant, "inseparable," so that the mere fact that the right to use water on land, if not a corporeal thing, was a separate and distinct property right from the land itself, does not indicate that it was not appertaining to the land. *Frank v. Hicks*, 35 Pac. 475, 483, 4 Wyo. 502.

#### To mill.

A deed to a mill sold under foreclosure proceedings, which had been operated in connection with a mill pond and dam, carried with it as an "appurtenance" the easement in the land overflowed by the mill pond, though the word itself was not used in the deed. *Jarvis v. Seele Milling Co.*, 50 N. E. 1044, 1045, 173 Ill. 192, 64 Am. St. Rep. 107.

"Appurtenances," as used in a deed conveying a mill on a stream with the "appurtenances," should be construed to mean right to the use of the water of the stream, and

all of it, for mill purposes, for it was a necessary incident to the use of the mill. *Strickler v. Todd* (Pa.) 10 Serg. & R. 63, 69, 13 Am. Dec. 649.

"Appurtenances," as used in a devise of a gristmill with its appurtenances, construed to include "everything necessary for the sale and free enjoyment of the gristmill and requisite for the support of the establishment, such as a dam, water, and race leading to the mill, a proper portion of ground before the mill for the unloading or loading of wagons, horses, etc., for without these appurtenances the gristmill could not be worked, and the bounty of the testator would be inoperative." *Blaine's Lessee v. Chambers* (Pa.) 1 Serg. & R. 169, 174.

A water right, granted in gross, does not become technically "appurtenant" to land and a mill upon and for which it is subsequently used by the grantee. *Bank of British North America v. Miller* (U. S.) 6 Fed. 545-547.

A water right in connection with a saw-mill passes by the word "appurtenances" in a deed. *Pickering v. Stapler* (Pa.) 5 Serg. & R. 107, 110, 111, 9 Am. Dec. 336.

#### To railroad.

The term "appurtenant," in its legal, common acceptance, implies a thing as belonging to, accessory, or incident to some other thing. As used in its connection with land, it means a thing used with the land and for its benefit, annexed to and connected therewith; so that an appurtenant of a railroad implies that it is incidental to, connected and used with, the road, as a part of and essential thereto, such as depots, stations, switches, and switching yards, and the like. *Wilson v. Ward Lumber Co.* (U. S.) 67 Fed. 674, 677.

An exemption from taxation of the capital stock of a railroad company and the road, with fixtures and "appurtenances," including workshops, warehouses, and vehicles of transportation, does not include a hotel building erected within the space which the company is entitled to hold for a right of way, though it is built under a lease from the company, and is a convenience to passengers and a means of profit to the road. The ticket offices, however, which are kept within such building are exempt. *Day v. Joiner*, 65 Tenn. (6 Baxt.) 441, 442.

The word "appurtenant" has no inflexible meaning, but must be construed in connection with the nature and subject of the principal thing granted. Ordinarily, land cannot be appurtenant to other lands or distinct parcels, or pass with it as a part of or belonging to it, but where used in a deed by a railroad company, conveying all its right, title, and interest, together with all and singular the hereditaments and "appurtenances" thereunto belonging, it was sufficient

to pass title to a lot contiguous to the line of way of the grantor and belonging to it, though such lot was not specifically set out in the description in the deed. *Missouri Pac. Ry. Co. v. Maffit*, 6 S. W. 600, 601, 94 Mo. 56.

In an action to foreclose a mortgage given upon a railroad, and its property of every kind or use, or adapted to use on or about its lines of railway, the question arises whether a pavilion was included in the mortgage. The trial court, after finding that such pavilion was covered by the phrase, "operated and held by the company in connection with its railroad, and for use on or about its lines," stated that such pavilion grounds were an important and necessary part of the appurtenances and equipments of said railroad. It was held that the term "appurtenances" was not used in its technical legal sense, since it would make the finding inconsistent with other findings that the pavilion grounds consisted of five acres of land, which by no legal possibility could be appurtenant to the railway in the technical legal meaning, as, for example, in the sense of the word "addition." Thus in *Frey v. Drahos*, 6 Neb. 10, 29 Am. Rep. 353, Lake, C. J., speaking of the word "appurtenances," said it is doubtless true that the word is frequently used in a more enlarged and comprehensive sense than its technical legal sense, and, when it can be gathered from the attendant circumstances that it was so used, a corresponding effect should be given to it in the interpretation of a contract, and such meaning will be given to it in the construction of such finding. *California Title Insurance & Trust Co. v. Pauly*, 43 Pac. 586, 587, 111 Cal. 122.

#### To ship.

"Appurtenances," as used in the phrase "appurtenances of a vessel," "must not be construed with a mere reference to the naked idea of a ship, for that which would be an incumbrance to a ship one way employed would be an indispensable equipment to another. With regard to a fishing vessel, the term 'appurtenances' includes all the tackle and furniture which are necessary to the proper operation of the vessel for the purposes for which it was designed." *Swift v. Brownell* (U. S.) 23 Fed. Cas. 554, 557.

"It may not be a simple matter to define what is and what is not an 'appurtenance of a ship.' There are some things that are universally so, things which must be appurtenant to every ship, be its occupation what it may. But particular things may not become so from their immediate and indispensable connection with the ship in the particular occupation to which she is destined or in which she is engaged. A ship of war has a special character, and, necessarily, special appurtenances. A packet, and particularly a steam one, has its specialties. So a Greenland ship has a character superadded by her special occupation, and must have the machinery

adapted to the catching of whales, and to the dressing of them on board the vessel." *The Ontario* (U. S.) 18 Fed. Cas. 736, 741.

"Appurtenances," as used in the rule providing that in suits in rem against a ship, her tackle, sails, apparel, furniture, boats, or other "appurtenances" which are in the possession of a third person may be ordered to be delivered to the marshal, "applies to all objects on board belonging to the owners for the purpose of the voyage" which do not belong to the vessel as a navigating ship. *The Witch Queen* (U. S.) 30 Fed. Cas. 396, 397.

In a bill of sale of a vessel and its "appurtenances," the ship's boat does not pass. *Starr v. Goodwin* (Conn.) 2 Root, 71.

The phrase "ship and her appurtenances," as used in 53 Geo. III, c. 159, whereby the owner and the ship and its appurtenances are liable to the extent of the value thereof for damages done to another ship in manner described by the act, means whatever is on board the ship, for the object of the voyage and adventure in which she is engaged, belonging to the owner. *Gale v. Laurie*, 5 Barn. & C. 156, 163.

All things belonging to the owners which are on board a ship and are connected with its proper use for the objects of the voyage and adventure in which the ship is engaged are deemed its appurtenances. Rev. Codes N. D. 1899, § 3469; Civ. Code S. D. 1903, § 386.

#### To tunnel right.

A right annexed to land is appurtenant where the connection has arisen either by grant or by prescription from long adverse enjoyment. Thus the grant of a tunnel right through a specified piece of ground, together with all and singular the appurtenances thereto belonging, carries with it the right to dump the waste rock at the mouth of the tunnel on the land owned by the grantors at the time of the conveyance of the tunnel right, since, in extracting or removing ore through the tunnel, there would arise the necessity for the disposition of waste rock, and earth that had to be removed in the prosecution of the work. *Scheel v. Alhambra Min. Co.* (U. S.) 79 Fed. 821, 823.

#### To water power or right.

Where a water power is granted, together with all the privileges and appurtenances thereto belonging, by virtue of the phrase "privileges and appurtenances" the grantee has the right to maintain the dam at the same height as that at which the grantor had the right to maintain it, or, in other words, it imports a conveyance of all the water-power privileges which the grantor owned. *Daniels v. Citizens' Sav. Inst.*, 127 Mass. 534, 535; *Hathorn v. Stinson*, 10 Me. (1 Fairf.) 224, 234, 25 Am. Dec. 228; *Smith*

*v. Moodus Water Power Co.*, 35 Conn. 392, 401.

A mill site will not be held to be an appurtenance of a water right to which claimant of the mill site has acquired a vested interest, though such mill site is necessary for the enjoyment of the water right. *Cleary v. Skiffich*, 65 Pac. 59, 63, 28 Colo. 362, 89 Am. St. Rep. 207.

#### To wharf.

The word "appurtenance" may in some cases, when used in a devise or lease, be read as "usually held, usually occupied, or enjoyed therewith," when necessary to carry the intention of the parties into effect; and in one sense land is appurtenant to a building. So that, where a wharf passed as appurtenant to a lot, flats built on tide lands extending to deep water, when necessary to the use of the wharf, will pass with the wharf as an appurtenance thereto. *Brown v. Carkeek*, 44 Pac. 887, 888, 14 Wash. 443.

### APROVECHAMIENTO.

"Aprovechamiento" is a term of the Spanish law, which when applied to pueblo lands has particular reference to the commons, as the dehesas and montes, and applies not only to the enjoyment, but a right to the enjoyment, of them. *Hart v. Burnett*, 15 Cal. 530, 566.

### APT TIME.

"Apt time" sometimes depends upon lapse of time, as when a thing is required to be done at the first term, or within a given time, it cannot be done afterwards; but it more usually refers to the order of proceedings as fit or suitable time; and hence as no time is prescribed within which a discharge in bankruptcy is to be pleaded, and the first step taken after such discharge was a motion to docket it, and be allowed to plead the discharge, it was done in "apt time," although it was a long time—some two years—after discharge. If it was done in the proper order, it makes the length of time elapsing immaterial. *Pugh v. York*, 74 N. C. 383, 384.

### ARBITRAR.

The meaning of the verb "arbitrar," as given in the dictionaries, is to "adjudge or award," or "to strike out means or expedients." *Sheldon v. Milmo*, 36 S. W. 413, 416, 90 Tex. 1.

### ARBITRARILY.

In holding that an instruction that the jury may disbelieve any witness, but that it would be a disregard of a juror's duty to

arbitrarily disregard the evidence of a witness, was not erroneous. The court said the jury could not have misunderstood the court in the use of the word "arbitrarily." They doubtless understood it to mean that it would be a disregard of the juror's duty to disregard the evidence of a witness without any reason therefor. If there was no reason for disbelieving the witness, of course the jury could not help believing his testimony; and, if under these circumstances he disregarded his testimony, of course, he acted arbitrarily, and was not properly discharging his duty as a juror. *State v. Sutfin*, 22 W. Va. 771, 778.

### ARBITRARY GOVERNMENT.

The difference between a free and an arbitrary government is that in the former limits are assigned to those to whom the administration is committed, but the latter depends on the will of the departments, or some of them. *Kamper v. Hawkins*, 1 Va. Cas. 20, 23.

### ARBITRATION.

See "Compulsory Arbitration."

"Arbitration" is the act by which the parties refer any matter in dispute between them to the decision of a third party. *Garr v. Gomez* (N. Y.) 9 Wend. 649, 661.

"Arbitration" is a hearing and determination of a cause between parties in controversy by a tribunal selected by them. *Duren v. Getchell*, 55 Me. 241, 247.

"Arbitration" is the investigation and determination of a matter or matters of difference between contending parties by one or more unofficial persons chosen by the parties, and called "arbitrators" or "referees." *Henderson v. Beaton*, 52 Tex. 29, 43; *Wood v. City of Seattle* (Wash.) 62 Pac. 135, 143, 52 L. R. A. 369.

Arbitration is where the parties injuring and injured submit all matters in dispute concerning any personal chattels or personal wrong to the judgment of two or more arbitrators, who are to decide the controversy. *Fargo v. Reighard*, 39 N. E. 888, 890, 13 Ind. App. 39; *Germania Fire Ins. Co. v. Warner*, 41 N. E. 969, 973, 13 Ind. App. 466.

Arbitration is a substitution by consent of parties of another tribunal for those provided by the ordinary processes of law. *Boyden v. Lamb*, 25 N. E. 609, 610, 152 Mass. 416.

"An 'arbitration' is a domestic tribunal created by the will and consent of parties litigant, and resorted to to avoid the expense of delay, and ill feeling consequent upon litigating in courts of justice. The arbitrators are generally selected from among the

friends of the parties, and are not supposed to be well versed in the law, but are expected to settle all matters in dispute untrammelled by the niceties of the law, and in a manner that will be just and equitable." *Relly v. Russell*, 84 Mo. 524, 528.

Any controversy relating to personal property may form the subject of "arbitration." And in all cases of injury either to the person or property, where damages would be recoverable by action, the arrangement of the matter may be left to arbitration. *Miller v. Brumbaugh*, 7 Kan. 343, 349.

"Arbitration" partakes of judicial proceedings, and an award by arbitrators is regarded with great respect by the courts, for it is the decision of persons chosen to settle the differences of the parties selecting them. It can hardly be considered of equal dignity with a judgment rendered by a court having jurisdiction of the persons and the subject-matter. *Shivley v. Knoblock*, 35 N. E. 1028, 1029, 8 Ind. App. 433.

"Arbitration" is an arrangement for taking and abiding by the judgment of selected persons in some disputed matter instead of carrying it to the established tribunals of justice; and is intended to avoid the formalities, the delay, the expense, and vexation of ordinary litigation. When the submission is made a rule of court, the arbitrators are not officers of the court, but are the appointees of the parties, as in cases where there is no rule of court. In either case the submission names the disputed matter upon which the arbitrators are to adjudge, and often prescribes the principles according to which they are to proceed, and the rules they are to follow in their decision. In *re Curtis-Castle Arbitration*, 30 Atl. 769, 770, 64 Conn. 501, 42 Am. St. Rep. 200.

No technical phrases or set form of words are necessary to constitute a submission to "arbitration." It is sufficient if it appears from what has passed between the parties that they mutually agreed to submit the matter in dispute between them to the decision of the person or persons named, and mutually agreed upon by them for that purpose. *McManus v. McCulloch* (Pa.) 6 Watts, 357, 360.

"Arbitration," at common law, was but a judicial investigation out of court. Upon an arbitration, it is well settled, upon a long line of decisions, that a party must have notice of a hearing before the judicial body, and unless the oath is expressly waived by the parties the witnesses must be examined under oath, such examination being in the presence of the parties, who have the right to be cross-examined. *People ex rel. Bliss v. Board of Sup'rs of Cortland County*, 15 N. Y. Supp. 748, 750.

Unless the statute or the submission under which the arbitrators act and derive

their authority provide to a contrary effect, or unless a contrary intention of the parties can be clearly and unmistakably gathered from the submission and attendant facts, the rule is general and imperative that all the arbitrators must unite in the award in order to render it valid. There is, however, a clear distinction between an "arbitration" of private import and one of public concern. In the latter a majority of the arbitrators chosen may act where all have met, but that rule does not obtain where the controversy is between individuals. *Morgan v. Merchants' Co-operative Fire Ins. Ass'n*, 64 N. Y. Supp. 873, 876, 52 App. Div. 61.

#### As action or suit.

See "Action"; "Suit."

#### Amicable lawsuit distinguished.

The words "arbitration" and "amicable lawsuit" are not convertible terms. The former carries with it the idea of settlement by disinterested third parties, and the latter by a friendly submission of the points in dispute to a judicial tribunal, to be determined in accordance with the terms of law. *Thompson v. Moulton*, 20 La. Ann. 535, 537.

#### Appraisal distinguished.

An act of the Legislature appropriating a sum of money for the purchase of certain relics to be paid on the certificate of three persons named, that the relics are in their opinion genuine, and that it is desirable in their judgment that they should be placed in the museum of the state library, is not a provision for "arbitration" to determine controversies between individuals, or in matters of private concern, in which all of the appraisers are required to act, but was an appointment of appraisers to act between an individual and the state, and is a matter of public concern, in which a majority act as the whole when all have met. *People v. Nichols*, 52 N. Y. 478, 481, 482, 11 Am. Rep. 734.

An "arbitration" is properly a submission to the decision of one or more persons of a matter in controversy or dispute between the parties. The authorities recognize a distinction between appraisers of value or persons selected to make a measurement or competition under a contract and arbitration properly so called. Where provisions are such in form that they require the submission of every controversy that may arise to arbitrators, and thus in terms oust the court of all jurisdiction in the matter, they are held invalid. But where they merely provide for the submission to arbitrators of the question of amount, so that the arbitrators have nothing to do but make an appraisal, they are generally sustained. An agreement in connection with the sale of land for the selection of persons called "arbitrators" to determine the value of the land

constitutes an appraisal rather than an arbitration. *Guild v. Atchison, T. & S. F. R. Co.*, 45 Pac. 82, 84, 57 Kan. 70, 88 L. R. A. 77, 57 Am. St. Rep. 312.

#### Reference distinguished.

In holding that the term "arbitration" could not be applied to the carrying out of an agreement by which the value of merchantable timber standing on land sold was to be estimated by three appraisers, the court say that the theory of an arbitration is that it is substituted for a proceeding in court. There is a broad distinction between a submission to arbitration and the reference of a collateral or incidental matter to appraisement, measurement, or calculation. *Noble v. Grandin*, 84 N. W. 405, 468, 125 Mich. 383.

An "arbitration" requires nothing more than the consent of the parties uniting in the submission for its enlargement, but there is a well-defined distinction between the mere arbitration and a reference under the statute, which is a judicial proceeding. The referee could not extend or enlarge his own authority any more than he can create it originally. *Lazell v. Houghton*, 32 Vt. 579, 583.

#### ARBITRATION CLAUSE.

The term "arbitration clause" does not strictly include a stipulation in the articles of an association to insure upon cargoes, to the effect that the association shall finally determine the amount due on any loss, but such stipulation is an agreement *inter se*, which does not purport to submit controversies to disinterested persons. *Perry v. Cobb*, 34 Atl. 278, 279, 88 Me. 435, 49 L. R. A. 889.

#### ARBITRATOR.

See "Board of Arbitrators"; "Competent Arbitrators."

Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. *Burchell v. Marsh*, 58 U. S. (17 How.) 344, 349, 15 L. Ed. 96.

An "arbitrator" is a private extraordinary judge, chosen by the parties who have a matter in dispute, and invested with power to decide the same, and the person is called an "arbitrator" because he generally has an arbitrary power, there being no appeal from his sentences, which are called "awards." *Miller v. President, etc., of Junction Canal Co.* (N. Y.) 53 Barb. 590, 595.

Arbitrators, when appointed, are judges, but those who appoint them are not necessarily such. *Reigart v. McGrath* (Pa.) 16 Serg. & R. 65, 66.

"Arbitrators" are judges chosen by the parties for themselves, and when so chosen

they must be taken as they are, with their weaknesses and frailties, of which all have some, and while they act honestly and fairly, according to such abilities as they have, their proceedings are valid and binding. *Silver v. Connecticut River Lumber Co.* (U. S.) 40 Fed. 192, 194.

"Arbitrators" have the power of the court and a jury. They are to determine the matters in controversy submitted to them, and their oath obliges them to perform that duty justly and equitably. Their award, upon being filed, becomes a record of the court, and remains a record, unless appealed from or reversed. *Kennedy v. Luhman*, 13 Montg. Co. Law Rep'r, 131, 134.

"Arbitrators" are judges selected by the parties litigant. Their decisions will not be set aside because of the admission of illegal evidence, nor for an error in judgment nor partiality nor misconduct being shown. They are, in fact, elected as a court of general jurisdiction, so far as relates to the matter submitted, and it is not essential that it should adjust all matters in dispute. An award determining only one of the disputed matters is good so far as it goes. *Vaughn v. Graham*, 11 Mo. 575, 578, 579 (citing *Pearce v. McIntyre*, 29 Mo. 423).

An arbitrator is a judge appointed by the parties. He is, with their consent, invested with judicial functions in the particular case. He is to determine the right as between the parties in respect to the matter submitted, and all questions of fact or law upon which the right depends are, under a general submission, deemed to be referred to him for decision. The court possesses no general supervisory power over awards, and if arbitrators keep within their jurisdiction their award will not be set aside because they have erred in judgment, either on the facts or the law. This general principle is subject to the qualification that awards may be set aside for palpable error of fact, like a miscalculation of figures. It may also be set aside for error of law when the question of the law is stated on the face of the award, and it appears that the arbitrators meant to decide according to law, and did not. *Fudickar v. Guardian Mut. Life Ins. Co.*, 62 N. Y. 392, 399.

"Arbitrators" are sometimes considered as the substitutes and sometimes as the judges of the parties. They can do whatever the parties themselves can do, and more than the courts can do. Their power is revocable as a power of attorney. *Dixon's Lessee v. Morehead* (Pa.) Add. 216, 222.

#### As an agent.

"An arbitrator is not an agent. He is not acting for and in the stead of the party selecting him, but as a person vested with power by the law to examine and determine



the matters in controversy which have been submitted to him, and whose imperative duty it is to do equal justice between the parties. His duties are more of a judicial than a fiduciary character, and his judgment partakes more of the nature of a judgment against than a contract on the part of the person to be charged." *Collins v. Oliver*, 23 Tenn. (4 Humph.) 439, 440.

"Arbitrators" are agents of both parties. Hence their acts are considered as the acts of the parties themselves, and a balance found by the arbitrators is considered as a balance struck by the parties on an account stated by themselves. It is on this theory that an award made pursuant to a submission not under seal has been held admissible in evidence under the court on an *insimul computassent*. *Hays v. Hays* (N. Y.) 23 Wend. 363, 367.

#### As a disinterested person.

An "arbitrator" is a disinterested person to whom a matter in dispute is submitted for decision. *Garr v. Gomez* (N. Y.) 9 Wend. 649, 661; *Miller v. President, etc., of Junction Canal Co.* (N. Y.) 53 Barb. 590, 595. An "arbitrator" is a disinterested person to whose judgment or decision matters in dispute are submitted by consent of parties. *State v. Appleby*, 25 S. C. 100, 104 (citing 2 Black. Comm. 16).

An "arbitrator" is said to be a private, extraordinary judge chosen by the parties to the matters in dispute, invested with power to decide the same. *Gordon v. United States*, 74 U. S. (7 Wall.) 188, 194, 19 L. Ed. 35. He should be disinterested, for no man can lawfully sit as judge in his own cause. *Perry v. Cobb*, 34 Atl. 278, 279, 88 Me. 435, 49 L. R. A. 389 (citing *State v. Delesdernier*, 11 Me. [2 Fairf.] 473).

Arbitrators are the agents of both parties alike, and not of one party only; and, like other judges, they are bound to exercise a high degree of judicial impartiality, without the slightest regard to the manner in which the duty has been devolved upon them. "Like jurors impaneled for the trial of a cause," said Judge Cushing in *Strong v. Strong*, 63 Mass. (9 Cush.) 560, "arbitrators are invested pro hac vice with judicial functions, the rightful discharge of which calls for and presupposes the most absolute impartiality." *Grosvenor v. Flint*, 37 Atl. 304, 305, 20 R. I. 21 (citing, also, *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137, 32 N. E. 1055; *Flint v. Pearce*, 11 R. I. 576; *Cleland v. Hedly*, 5 R. I. 163; *Peckham v. School Dist. No. 7*, 7 R. I. 545).

#### As a judicial officer.

Arbitrators are not officers of the court, but the judges of the parties' own choosing. The court has no control over them. *Farrington v. Hamblin* (N. Y.) 12 Wend. 212, 213.

An arbitrator is a quasi judicial officer, under our laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influence as in the case of judge or juror. An arbitrator appointed under a rule of court is not liable to an action by one party to the action referred to arbitration for fraudulently inducing, in pursuance of a conspiracy with the attorney of the other party to the action so referred, the other arbitrators to unite with him in an unjust award in favor of the latter party. *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 187 Mass. 424, 426, 50 Am. Rep. 323.

#### As one chosen by both parties.

An arbitrator is one chosen by the parties to a dispute, and given authority to decide the same. In order to clothe a person with the authority of an arbitrator, the parties must mutually agree to be bound by the decision of the person chosen. *Gordon v. United States*, 74 U. S. (7 Wall.) 188, 195, 19 L. Ed. 35.

An arbitrator is a person selected by mutual consent of the parties to determine the matter in controversy between them; thus where one of two joint owners of property did not consent to the selection of an arbitrator the arbitration was void. *City of Mobile v. Wood* (U. S.) 95 Fed. 537, 538.

## ARBITRIOS.

"The noun 'arbitrios,' in Mexican law, has a well-defined technical signification. Escribne gives its meaning as the tax which, in default of *proprios*, a town imposes with competent authority on certain articles of merchandise. As indicating the sources of revenue of a municipality, the words '*proprios*' and '*arbitrios*' are usually found linked together, and when connected they are sometimes used as meaning the ways and means. The word '*arbitrios*' was sometimes used in a general sense, as meaning the resources of the towns, and included their privileges in the royal lands as well as the taxes." *Sheldon v. Milmo*, 36 S. W. 413, 416, 90 Tex. 1.

## ARCHBISHOP.

Bishop as including, see "Bishop."

## ARCHITECT.

See "Practical Architect and Sanitary Engineer."

As a laborer, see "Laborer."

As an expert, see "Expert."

As a mechanic, see "Mechanic."

An "architect" is a person skilled in the art of building; one who understands architecture, or makes it his occupation to form

plans and designs of buildings, and to superintend the artificers employed. *Wilson & Edwards v. City Council of Greenville*, 43 S. E. 966, 967, 65 S. C. 426.

Architects and builders are well known as persons engaged, as a business, in planning, constructing, remodeling, and adapting to particular uses buildings and other structures; and if their experience and observation are sufficient, they may be regarded as especially skilled in the business, and qualified, *prima facie*, to testify as experts, on the question of the proper construction and safety of a building. *Turner v. Haar*, 21 S. W. 737, 738, 114 Mo. 335.

Architecture is the art of building according to certain determined rules. The owner does not know the rules. He employs an architect, who makes the plans in accordance with them, and if the architect undertakes to carry out his plan he is not to be heard after he has executed it as an architect to urge that, his employment having changed from an architect to that of a builder, he is no longer bound for his defective plan. Where a surety company signs a bond guarantying the safe execution of another contract as an "architect and contractor," it is equally as responsible as the architect and builder for the defectiveness of the specifications or the work, where the architect and builder are one and the same person. *Louisiana Molasses Co. v. La Sasser*, 23 South. 217, 220, 52 La. Ann. 2070.

## ARCHIVE.

An "archive" is the original of a deed or other instrument which is left in the public archives as evidence of title. *Guilbeau v. Mays*, 15 Tex. 410, 414.

The word "archives," as used in the statutes of Texas, means public records and papers required or permitted by law to be filed in public places of deposit for preservation and use as evidence of the facts. It is not necessary that papers so required to be filed should be stated to be archives. But under article 57, Rev. St., providing, among other things, that all "books, transfers, powers of attorney, field notes, maps, plats, legal proceedings, official reports, original documents, and other papers appertaining to the land of the republic or the state of Texas, that have been deposited or filed in the general land office in accordance with any law of the republic or state of Texas," shall be deemed archives, there can be no doubt that a report of one appointed by a legislative act to examine and make true copies of the acts and charters founding certain towns, when duly filed in the general land office as required by the appointment, became a part of the archives. *Texas M. Ry. Co. v. Jarvis*, 7 S. W. 210, 214, 69 Tex. 537.

## ARDENT SPIRITS.

"Ardent spirits," as used in a statute forbidding the sale of wine, gin, rum, brandy, whisky, cider spirits, and other kinds of "ardent spirits," by a less quantity than a quart, without a license, means the kind of spirits named in the statute; the words "ardent spirits" being a general term, the meaning of which was specified by a particular naming of the spirits intended to be included in the term, and hence, on an indictment for selling ardent spirits, it was necessary that the prosecution should prove that defendant sold one of the samples named in the statute. *State v. Townley*, 18 N. J. Law (3 Har.) 311, 321.

"Ardent spirits" is a term applied to liquors obtained by distillation, such as rum, whisky, brandy, gin. *Sarlis v. United States*, 152 U. S. 570, 572, 14 Sup. Ct. 720, 721, 38 L. Ed. 558.

The term "ardent spirits" does not include alcohol. *State v. Martin*, 34 Ark. 340, 341.

"Ardent spirits," as used in Rev. St. § 2139, providing that no "ardent spirits" shall be introduced into the Indian country, and that every person who introduces or attempts to introduce any ardent spirits or wines into such country shall be punishable, etc., is synonymous with the words "spirited liquors," as there used. The term includes lager beer. *United States v. Ellis* (U. S.) 51 Fed. 808, 810.

## ARE.

In holding that the statute providing that all children, whosoever born, whose fathers or mothers are citizens at the time of the birth of such children, shall be citizens, etc., did not include a person born in a foreign country of parents also born in such country, although one of the parents was a native of Virginia, who removed to England before the Revolution, married there and resided in that country until after the peace, the court say: The right is not restricted to children whose fathers or mothers are or were citizens at the time of the birth of such children, but the right is extended as well to cases where the birth occurred before as where it might occur after the passage of the act. Previous cases are provided for by the words "were" and subsequent cases by the words "are" citizens at the time of their birth, etc. It is no objection to this construction that the word "are" is in the present tense, and must therefore have a present signification. Every present time is relative. It may have been present formerly, it may be present now, or it may be present at some future period. The word "are," therefore, although in the present tense, has, when applied to a transaction yet to come, a

future signification, and is only equivalent to "shall" or "may be," and it must be so construed in the case before us, for it relates to parents who then were or might be citizens at the time of births then occurring or which might thereafter occur. *Barzizias v. Hopkins & Hodgson* (Va.) 2 Rand. 276, 293.

The words "are hereby granted," as used in Act Cong. Sept. 28, 1850 (9 St. 519), conveying to the several states all the swamp lands and overflowed lands within their limits remaining unsold at the date of the act, import a present grant, and not a promise of one in the future, and therefore the statute passed title to the state on its passage, subject only to a determination as to what lands had been sold. *Tubbs v. Wilhot*, 11 Sup. Ct. 279, 138 U. S. 134, 38 L. Ed. 887.

Where a statute defining the time for making application for new trials provided (1) that the act should not apply to cases now pending in which motions are made for new trials, and (2) that the act should not apply to cases already tried in which motions for new trials may be made or are now pending, the words "are made," in the first proviso, were used in the sense of "shall be made," and not in the sense of "have been made." This consideration is rendered necessary by the fact that the second proviso embraces all cases which have been tried, so that in order to render the first proviso operative it is necessary to give the phrase this construction. In discussing the meaning of the words, the court says: "Grammatically speaking 'are made' is the passive voice of the verb 'to make.' It may refer to the past or to the future time. When the reference is to past time it signifies 'have been made'; when to future time, it signifies 'shall be made.'" *Smith v. Davis*, 85 Ga. 625, 11 S. E. 1024.

## ARGILLITE.

"Argillite" is a term used by mineralogists for pulverized flake or slate rock, ordinarily known as clay slate. *Plastic Slate-Roofing Joint-Stock Co. v. Moore* (U. S.) 19 Fed. Cas. 812, 813.

## ARGOLS.

"Argols" and "crude tartar" are synonymous. The words are used convertibly by those who deal in the article. When wine ferments certain deposits cling to the sides or fall to the bottom of the casks. These deposits are mingled with a variety of impurities, such as glucose, leaves, sticks, and particles of dust, silicate, and other like things. By washing in cold water these impurities are removed, and the crude tartar is left free from their presence. *Reckuagle v. Murphy*, 102 U. S. 197, 198, 26 L. Ed. 130.

## ARGUE.

As used in rule 8 of the Supreme Court (40 Pac.), requiring that in all cases "to be argued" each party must furnish to the court printed briefs, "argued" means to be heard, to be submitted, and does not mean actual oral argumentation. *Oregon Ry. Co. v. O'Brien*, 13 Pac. 757, 3 Wash. T. 21.

## ARGUMENT.

"Argument," as used in Code, § 3251, providing that costs shall be allowed a party for "argument" in the Court of Appeals, comprises within its meaning a submission of the reasoning on which counsel relies in a printed form, as well as by spoken address. *Malcolm v. Hamill* (N. Y.) 65 How. Prac. 506, 507.

In Sup. Ct. Rule 8, providing that exceptions to proceedings on appeal, or any technical objection to the record affecting the right of the appellant to be heard and the points of error assigned, must be in writing and filed at least one day before "argument" or they will be disregarded, "argument" means an oral argument before the court, and cannot mean that the argument was not had upon the merits until the briefs were filed. Agreeing to waive argument before the court and taking time to file briefs on the merits of the case was the same in effect as an oral argument, and a motion to dismiss the appeal should have been made and noticed before that time. *State v. California Min. Co.*, 13 Nev. 203, 209.

## ARISE—ARISING.

"Arise," as used in a lease of coal lands reserving the right to use any part of the surface in case of unforeseen contingencies which may "arise," means come into notice or become visible. *Van Meter v. Chicago & V. M. Coal Min. Co.*, 55 N. W. 106, 108, 85 Iowa, 92.

In reason and law a contract may be said to "arise" as well where it is executed as where it is made. *De Lovio v. Bolt* (U. S.) 7 Fed. Cas. 418, 435.

The word "arising" refers to the present time or time to come, but cannot with any propriety refer to the time past and embrace former transactions. *United States v. Heth*, 7 U. S. (3 Cranch) 399-413, 2 L. Ed. 479.

### Case or cause.

Statutes of limitations providing that, when a cause of action has "arisen" in another state, and by the laws of the state where the action arose it cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state, means when jurisdiction exists

in the courts of the state to adjudicate between the parties upon the particular cause of action, if invoked; or, in other words, when the plaintiff has the right to sue the defendants in the courts of the state upon the particular cause of action, without regard to the place where the cause of action had its origin. *Freundt v. Hahn*, 63 Pac. 1107, 24 Wash. 8, 85 Am. St. Rep. 939 (citing *Berry v. Krone*, 46 Ill. App. 82); *Hyman v. McVeigh*, 10 Leg. News, 157.

A "cause of action" arises when that is not done which should have been done, or that is done which ought not to have been done. The time when a cause of action arises determines the place wherein it arises, for, when that occurs which is the cause of action, the place where it occurs is the place where the cause of action has arisen. Thus, where a foreign corporation doing business in New York purchased goods from another foreign corporation doing business at its domicile where the contract of sale was made, the cause of action for the purchase of goods arose at the place where the buyer was doing business, and therefore the seller could sue there, under a provision that one foreign corporation may sue another in New York where the cause of action arose within the state. *Shelby Steel-Tube Co. v. Burgess Gun Co.*, 40 N. Y. Supp. 871, 873, 8 App. Div. 444.

2 Rev. St. 168, § 2, providing that every circuit judge within the limits of a circuit shall have all the original jurisdiction vested in the chancellor in all causes and matters when "such causes shall have arisen" within the circuit of such judge, does not include an action for breach of a contract which was made within the judge's district, but which was to be performed outside of it, and where the default of the defendants on which the plaintiff rested his cause occurred in another district. *Burckle v. Eckhart*, 3 N. Y. (3 Comst.) 132, 136.

"Arise," as used in a statute of limitations providing that an action shall be brought by an administrator to recover for the death of his intestate within one year after the cause of action shall have arisen, means to come into existence, and, inasmuch as no cause of action could arise or exist in favor of an administrator until he comes into existence as such, the action did not arise until the appointment of the administrator, and hence the statute did not begin to run from the killing of the intestate. *Andrews v. Hartford & N. H. R. Co.*, 34 Conn. 57, 59.

One of the definitions of "arising" is "appearing," and one of the definitions of the verb "arise" is "to appear" or "to become known," "to become visible, sensible, or operative." Where plaintiff has procured a judgment under the joint debtor act, and proceedings are instituted against both de-

fendants, the cause of action in such proceeding does not arise on the judgment, within the meaning of 2 Rev. St. p. 3, §§ 1, 3, 4, authorizing a judgment in such a case. *Oakley v. Aspinwall*, 8 N. Y. Super. Ct. (1 Duer) 1, 37.

Code Civ. Proc. § 67, providing that actions against a public officer for an act done by him by virtue of his office must be tried in the county where the "cause of action or some part thereof arose," means where the debt for which the officer was sued was contracted or originated, and as an officer's official acts are confined to his county, and as the cause of action is his official act, it follows that the cause of action "arose" in the county in which the officer acted, and not out of the county where he did nothing by virtue of his office. All public officers, when sued about their official acts, should be sued in the county where they transact their official business. *Steele v. Rutherford County Com'rs*, 70 N. C. 137, 138.

"Arising," as used in Const. art. 8, § 5, providing that all civil and criminal business "arising" in any county must be tried in such county, etc., will not be held to have been used in the sense of having been commenced, so as not to fix the venue of the action, but in its ordinary sense. *Konold v. Rio Grande W. Ry. Co.*, 51 Pac. 256, 257, 16 Utah, 151.

#### Arising in a justice's court.

There is no distinction between cases arising in a justice's court and actions originally commenced in that court, as used in Code, § 11, providing that an appeal should not be allowed to the Court of Appeals in an action originally commenced in a court of a justice of the peace. *Cook v. Nellis*, 18 N. Y. 128, 127.

#### Arising in naval forces.

"Cases arising in the naval forces" are cases originating in the naval forces or service, or, in other words, offenses against the laws regulating the navy, committed by a party while in the naval forces. The contention that, although an offense has been committed while in the naval service, yet a "case" does not arise until a charge is actually made, and, if the charge is not actually framed and presented till after the offender ceases to be in the service, it is not a case arising in the naval forces, is not maintainable. "A case," in ordinary parlance, is that which falls, comes, or happens; an event; also a state of facts involving a question for discussion. But the event—that which happens; the state of facts presenting the question for discussion—must have arisen, must have had an origin. What does "arising" mean, as here used? Certainly not merely making a statement of the pre-existing facts, which constitutes a "case" for judicial cognizance. Among the ordinary and most common definitions of the word "arise" are to

proceed, to issue, to spring; and a case arising in the land or naval forces seems to be a case proceeding, issuing, or springing from acts in violation of the naval laws and regulations, committed while in the naval forces or service. In *re Bogart* (U. S.) 3 Fed. Cas. 796, 798.

#### **Arising on contract.**

See, also, "Action on Contract."

Rev. St. § 3522, authorizing a filing of any claim "arising on contract" as a counterclaim in an action, means such demands as "would have been redressed at common law by any of the forms of action which might be resorted to, to recover damages for breaches of contract." Board of St. Louis Public Schools v. Broadway Savings Bank's Estate, 12 Mo. App. 104, 108.

As used in Comp. Laws, § 4995, authorizing an attachment in actions arising on contract, the term "arising on contract" must be construed to mean a debt or claim ascertained or ascertainable by reference to the contract, or that can be definitely fixed by the rules of law, and which is made to clearly appear by the statement in the affidavit of the grounds of the claim. This would include all claims for damages in which, from the contract and facts stated in the affidavit, a court, on applying the law, can definitely determine the amount which plaintiff is entitled to recover, and it would exclude all cases where the amount of the claim can be determined by no fixed rule of law, but it is to be determined entirely by the opinion of the court or jury. An action for breach of contract of marriage well illustrates the latter class of cases, inasmuch as no court, from the facts stated in the affidavit, could determine the amount plaintiff was entitled to recover. Damages in such a case might be any sum within the *ad damnum* clause. *Coats v. Arthur* (S. D.) 58 N. W. 675, 676.

As used in Hill's Code, § 73, requiring that a counterclaim must be a claim "arising out of the contract or transaction set forth in the complaint" as the foundation of the plaintiff's claim, will be construed, in an action on a promissory note given for a machine purchased, to mean "any cause of action in favor of the defendant, and against the plaintiff, arising out of the contract or transaction between the parties of which the promissory note set out in the complaint is but the evidence." *Wait v. Wheeler & Wilson Mfg. Co.*, 31 Pac. 661, 662, 23 Or. 297.

Civ. Code, § 55, defining marriage as a personal relation "arising out of a civil contract" to which the consent of parties capable of making it is necessary, means a contract then and there to become husband and wife. The civil contract of the parties is simply that they forthwith enter into a certain status of relation. The rights and obligations

of that status are fixed by society in accordance with the principles of natural law, and are above and beyond the parties themselves. They cannot modify the terms on which they are to live together, nor superadd to the relation a single condition. The personal relation created by the contract is not merely a contract. The contract is the portal through which the parties enter into the relation of marriage, and they can enter into that relation in no other way. Although all persons competent may marry at their own volition, the law fixes the rights and duties of those who are married. *Sharon v. Sharon*, 16 Pac. 345, 348, 75 Cal. 1.

The words "arising on contract" in the first subdivision of section 129 of the Code, relative to two classes of actions, are to be regarded merely as a translation of the old Latin phrase "*ex contractu*," and extend into and include implied contracts, as well as those which are expressed. *People v. Bennett* (N. Y.) 6 Abb. Prac. 343, 348.

A cause of action may be said to arise when the contract out of which it grows is entered into or made. *Emerson v. The Shawano City*, 10 Wis. 433, 435.

#### **Arising on the trial.**

Under a statute providing that appeals from the rulings and decisions of the superior court upon questions of law arising on the trial of criminal cases may be taken by the state in the same manner as by the accused, it is held that the phrase "questions of law arising on the trial" means all questions which could theretofore have been reviewed either upon motions of error or motions for a new trial, and hence the state may appeal from a ruling on a demurrer to a complaint in a criminal case, although such ruling might not with absolute strictness be said to be a question of law arising at trial. *State v. Clerkin*, 19 Atl. 517, 58 Conn. 98.

#### **Arising under act of Congress.**

A case "arising under act of Congress" is a controversy which turns on the existence, effect, or operation of an act of Congress, and hence a suit brought to determine the same is a case arising under such act within the statute. *Hughes v. Northern Pac. R. Co.* (U. S.) 18 Fed. 106, 110 (cited and approved *Northern Pac. R. Co. v. Carland*, 3 Pac. 134, 138, 5 Mont. 146).

#### **Arising under Constitution or laws of United States.**

"A case arising under the Constitution or laws of the United States" is a case the correct decision of which depends upon a construction of the Constitution or an act of Congress. *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264, 379, 5 L. Ed. 257; *Stanley v. Board of Sup'rs of Albany County* (U. S.) 6 Fed. 561.

A case arising under the Constitution or laws of the United States "is a case where, from the questions involved, it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction." *Starin v. New York*, 6 Sup. Ct. 28, 31, 115 U. S. 248, 29 L. Ed. 388; *Germania Ins. Co. v. Wisconsin*, 7 Sup. Ct. 260, 261, 119 U. S. 473, 30 L. Ed. 461.

Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute right or privilege, or claim, or protection or defense of the party by whom they are asserted. *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 141, 26 L. Ed. 96.

The phrase "suit arising under the Constitution or laws of the United States," as used in defining the limits of the jurisdiction of the federal courts, requires that the suit be one which really and substantially involves a suit or controversy as to a right which depends on the construction or effect of the Constitution or of some law or treaty of the United States. *Carson v. Dunham*, 7 Sup. Ct. 1030, 1032, 121 U. S. 421, 30 L. Ed. 992.

"Cases arising under the laws of the United States" are such as grow out of the legislation of Congress, whether they constitute a right or privilege, claim or protection, or defense of the party, in whole or in part, by whom they are asserted. *Cunningham v. Neagle*, 10 Sup. Ct. 658, 679, 135 U. S. 1, 34 L. Ed. 55. The phrase cannot be construed to embrace a case in admiralty, for such a case does not arise under the Constitution or laws of the United States. These cases are as old as navigation itself, and the law admiralty or maritime, as it has existed for ages, is applied by our courts to the cases as they arise. *American Ins. Co. v. Canter*, 26 U. S. (1 Pet.) 511, 543, 7 L. Ed. 242.

Acts which arise under the Constitution and laws of the United States must be understood to be those growing out of, created by, or brought into being by the laws of the United States. *Bank of United States v. Roberts* (U. S.) 2 Fed. Cas. 728, 732.

Const. art. 3, § 2, declaring that the judicial power of the federal courts shall extend to all cases in law and equity "arising under the laws of the United States," etc., gives the federal courts jurisdiction of all suits on bonds of United States marshals, irrespective of the citizenship of the parties. *United States v. Davidson* (U. S.) 25 Fed. Cas. 771, 772.

That a case may arise under the Constitution and the laws of the United States, it need not be of an unmixed character; if the principal right, the right of property in the

subject in controversy, is given or created by an act of Congress made in pursuance of the Constitution, it is sufficient. *Magill v. Parsons*, 4 Conn. 317, 323, 331.

Under a statute punishing conspiracies against the United States of all kinds, a conspiracy to defraud the government, though it may be directed to the revenue, as it is punishable under such law, cannot be said in any just sense to "arise" under the revenue laws. *United States v. Hirsch*, 100 U. S. 33, 35, 25 L. Ed. 539.

In statutes providing for the removal of any cause of a civil nature, at law or in equity, brought in any state court, and arising under the Constitution or laws of the United States, it is held sufficient to justify a removal by the defendant that the record at the time of the removal show that either party claim a right under the statutes or laws of the United States, but the suit must be one in which some title, right, or privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or sustained by a contrary construction. Thus, if the only right claimed by the plaintiff is under a state law, a suggestion in his bill that defendant will contend that such state law is void, because in contravention of the laws of the United States, cannot give the circuit court jurisdiction. *State of Tennessee v. Union & Planters' Bank*, 14 Sup. Ct. 654, 656, 152 U. S. 454, 38 L. Ed. 511.

#### Arising under treaty.

Whenever a right grows out of or is protected by treaty, it is sanctioned against all the laws and judicial decisions of the state, and the person's rights thereunder are cases "arising" under treaties; but where a person's title is not affected by the treaty, and he claims nothing under a treaty, so that his title cannot be protected by it, the determination of his rights does not arise therein. *Owings v. Norwood*, 9 U. S. (5 Cranch) 344, 348, 3 L. Ed. 120.

"Arising out of a treaty," as used in Rev. St. § 1066, providing that the Court of Claims shall not have jurisdiction of "claims arising out of a treaty," means a claim where the right itself, which the petition makes the foundation of the claim, has its origin and derivation, its life and existence, from some treaty stipulation. *United States v. Weld*, 8 Sup. Ct. 1000, 1003, 127 U. S. 51, 32 L. Ed. 62.

#### Arising upon or concerning vessels.

The words "arising upon or concerning," in Rev. St. 566, which enacts that in case of admiralty and marine jurisdiction relating to any matter on contract or tort "arising upon or concerning" any vessel of 20 tons burden or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce between places in different

states and territories upon the Lakes and navigable waters connecting the Lakes, the trial of issues of fact shall be by jury when either require it, may be construed to apply to collisions, as well as contracts or torts actually occurring on board a vessel, and applies to either of two colliding vessels, though one of them is not a vessel within the description of the statute, as it is difficult to see why, if two vessels are interested in a contract or involved in a tort, the cause of action does not concern one of them as much as the other. *The Erie Belle* (U. S.) 20 Fed. 63.

## ARKANSAS.

Current notes of, see "Current Notes."

## ARM OF THE SEA.

Lord Hale says that "the sea is either that which lies within the body of the county or without it; that an arm or branch of the sea, within the fauces terræ, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of the county, but that part of the sea which lies not within the body of a county is called the main sea or ocean." He adds, "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea flows and reflows," and in this he follows the exact definition given in the Book of Assizes, 22. This is the doctrine recognized by the courts of the country. *Hubbard v. Hubbard*, 8 N. Y. (4 Seld.) 196, 199; *United States v. Grush* (U. S.) 26 Fed. Cas. 48, 51.

A sound is an "arm of the sea," within the common-law acceptation of the term, when it is navigable tide water. *The Martha Ann* (U. S.) 16 Fed. Cas. 868, 869.

The term "arms of the sea" includes rivers in which the tide ebbs and flows. "That is called an arm of the sea where the tide flows and reflows, and so far only as the tide flows and reflows." *Adams v. Pease*, 2 Conn. 481, 484 (Hale, *De Jure Maris*, c. 4).

An "arm of the sea" may include various subordinate descriptions of waters where the tide ebbs and flows. It may be a river, harbor, creek, basin, or bay; and it is sometimes used to designate very extensive reaches of waters within the projecting capes or points of a country. *United States v. Grush*, Fed. Cas. No. 15,268 [5 Mason, 290]. Puget Sound, then, with its multitude of inlets, havens, harbors, and bays, may properly be held to be an arm of the sea. *Smith v. United States*, 1 Wash. T. 262, 268.

"Arm of the sea," within the meaning of Rev. St. § 5346, providing for the punishment of every person who upon the high seas, or in any "arm of the sea," or in any river,

haven, creek, basin, or bay within the admiralty jurisdiction of the United States, commits an assault on another, means such as are connected immediately with the high seas, and does not include the Great Lakes or the straits which connect Lake Huron and Lake Erie. *Ex parte Byers* (U. S.) 32 Fed. 404, 405.

## ARMATURE.

An "armature," as the term is applied to a portion of the machinery used to generate electricity, is a coil of wire, wound on a metal core, and mounted on a shaft, and is revolved by the power communicated from the engine through the means of the belt. This armature is revolved in or between the ends of a large horseshoe magnet, the opening of which is downward. *People v. Wemple*, 15 N. Y. Supp. 711, 715, 61 Hun, 53.

## ARMED.

In Rev. St. c. 118, § 25, providing for the punishment of a person making an assault "armed" with a dangerous weapon, "armed" means furnished or equipped with weapons of offense or defense. A person who has in his hand a dangerous weapon with which he makes an assault is certainly armed within the meaning of the statute. *State v. Lynch*, 33 Atl. 978, 979, 88 Me. 195.

## ARMED FORCE.

The term within a statute authorizing certain officers of the peace or mayors of a city to call out an armed force in case of riot gives them no authority over the militia, it not being included in the term. *Chapin v. Ferry*, 28 Pac. 754, 756, 3 Wash. St. 386, 15 L. R. A. 116.

## ARMED PROWLERS.

The Tennessee act of May 17, 1865, entitled "An act to punish all armed prowlers, guerillas, etc.," means armed persons wandering or roaming about over the country for the purpose of plundering or robbing the people, or for the purpose of plunder. *Vaughn v. State*, 43 Tenn. (3 Cold.) 102, 107.

## ARMED VESSELS.

It will be difficult to precisely mark the limits which would bring a captured vessel within the description of the acts of Congress as to "armed" vessels. Where there was on board of a vessel one musket, a few ounces of powder, and a few balls, the capacity of the vessel for offense is not sufficient to entitle it to be called an armed vessel. *Murray v. The Charming Betsey*, 6 U. S. (2 Cranch) 64, 121, 2 L. Ed. 208.

## ARMS.

See "Bear"; "Firearms"; "Loaded Arms."

"In the days of chivalry and knight-errantry, and at the present time where distinctions are recognized by law between wealth and other adventitious influences, and property or weakness, the adventurous and the great have adopted their insignia, suggested by valorous achievement, or other causes. These are called their arms or family escutcheon, and are usually engraved on their seals." And, as used in the statute requiring all notaries to keep a seal on which shall be engraved the arms of the territory, "arms" clearly means the "armorial insignia of a state or political community, intended to distinguish it from others." *Kirksey v. Bates* (Ala.) 7 Port. 529, 535, 31 Am. Dec. 722.

The term "arms," in its most comprehensive signification, probably includes every description of weapon or thing which may be used offensively or defensively. In its most restricted sense it includes guns or firearms of every description, as well as powder, lead, and flints, and such other things as are necessarily used in loading and discharging them, so as to render them effective as instruments of offense or defense, and without which their efficiency for these purposes would be greatly diminished, if not destroyed. *State v. Buzzard*, 4 Ark. (4 Pike) 18, 21.

The term "arms," as used in the chapter on offenses relating to the arrest and custody of prisoners, includes any deadly weapon. *Pen. Code Tex. 1895, art. 244.*

**In constitutional guaranty of right to bear arms.**

"Arms," as used in Const. 1870, art. 2, § 5, providing that the citizens of this state shall have the right to keep and bear arms for their common defense, means such weapons as are used for the purposes of war, and does not include weapons not used in civilized warfare. *Fife v. State*, 31 Ark. 455, 458, 25 Am. Rep. 556.

The arms spoken of in the second article of the amendments of the Constitution of the United States, providing that the right of the people to keep and bear arms shall not be infringed, means such arms as are borne by people at war, or, at least, carried openly. *State v. Smith*, 11 La. Ann. 633, 634, 66 Am. Dec. 208.

The term "arms," in the Constitution of Tennessee, guarantying the right to carry arms, means "such weapons as are properly designated as such, as the term is understood in the popular language of the country, and such as are adapted to the efficiency of the citizen as a soldier when called on to make good the defense of a free people. The term includes the rifle of all descriptions, the shot-

gun, the musket, and repeater. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 179, 8 Am. Rep. 8.

In Const. § 26, of the Declaration of Rights, declaring that free white men have a right to keep and bear arms for their common defense, "arms" is to be construed to mean such arms as "are usually employed in civilized warfare, and that constitute the ordinary military equipment," and hence Act 1837-38, c. 137, § 2, which prohibits any person from wearing any bowie knife, Arkansas toothpick, or other knife or weapon resembling such knives under his clothes or concealed about his person, is not unconstitutional. *Aymette v. State*, 21 Tenn. (2 Humph.) 154, 158.

The word "arms," in the phrase "the right to bear arms," evidently means the arms of a militiaman, the weapons ordinarily used in battle, to wit, guns of every kind, swords, bayonets, horseman's pistols, etc. That country is armed which has an army ready for fight. The call to arms was a call to put on the habiliments of battle, and it may be greatly doubted if in any author of the early days a use of the word "arms," when applied to people, can be found which includes pocket pistols, dirks, sword canes, toothpicks, bowie knives, and a host of other relics of past barbarism, or inventions of modern savagery of like character. *Hill v. State*, 53 Ga. 472, 475.

The word "arms," as we find it in the Constitution of the United States, securing to the people the right to keep and bear arms, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the saber, holster pistols, and carbine; of the artillery, the fieldpiece, siege gun, and mortar, with side arms. The terms "dirks," "daggers," "slung shots," "sword canes," "brass knuckles," and "bowie knives" do not belong to military vocabulary. *English v. State*, 35 Tex. 473, 475, 476, 14 Am. Rep. 374.

## ARMY.

**Militia distinguished.**

There is a broad distinction in the Constitution between the militia and the army, the powers conferred upon Congress in reference to one being widely different from the powers conferred and denied in reference to the other. An army is a body of men whose business is war. *Borroughs v. Peyton* (Va.) 16 Grat. 470, 475.

**Navy included.**

"Army," as used in Acts of Congress, and particularly in 12 Stat. 597, admitting to citizenship aliens enlisted in the "army"



of the United States, on proof of one year's residence, etc., means the land force only, and excludes the naval forces or marine corps, "although the word in its most general sense might be taken to include all the organized and armed power of the nation." *In re Bailey*, 2 Fed. Cas. 360 (followed in *Re Chamavas*, 21 N. Y. Supp. 104, 105).

"Army" is a word of very general signification, analogous and equivalent to "military service," and perhaps of itself would embrace persons employed in the navy. When we speak of the military power of a country, we intend as well its seamen as its soldiers, its naval as well as its land forces. In its etymology the word "army" denotes men in arms, whether ashore or afloat, and historically we know that not until a comparatively recent period in any country was the navy distinguished as a separate establishment. Even now, only in some special case, do men speak of the army as distinguished from the navy. The term in law is nomen generalissimum, and includes the navy. *In re Stewart*, 30 N. Y. Super. Ct. (7 Rob.) 635, 636.

#### ARMY OFFICER.

See "Mounted Officer."

Act Cong. March 3, 1883 (22 St. at Large, 473), providing that all officers of the navy shall be credited with the actual time they may have served as "officers or enlisted man in the regular or volunteer army or navy or both," and shall receive all the benefits of such actual service, should be construed to include all men regularly in service in the army or navy, and that the expression "officers or enlisted men" is not to be construed distributively, as requiring that a person should be an enlisted man or an officer nominated and appointed by the President or by the head of a department, but that it was meant to include all men in service, either by enlistment or regular appointment in the army or navy. The word "officer" is used in the more general sense, which should include a paymaster's clerk. *United States v. Hendee*, 8 Sup. Ct. 507, 508, 124 U. S. 309, 31 L. Ed. 465; *United States v. Cook*, 9 Sup. Ct. 108, 109, 128 U. S. 254, 32 L. Ed. 464.

"Officers of the army on the retired list" are officers who have served a sufficient length of time to be entitled to be retired from active duty under ordinary circumstances, but who are still liable to be assigned by their superior officers to specified duties. Such officers are nevertheless members of the army, and in the military service of the government. *United States v. Tyler*, 105 U. S. 244, 26 L. Ed. 935. "It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose name shall be upon its regis-

ter, are subject to the rules and articles of war, and may be tried by military court-martial, and not by jury, are not in the military service." *Hill v. Territory*, 7 Pac. 63, 65, 2 Wash. T. 147.

"Officers," within the meaning of Act Cong. June 18, 1878, in reference to the pay of officers of the army, is limited to commissioned officers. *Babbitt v. United States*, 16 Ct. Cl. 202, 211.

#### Office and rank separate.

Under the statutes of the United States in reference to the army, the office of an officer of the army and his rank are not necessarily identical; the office has a rank attached to it, expressed by its title only; no other rank is conferred on the officer; the office remaining the same, the officer may have a different rank conferred on him as a title of distinction, to fix his relation or position with reference to other officers, as to privilege, precedence, or command, or to determine his pay. *Wood v. United States*, 2 Sup. Ct. 551, 553, 107 U. S. 414, 27 L. Ed. 542.

#### AROMATIC.

In the name "Wolf's Aromatic Schiedam Schnapps" the word "aromatic" is employed as expressive of one of the qualities of the liquor, and therefore cannot be claimed as a trade-mark. *Burke v. Cassin*, 45 Cal. 467, 480, 13 Am. Rep. 204.

#### ARPENT.

It not unfrequently happens in Louisiana that the word "arpent" is used when "acre" is meant, whereas there is a considerable difference between the two, the arpent being of 192 feet and the acre of 209 and a fraction. *Randolph v. Sentilles (La.)* 34 South. 587, 588.

#### ARRAIGN.

To "arraign" is nothing else but to call the prisoner to the bar of the court to answer to the matter charged upon him in the indictment. *Crain v. United States*, 16 Sup. Ct. 952, 956, 162 U. S. 625, 40 L. Ed. 1097; *United States v. Curtis (U. S.)* 25 Fed. Cas. 726, 727 (citing 4 Bl. Comm. 322, 2 Hale, P. C. 216, c. 28); *Goodin v. State*, 16 Ohio St. 344, 347; *Early v. State*, 1 Tex. App. 248, 268, 28 Am. Rep. 409; *State v. Weedon (Mo.)* 34 S. W. 473, 475; *People v. Frost (N. Y.)* 5 Parker, Cr. R. 52, 54 (quoting 4 Bl. Comm. p. 322).

#### ARRAIGNMENT.

Arraignment is the calling of a person to the bar of the court to answer the matter charged against him. *State v. Brock*, 39 S.

E. 359, 360, 61 S. C. 141; *State v. Weber*, 22 Mo. 321, 325; *Fitzpatrick v. People*, 98 Ill. 259, 260; *State v. Jackson*, 82 N. C. 565, 568.

Lord Hale says: "An arraignment consists of three things: First, the calling the prisoner to the bar by his name and commanding him to hold up his right hand, which, though it may seem a trifling circumstance, yet it is of importance, for, by holding up his hand, *constat de persona indictati*, and he owns himself to be of that name; second, reading the indictment distinctly to him in English, that he may understand his charge; third, demanding of him whether he be guilty or not guilty, and if he pleads not guilty the clerk joins issue with him *cul. prist.* and enters the prisoner's plea, then demands how he will be tried; the common answer is 'by God and the country,' and thereupon the clerk enters *po. se.*, and prays to God to send him a good deliverance." *State v. Weber*, 22 Mo. 321, 325; *Crain v. United States*, 16 Sup. Ct. 952, 956, 162 U. S. 625, 40 L. Ed. 1097; *State v. Brock*, 39 S. E. 359, 360, 61 S. C. 141. The holding up by the prisoner of his hand is not an indispensable ceremony, but calculated merely for the purpose of identifying the person. Any other acknowledgment will answer the purpose as well. Therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient. Then the indictment is to be read to him distinctly in the English tongue, that he may fully understand his charge, after which it is to be demanded of him whether he be guilty of the crime of which he stands indicted, or not guilty. *Early v. State*, 1 Tex. App. 248, 268, 28 Am. Rep. 409.

An "arraignment" consists of three parts: Calling the person to the bar by his name and requesting him to hold up his hand or do some other act of identification; reading the indictment to him in such language as to convey to his mind the nature of the charge against him; demanding of him whether he is guilty or not guilty. *Ellick v. Territory*, 1 Wash. T. 136, 139.

Much of the common-law solemnity that was formerly used in a formal arraignment of those who stood indicted for crime is now dispensed with. There were reasons for an adherence to them which do not now exist. It was at one time necessary to ask him how he would be tried, but as the right to trial by battle never obtained with us, and the law has provided that every such issue shall be submitted to a jury of the country as the exclusive triers of fact, that question would be entirely meaningless. Our law does not demand that he shall formally and explicitly plead not guilty. If he requires a trial, or does not confess the indictment to be true, it is the duty of the court to enter a plea of not guilty, and proceed in the same man-

ner as if he had formerly pleaded. Therefore, if the accused appear and plead to the indictment, no more formal arraignment is necessary. *State v. Braunschweig*, 36 Mo. 397, 398.

A plea of not guilty to the indictment is a sufficient "arraignment." *State v. Grate*, 68 Mo. 22, 27.

"No technical arraignment, such as requiring the prisoner to hold up his hand, the reading over the indictment to him, and asking him whether he be guilty or not guilty, is necessary." And therefore a record reciting the coming of the prosecuting attorney and the defendant in his own proper person and by counsel, and that the said defendant, for his plea to such bill of indictment upon his formal arraignment, pleads not guilty, shows a sufficient arraignment. *State v. Weeden*, 34 S. W. 473, 475, 133 Mo. 70.

"Arraignment," as used in *Sess. Acts* 1866-67, p. 931, c. 208, providing that a person indicted for an offense punishable with death may on his "arraignment" demand trial in the circuit court, merely means the calling of the prisoner to the bar to answer to the charge, and does not include the appeal. *Whitehead v. Commonwealth (Va.)* 19 Grat. 640, 643.

"Arraignment" is the bringing in of one indicted for a crime, reading the indictment to him in open court, and requiring him to plead thereto. *In re Durant*, 12 Atl. 650, 853, 60 Vt. 176.

Arraignment of a person accused of a public offense is nothing more than calling him to the bar of the court, and demanding of him, after explanation of the indictment, whether he pleads guilty or not guilty. The purpose of the arraignment is to obtain from the accused an answer; in other words, his plea to the indictment. *United States v. McKnight (U. S.)* 112 Fed. 982, 983.

An arraignment is the reading of an indictment by the clerk to the defendant, and asking him if he pleads guilty or not guilty to the indictment. *Ann. St. Ind. T.* 1899, § 1493; *People v. Di Medicis*, 80 N. Y. Supp. 212, 39 Misc. Rep. 438. The reading of the indictment to the jury in the hearing of the defendant was a substantial compliance with the statute. *Utterback v. Commonwealth*, 20 Ky. Law Rep. 1515, 1517, 49 S. W. 479, 480, 105 Ky. 723, 88 Am. St. Rep. 328.

## ARRANGE.

A promise to "arrange" a debt clearly imported an agreement to pay it. *Abel v. Wilder*, 77 Tenn. (9 Lea) 453, 455.

"Liquidated," when used in connection with claims which can be divided so as to allow actions to be brought in justices' courts,

is synonymous with "arranged." *Parris v. Hightower*, 76 Ga. 631, 634.

### ARRANGEMENT.

When taken by itself, "arrangement" has a different signification from the words "contract" or "agreement"; yet when taken in connection with the allegations of the complaint, that there was an "arrangement" between a railroad company and a copartnership for which plaintiff was working, requiring a railroad company to transport the employees of the copartnership, was a sufficient allegation of an agreement to that effect. *Gilmore v. Westerman*, 43 Pac. 345, 349, 13 Wash. 390.

Eastern Counties Railway Act, 6 & 7 Wm. IV, c. 106, § 111, enacts that in every case in which the owner of any land, or other person by the act capacitated to convey, shall, in their "arrangements with the company," have received or agreed to receive compensation for gates, bridges, etc., instead of the same being erected by the company, it shall not be lawful for such owners to pass or cross the railway from one part to the other, otherwise than by a bridge to be erected at the expense of such owners. Held, that the word "arrangements" included all contracts and agreements for the erection of crossings, and that a receipt of compensation under the act was an arrangement within the section, and hence that the landowner had no right thereafter to cross the railway without the erection of a bridge. *Manning v. Eastern Counties Ry. Co.*, 12 Mees. & W. 237.

The Century Dictionary defines "arrangement" as "preparatory measure or negotiation; previous disposition or plan; preparation; commonly used in the plural, as 'we have made arrangements for a journey.'" Webster defines the word as meaning "preparatory measure; preparation; as 'we have made arrangements for receiving company.'" As used in 20 St. at Large S. C. p. 377, relating to usury, and providing that the act shall not apply to discounts or arrangements made prior to a certain date, includes an instance where, prior to the date specified, the amount, terms, and security for a loan had all been agreed upon, and all that remained to be done after that date was to execute the papers and transfer the money. *Union Mortgage Banking & Trust Co. v. Hagood* (U. S.) 97 Fed. 360, 364.

"Arrangement," as used in Bankrupt Law Consolidation Act 1849, 12 & 13 Vict. c. 106, means compositions between the debtor and creditor. While the natural meaning of the word "arrangement" is a "setting in order," the word is not limited to that meaning, but applies to and includes contracts or agreements between debtor and creditor for the settlement of their claims. *Tetley v. Taylor*, 1 El. & Bl. 521, 540.

### ARRAS.

"Arras," as used in the Spanish law, "is that which the husband gives the woman on account of marriage." *Cutter v. Waddingham*, 22 Mo. 206, 254 (citing 1 Partidas, 507).

In White's M. Recopilacion, where "arras" is translated into "jointure," as conveying nearly the same meaning, the writer defines "arras" as "a dowry assigned to, or settled upon, the wife by her husband for her maintenance after his death, which cannot exceed in value or amount the tenth part of his fortune or property," and the right of the wife to arras is likened to her right to dower under the common law. *Miller v. Dunn*, 62 Mo. 216, 219.

### ARRASENE.

"Arrasene" consists of goods formed of two or more strands or threads of silk, with short cross threads, interlaced or woven so as to make a kind of fringed thread or embroidery yarn. *Mandel v. Spalding* (U. S.) 28 Fed. 609, 610.

### ARRAY.

See "Challenge to the Array."

"Array" is the whole body of persons summoned to attend a court, as they are arrayed or arranged on the panel. *Durrah v. State*, 44 Miss. 789, 796 (citing Comyn's Dig., Challenge, B).

By the "array" of grand jurors is meant the whole body of persons summoned to serve as such before they have been impaneled. Code Cr. Proc. Tex. 1895, art. 398.

### ARREARAGE—ARREARS.

"Arrear" is that which is behind in payment, or which remains unpaid though due, so that an affidavit that rent is in arrear is an affidavit that it is due and unpaid. *Hollingsworth v. Willis*, 8 South. 170, 64 Miss. 152.

The word "arrears" comes from the French "arri re," meaning behind, and signifies money unpaid at the due time, as rent behind, and such is its definition in all the dictionaries. It is unlike the word "due," in that due has more than one signification, and expresses two distinct ideas, at one time signifying a simple indebtedness with reference to the time of payment, while at other times it shows that the date of payment is past. But there is no such ambiguity about the word "arrears." Always it must be past due to be in arrears, and cases in the law concerning real property illustrate this meaning when used to express that rent is in arrears (citing *Moss v. Gallimore*, 1 Doug. 279; *Birch v. Wright*, 1 Term R. 378). Hence the power

of a fraternal insurance company to declare its dues in arrears is limited to the time after such dues become due and payable. *Wiggin v. Knights of Pythias* (U. S.) 31 Fed. 122, 125.

"Arrearage," as used in the by-laws of a mutual benefit order, providing that a suspended member can be reinstated only on paying "all arrearages of every kind," means all the charges that have accrued, and which could have been justly demanded of the member had he not been in default, so that a member cannot claim reinstatement without paying assessments levied while he was suspended, although during such suspension he was not a member entitled to the benefits of the order. *Sovereign Camp Woodmen of the World v. Rothschild*, 40 S. W. 553, 557, 15 Tex. Civ. App. 463.

#### Of assessment.

"Arrearage," as used in P. L. 1886, p. 149, giving jurisdiction of cases involving arrearages of assessments to the commissioners of adjustment, does not necessarily mean an unpaid balance of a subsisting assessment, but any sum which has been assessed for a public improvement makes arrearages, without reference to the invalidity of the law under which it was imposed. The setting aside of such an assessment for total invalidity does not prevent the sum represented thereby from being regarded as an arrearage. *State v. City of Newark*, 18 Atl. 572, 573, 52 N. J. Law (23 Vroom) 138.

#### Of mortgage.

In a will of a testatrix, who had a mortgage on the estate of which her brother was tenant for life, and had also his bond for "arrears" of interest on that mortgage, a bequest giving to the brother the "arrears" of the mortgage did not mean the mortgage itself, but what might be due at the death of the testatrix. *Hamilton v. Lloyd*, 2 Ves. Sr. 416.

#### Of rent.

As chose in action, see "Rent in Arrears."

The phrase "arrearages of rent," as used in Acts 1715, c. 27, § 5, providing that actions of debt for "arrearages of rent" shall be limited to three years, includes an action of debt for the use and occupation of real estate. *Ellder v. Henry*, 34 Tenn. (2 Sneed) 81, 85.

"Arrears of rent" are chattels real of a mixed nature, being partly in possession and partly in action, and, if the husband survive his wife, he, and not her representatives, shall have all those arrears which became due during the marriage in her right, by survivorship. *Condit v. Neighbor*, 13 N. J. Law (1 J. S. Green) 83, 92 (citing *Clancy, Husb. & W.* 10).

11 Geo. II, c. 19, § 1, provides that, in case any tenant of lands on the demise or holding

whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away or carry off or from said premises his goods or chattels, to prevent the landlord distraining the same for arrears of rent so reserved, due, or made payable, the landlord may seize the same wherever found. Held not to require that the rent should be in arrear at the time of the removal, and, where a tenant on the morning of the quarter day fraudulently removed his goods with intent to avoid a distress which became due on that day, such rent was within the meaning of the statute. *Dibble v. Bowater*, 2 Ell. & Bl. 564, 569.

#### On stock.

"Arrears," as used in the by-laws of a corporation prohibiting the transfer of corporate stock as long as the holder is in arrears, or in any form indebted to it, is to be construed as including subscriptions on stock after the making of a call therefor, and not subscriptions before such call is made. *Kahn v. Bank of St. Joseph*, 70 Mo. 262, 272.

## ARREST.

See "Illegal Arrest"; "Legal Arrest"; "Privilege from Arrest"; "Warrant of Arrest."

An arrest is the taking, seizing, or detaining the person of another; touching or putting hands on him in the execution of process, or any act indicating an intention to arrest. *United States v. Benner* (U. S.) 24 Fed. Cas. 1084, 1086; *Rhodes v. Walsh*, 57 N. W. 212, 213, 55 Minn. 542, 23 L. R. A. 632; *Lansing v. Case*, 4 N. Y. Leg. Obs. 221, 223.

An arrest "is the apprehending or detaining of the person in order to be forthcoming to answer an alleged or suspected crime." *Ex parte Sherwood*, 15 S. W. 812, 813, 29 Tex. App. 334; *Montgomery County v. Robinson*, 85 Ill. 174, 176; *Hogan v. Stophlet*, 53 N. E. 604, 606, 179 Ill. 150, 44 L. R. A. 808.

An arrest is a restraint of the person, and taking of the party into actual custody, under legal process. *Hart v. Flynn's Ex'r*, 38 Ky. (8 Dana) 190, 191; *Emery v. Chesley*, 18 N. H. 198, 201.

By "arrest" is to be understood "to take the party into custody." It is so used in works of authority. An arrest is the beginning of imprisonment; when a man is first taken and restrained of his liberty by power or color of a legal warrant. *French v. Bancroft*, 42 Mass. (1 Metc.) 502, 504.

To constitute a legal "arrest," the officer must lay his hand on the defendant or otherwise take possession of his person. He must make him his prisoner in an unequivocal form. *Petit v. Colmary* (Del.) 55 Atl. 344, 345.

To constitute an arrest, the officer must exercise a controlling authority over the defendant, and have the process in his hand to enforce. *Lansing v. Case*, 4 N. Y. Leg. Obs. 221, 223.

Arrest is the taking of a person into custody that he may be held to answer for a public offense. Code Cr. Proc. S. D. 1903, § 110; Gen. St. Kan. 1901, § 5571; Comp. Laws Nev. 1900, § 4092; Rev. St. Okl. 1903, § 5255.

An arrest is the taking of a person into custody in the manner authorized by law. Rev. Codes N. D. 1899, § 7912. An arrest is taking a person into custody in a case and in the manner authorized by law. Rev. St. Utah 1898, § 4035. An "arrest" is taking a person into custody in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person. Pen. Code Idaho 1901, § 5236. An "arrest" is taking a person into custody in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person. Pen. Code Cal. 1903, § 834.

Arrest is the taking of a person into custody, that he may be held to answer for a crime. Cr. Code N. Y. 1903, § 167; Ann. Codes & St. Or. 1901, § 1601.

An "arrest" is made by an actual restraint of the person of the defendant or by his submission to the custody of the officer, under authority of a warrant or otherwise. Rev. St. Mo. 1899, § 2540.

An offer of a reward for the arrest and conviction of an unknown perpetrator of a crime cannot be taken literally, but the conditions thereof are substantially performed by a person who obtains possession of the facts necessary to secure his arrest and conviction, and gives them to some proper person interested, although he does not himself make the arrest, but this and the prosecution are made by the proper officers. *Kinn v. First Nat. Bank*, 95 N. W. 969, 971, 118 Wis. 537 (citing *Haskell v. Davidson*, 91 Me. 488, 40 Atl. 330, 42 L. R. A. 155, 64 Am. St. Rep. 254).

"Arrest," as used in Code 1892, § 1387, providing a reward for the arrest of any one who has killed another and is fleeing or attempting to flee before arrest, the term "arrest" refers to an arrest for the offense arising from the killing of another, and the fleeing before arrest means the fleeing of one, who has killed another, before arrest for the offense arising from that killing. So that, where one who wounded another, while his victim was still alive, was arrested and tried for assault with intent to kill and discharged, and, on his victim's subsequently dying, fled, one who then arrested him for the offense of killing his victim was entitled to the reward. *Newton County v. Doolittle*, 18 South. 451, 72 Miss. 929.

#### Actual touching unnecessary.

An arrest is usually made by taking the person into actual custody. The common practice is to put the hand upon the individual, and any touching, however slight, is enough. *Genner v. Sparks*, 1 Salk. 79. But no manual touching of the body or actual force is necessary to constitute an arrest, if the party be within the power of the officer and submits to the arrest. *Butler v. Washburn*, 25 N. H. (5 Fost.) 251, 258 (citing *Horn v. Batten*, Bull. N. P. 62); *Emery v. Chesley*, 18 N. H. 198, 201; *Bissell v. Gold* (N. Y.) 1 Wend. 210, 215, 19 Am. Dec. 480. But mere words will not make an arrest if the party resists and refuses to be arrested. *Case v. State* (Miss.) 17 South. 379, 381.

"To constitute a legal arrest, it is not necessary that the officer should touch the person of the individual against whom the precept has issued. It is sufficient if, upon being in his presence, he tells him he has such a precept against him, and the person says, 'I submit to your authority,' or uses language expressive of such submission. But it is not every touching of the person that will constitute an arrest; it must be touching with such an intent, as for instance, an officer has a ca. sa. against a defendant whom he meets in company, and goes up to him and shakes hands with him, without apprising him that he has such a precept. This might not be an arrest unless so intended and understood by the party. So if an officer meets the defendant in public company or on a highway and notifies him of his having a precept, and directs him to meet him at some particular place, this might be an arrest or not, as the parties intended." *Jones v. Jones*, 35 N. C. 443, 449.

The term "arrest" has a technical meaning, and implies that the person is restrained of his liberty by some officer of the law, armed with lawful process authorizing the arrest. The officer need not touch the person of such party to make the arrest effectual, but he must have and intend to have control of the party's person. Thus, if the officer come into a room and tell the person that he arrests him, and locks the door, there is an arrest. If the officer and the party to be arrested meet, and the former notifies the latter that he has process for his arrest, and the officer directs to meet him at a particular place, this would be a sufficient arrest if the officer and the party so agree and intend. *State v. Buxton*, 102 N. C. 123, 131, 8 S. E. 774, 775.

An actual touching of hands is not essential to constitute a valid arrest. If the defendant voluntarily consents to be considered under arrest, in consideration of being allowed his freedom of locomotion under the discretion of the officer, the arrest is complete. Pen. Code Ga. 1895, § 893.

**Apprehension distinguished.**

The word "arrest" is more properly used in civil cases, and "apprehension" in criminal. The word "arrest," among others, has the meaning of to take, seize, or apprehend a person by authority of legal process issued for that purpose. *Montgomery County v. Robinson*, 85 Ill. 174, 176; *Hogan v. Stophlet*, 53 N. E. 604, 606, 179 Ill. 150, 44 L. R. A. 509.

**In admiralty.**

"The term 'arrest' is a technical term used in admiralty process to indicate an actual seizure of property." *Pelham v. Rose*, 76 U. S. (9 Wall.) 103, 107, 19 L. Ed. 602.

**As imprisonment.**

See "Imprison—Imprisonment."

"An arrest is an imprisonment." *Blight v. Meeker*, 7 N. J. Law (2 Halst.) 97, 98.

**As substitute for ne exeat.**

The "arrest" authorized by Code Civ. Proc. § 551, authorizing the court to grant an order of arrest in an action wherein the judgment demanded would require the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, and there might be danger that the judgment or order requiring the performance of the act would be ineffectual, is a substitute for the writ ne exeat. *Ensign v. Nelson*, 1 N. Y. Supp. 685, 686, 49 Hun, 215.

**Service of civil process.**

A member of Congress while in his state on private business, with leave of absence, during a session of Congress, is not exempt from service of civil process under the Constitution of the United States, art. 6, declaring that Senators and Representatives shall in all cases, except treason and felony and breach of the peace, be privileged from arrest during their attendance at sessions of their respective houses, in going to and returning from the same; the word "arrest," being construed in its strict sense, applying to arrest of their persons, and not relating to an exemption from suit. *Worth v. Norton*, 33 S. E. 792, 794, 56 S. C. 56.

In construing the constitutional provision that the members of each house shall in all cases except treason, felony, or breach of the peace, be privileged from arrest during the session of their respective houses, and in going to and returning from the same, the court, after quoting the definitions given in *United States v. Benner* (U.S.) 24 Fed. Cas. 1084, *Hart v. Flynn's Ex'r*, 38 Ky. (8 Dana) 190, *Montgomery County v. Robinson*, 85 Ill. 174, and *French v. Bancroft*, 42 Mass. (1 Metc.) 502, said that this meaning of "arrest" was well known and understood at the time of the adoption of the Constitution, and

will be presumed to have been used in that sense, and such provision does not give them a privilege from the service of summons in a civil action. *Rhodes v. Walsh*, 57 N. W. 212, 213, 55 Minn. 542, 23 L. R. A. 632. A like construction was given to a similar provision in Const. Tex. art. 3, § 16. *Gentry v. Griffith*, 27 Tex. 461, 462.

"Arrest," as used in an act exempting from arrest persons necessarily attending on courts, means an actual detention of the person, and hence the service of a summons or citation on one while attending on a court is not within the statute. *Huntington v. Shultz* (S. C.) Harp. 452, 453, 18 Am. Dec. 660. As used in Rev. St. Ill. c. 12, § 8, providing that attorneys, judges, etc., shall be privileged from arrest while they are attending court, or going to and returning from it, means "the detention of the person in contradistinction to mere service of summons." *Robbins v. Lincoln* (U. S.) 27 Fed. 342, 343.

As defined by Gen. St. 1894, c. 105, "arrest" is "the taking of a person into custody, that he may be held to answer for a public offense, and is accomplished by an actual restraint of the person of the defendant, or by his submission to the custody of the officer; and the officer is required to inform the defendant that he acts under the authority of a warrant, and show the warrant if required." Subpoenas are put upon a different footing from the service of a criminal warrant, and there is no arrest in such case. *Steenerson v. Polk County Com'rs*, 68 Minn. 509, 516, 71 N. W. 687, 690.

**ARREST OF JUDGMENT.**

See, also, "Motion in Arrest of Judgment."

An arrest of judgment is the act of staying a judgment, or refusing to render judgment in actions at law and criminal cases, after verdict, for some matters intrinsic, appearing on the face of the record, which would render the judgment, if given, erroneous or reversible. The question raised by a motion in arrest of judgment is a question of law arising from the face of the record. Hence an objection that the act of the Legislature under which the term of court was held was not passed in a constitutional manner, as disclosed by the journals of the Senate and House of Representatives, cannot be raised on such a motion. *Browning v. Powers*, 44 S. W. 224, 142 Mo. 322.

According to Blackstone, arrests of judgment arise from intrinsic causes appearing upon the face of the record, and he enumerates the grounds which will be sufficient to prompt this action of the court, as follows: "Where the declaration varies totally from the original writ; where the verdict materially differs from the pleadings and issues

thereon; and where the case laid in the declaration is not sufficient in point of law to found an action upon." 8 Bl. Comm. 393. A standard writer says: "As a general rule, a judgment can be arrested only for some matter appearing, or the omission of some matter which ought to appear, on the face of the record itself." *Byrne v. Lynn*, 44 S. W. 311, 316, 18 Tex. Civ. App. 252 (citing 1 Black, Judgm. § 98).

An arrest of judgment is a setting aside of judgment after verdict, predicated on some defect which appears on the face of the record or pleadings. *Rountree v. Lathrop*, 69 Ga. 539, 540; *People v. Kelly*, 94 N. Y. 526, 530. It cannot be based on a mere affidavit showing the existence of a fact outside of the record, and which does not constitute a part of the same. *People v. Kelly*, 94 N. Y. 526, 530.

#### ARREST ON CIVIL PROCESS.

The words "arrested on civil process" in the section of the national guard act, providing that no officers or soldiers shall be arrested in civil suits while going to, remaining at, or returning from the place where he is ordered to attend for election of officers or military duty, cannot be construed to mean "privilege from suit." *Land Title & Trust Co. v. Rambo*, 34 Atl. 207, 174 Pa. 566.

#### ARRESTED FOR DRUNKENNESS.

A statement in a libelous article that the plaintiff was "arrested for drunkenness" is not an assertion that he was in fact drunk, but only that he was arrested on a charge of drunkenness. *Stacy v. Portland Pub. Co.*, 68 Me. 279, 286.

#### ARRESTS, RESTRAINTS, DETAINMENTS OF KINGS, ETC.

See, also, "Restraint of Kings or Princes"; "Unlawful Arrest, Restraint and Detainment."

The words arrest, restraint, and detainment of all kings, in a marine policy insuring against arrest, restraint, and detainment of all kings, covers a loss caused by a vessel being unable to enter her port of destination by reason of a blockade, though she proceeds to other ports without attempting to enter the blockaded port. *Schmidt v. United States Ins. Co.*, 1 Johns. 249, 262, 3 Am. Dec. 319.

An insurance on merchandise on board a vessel against usual sea risks, and also against "arrests, restraints, and detainments of kings, princes, or people," should be construed to cover a blockade which prevents the vessel from entering her port of destination and requires her to put back to the port

of departure. *Vigers v. Ocean Ins. Co.*, 12 La. 362, 366, 32 Am. Dec. 118.

A policy of insurance on a vessel insured against "arrests, restraints, and detainments of kings." Held, that such clause was intended to insure against any interruption of the voyage by reason of foreign governmental action, and hence, if the vessel within a foreign port was blockaded in the course of her voyage and prevented from proceeding, she being a neutral vessel, and having on board a neutral cargo laden before the institution of the blockade, she sustained a loss within the clause entitling her to recover thereunder, the restraint being unlawful. *Olivera v. Union Ins. Co.*, 16 U. S. (3 Wheat.) 183, 188, 189, 4 L. Ed. 465.

Arrests, restraints, and detainments of kings, princes or peoples, within the meaning of a marine policy on a cargo of slaves against such arrests, restraints, and detainments, includes the issuing of a writ of habeas corpus by a judicial officer of a government within the control of which the vessel is driven by stress of weather, which results in the slaves being taken from the vessel and set at liberty. *Simpson v. Charleston Fire & Marine Ins. Co.* (S. C.) Dud. 239, 242.

#### ARRIVE—ARRIVAL.

See "Nonarrival"; "On Arrival"; "To Arrive."

"Goods 'arrive' when they reach their destination. The term necessarily involves the idea of cessation of transit. Goods shipped from Virginia to Alabama cannot be said to arrive in North Carolina, South Carolina, or Georgia, but only when they reach their destination in Alabama." *In re Langford* (U. S.) 57 Fed. 570, 573.

"Arrival," as used in a contract for the sale of goods to be shipped by a certain steamer, and providing that if there shall be no arrival there is no sale, refers to the goods which are the subject of the contract, and not the particular vessel by which they are shipped; meaning simply that if the goods never arrive at their destination the buyers shall not become liable for the price, and does not release the buyer from such liability if the goods arrive by another steamer than that by which they were originally shipped. *Harrison v. Fortlage*, 16 Sup. Ct. 488, 490, 161 U. S. 57, 40 L. Ed. 616.

"Arrival," within the meaning of Act Cong. Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177], providing that intoxicating liquors transported into another state, or remaining therein for use, etc., shall upon arrival in such state be subject to the operation of its laws enacted in the exercise of its police power, is to be construed to have reference to its arrival at its destination, and not at the state line, and therefore the power

of the state does not attach when the goods first entered the state, and before they reach their destination. *Rhodes v. Iowa*, 18 Sup. Ct. 664, 667, 170 U. S. 412, 42 L. Ed. 1088. Contra, see *State v. Aiken*, 20 S. E. 221, 232, 42 S. C. 222, 26 L. R. A. 345. The word *as* so used refers to the time when the goods have been placed in the railroad company's warehouse in readiness for the call of the consignee. But a delivery to the consignee is not essential to the idea of arrival. *Southern Ry. Co. v. Heymann*, 45 S. E. 491, 492, 118 Ga. 616.

Whisky purchased in North Carolina, being carried by the purchaser in a buggy from the place of purchase to his residence, will not be deemed to have arrived within the territorial limits of the state, nothing having been done to break the continuity of the transportation from the place of purchase. *State v. Holleyman*, 33 S. E. 866, 867, 55 S. C. 207, 45 L. R. A. 567.

22 Stat. 521, exempting from duty wearing apparel in actual use, and other personal effects of "persons arriving in the United States," means citizens returning, or foreigners visiting or immigrating. *Astor v. Meritt*, 4 Sup. Ct. 413, 419, 111 U. S. 202, 28 L. Ed. 401.

Laws 1898, c. 230, being the act in relation to the public administrator in the county of New York, in its reference to assets which "shall arrive within the county of New York after his death," means that the assets may arrive or come into the state in good faith in due course of business, and not for the avowed purpose of securing a resident plaintiff who can prosecute a negligence action against a foreign corporation on a cause of action arising in, and between residents of, another state. *Hoes v. New York, N. H. & H. R. Co.*, 66 N. E. 119, 121, 173 N. Y. 435.

#### ARRIVE—ARRIVAL (Of Vessel).

##### As anchoring.

The arrival of a vessel does not necessarily imply anchoring, nor is it necessary that she should be at anchor before she is considered as having "arrived." There can be no actual bounds within which a vessel must come, and no arbitrary distance can be determined in feet, yards, or fathoms which might not very soon be proven unreasonable and inexpedient, and a vessel is deemed to have arrived, within the wrecking rule in salvage cases, where she is within reasonable hailing distance, ready to receive and obey orders. *Acosta v. The Halcyon* (U. S.) 1 Fed. Cas. 57.

To constitute the "arrival" of a certain quantity of oil in a vessel, the vessel must be moored within the time stipulated. *Gray v. Gardner*, 17 Mass. 188, 190.

##### As arrival at place of discharge.

"As between the shipowner and the charterer, the arrival of the ship is deemed to be complete from the time when the ship has arrived at the usual or designated place to discharge her cargo within the port, such as the public docks, although she may not be able to get a berth immediately so as to commence the discharge." *Gronstadt v. Witt-hoff* (U. S.) 15 Fed. 265, 268.

In a bill of lading providing that 24 hours after arrival at a certain port a certain time should be allowed for receiving the cargo, etc., "arrival" means going to the place at which the master may report his vessel as ready to deliver her cargo and call upon the consignee to provide a place for delivery. *Kenyon v. Tucker*, 23 Atl. 61, 62, 17 R. I. 529.

There has been an arrival of a vessel within its charter party, providing for demurrage after arrival, where she was stopped in the harbor by the consignees, and the captain went ashore and was thereafter told to take his vessel to any point in the harbor to wait before discharging his cargo until it could be sold. *Reed v. Weld* (U. S.) 6 Fed. 304.

"Arrival," within a bill of lading providing for demurrage 24 hours after arrival, does not mean when the vessel has reached the wharf of the consignee, where the vessel was unable to do so because of ice in the harbor, but reached a neighboring wharf and tendered the cargo. *Choate v. Meredith* (U. S.) 5 Fed. Cas. 648.

A policy obligating the underwriters to return to the assured seven pounds per cent. premium "for arrival" meant the arrival of the vessel at the place where the captain elected to discharge his cargo, and this though the point selected was a point two miles and a half outside the harbor where ships generally discharge, and from which the vessel was taken possession of by government officers and her cargo confiscated, thereby discharging the underwriters from liability for loss, and, the ship having "arrived" within the terms of the policy, entitled the assured to the discount. *Dalglish v. Brooke*, 15 East, 295, 296.

"Arrival," as used in Consular Act 1803, c. 62, § 1 (2 Story's Laws, p. 884; 2 Stat. 203, c. 9), imposing a penalty of \$500 for not depositing a ship's register with the consul on arrival in a foreign port, means an arrival at a voluntary port of destination for purposes of trade. *Parsons v. Hunter* (U. S.) 16 Fed. Cas. 1,259, 1,260.

If a vessel is insured until she arrives at a particular port, and is destined to discharge cargo successively at two different wharves within that port, each being a distinct place for delivery of cargo, the risk



ends when she has been moored 24 hours in safety at the first place. A vessel "arrives" at a particular port when she comes or is brought to the place where it is intended to discharge her, and where is the usual and customary place of discharge. When the vessel is insured to one or two ports and sails for one, the risk terminates on her arrival there. *Simpson v. Pacific Mut. Ins. Co.* (U. S.) 22 Fed. Cas. 174, 175.

"Arrived," as used in a marine policy providing that it shall continue in force until the vessel shall have arrived in a certain harbor, is to be construed to mean arrival at the particular point or place in the harbor which is the ultimate destination of the ship. *Meigs v. Mutual Marine Ins. Co.*, 56 Mass. (2 Cush.) 439, 453.

#### As arrival at port of destination.

Rev. St. § 2867 [U. S. Comp. St. 1901, p. 1908], providing that if, after the arrival of any vessel within the limits of a collection district, any part of her cargo shall be unladen without authority of a customs officer, the merchandise so unladen shall be forfeited, held to mean the arrival of a vessel within a port with the intent to discharge her cargo, and hence, where the vessel has been driven ashore by stress of weather and unladen of her cargo without authority of a customs officer, the case is not within the statute. *The Cargo ex Lady Essex* (U. S.) 39 Fed. 765, 767.

Merely touching at a port, without coming to an entry or transacting any business, is not an "arrival" within Act Feb. 28, 1803, § 2, 2 Stat. 203, concerning consuls and vice consuls, requiring masters of vessels to deposit their ship papers with the consul on their arrival in a foreign port. It is difficult to determine the precise import of the word "arrival." Its common and obvious meaning is coming to some port or place, but in the fiscal navigation laws of the United States it is perhaps not most generally used in its original and etymological meaning, nor is it invariably used in one and the same sense, so that what is deemed by law to be an arrival for one, perhaps is not deemed to be so for another. In the twenty-fifth section of the collection law, requiring every master of a vessel coming from a foreign port, on his arrival within four leagues of the coast, or within the limits of any collection district, to exhibit and manifest his cargo to the officer of the customs who comes on board his vessel, it was used in the most common signification, and means coming within four leagues of the coast or within the limits of a district. And it was held in another case that the casual touching at a port for purposes not connected with the object of the voyage was not an arrival within Act Feb. 18, 1793, authorizing vessels in certain cases, when in a district to which they do not be-

long, to change their papers and take out a temporary register or license, which they are required, within 10 days after their arrival within the district to which they belong, to surrender, and take out new papers. In the section of the law under consideration in the case at bar, the word "arrival" means an arrival at the port of destination. *Toler v. White* (U. S.) 24 Fed. Cas. 3, 6.

The ordinary meaning of the word "arrival," in the revenue laws, is the coming of a vessel to some place of her destination in the course of a voyage, some terminus embraced within the range of her employment, or of the expedition in which she is engaged. In this way it is used as contradistinguished from the phrase "touching at a port," though in a more loose sense a vessel is said to arrive at a port at which she touches. The strict and etymological meaning of the word "arrive" is to come to the shore, and in the French language, through which the word comes to us from the Latin, this meaning is preserved. The word implies a transitus and a terminus, a voyage made, and a point at which it terminates. *United States v. Shackford* (U. S.) 27 Fed. Cas. 1040.

The mere transit through the waters of the St. Mary's river for the purpose of proceeding to Spanish territory is not an "arrival" within the limits of the United States from a foreign port, within the act requiring a vessel so arriving to report or enter with a collector of the United States. *The Apollon*, 22 U. S. (9 Wheat.) 362, 368, 6 L. Ed. 111.

The term "arrival," as used in the act of 1803, § 2, requiring the master of a United States ship, on its arrival in a foreign port, to deposit his register, sea letter, and Mediterranean passport, means arrival at a voluntary port of destination for the purposes of trade. *Parsons v. Hunter* (U. S.) 18 Fed. Cas. 1259, 1260. A Spanish fishing smack from Havana, which anchored within five miles of the mainland of Florida for the purpose of repairing a disabled mast, and which was not bound to and did not enter any port of the United States, is not within the provision of Rev. St. § 2773 [U. S. Comp. St. 1901, p. 1862], providing that if any vessel, having arrived within the limits of any collection district from any foreign port, departs or attempts to depart from the same without making report or entry, she shall be liable to a penalty, etc., as such ship could not be said to have "arrived." *The Javirena* (U. S.) 67 Fed. 152, 155, 14 C. C. A. 350.

Act Cong. Feb. 28, 1803 (2 Stat. 203), declared that it shall be the duty of the master of a ship belonging to citizens of the United States, on his arrival at a foreign port, to deposit his passport with the consul. It was held that "arrival" means an arrival for the purpose of business, requiring an entry and clearance, and does not include putting into a foreign port to get information, without

going to the harbor or wharves, and not entering or repairing, or needing the aid of a consul in any respect, and leaving the port within a few hours. *Harrison v. Vose*, 50 U. S. (9 How.) 372, 384, 13 L. Ed. 179.

#### Enter distinguished.

In reference to a vessel reaching port, the words "arrive" and "enter" are not synonymous, as there may be an arrival without an actual entry or an attempt to enter a port. An arrival within a port cannot be without an entry into the port. *United States v. Open Boat* (U. S.) 27 Fed. Cas. 346, 351.

#### ARRIVING FROM SEA.

As far as the use of wharves is concerned, a boat returning from Galveston to the port of New Orleans is a "vessel arriving from sea," without any necessary connection with her former entry into the same port from which she cleared for the port of Galveston. *The Thomas Melville* (U. S.) 62 Fed. 749, 751, 10 C. C. A. 619.

#### ARROWROOT.

As starch, see "Starch."

#### ARROGATION.

Arrogation is a form of the ceremony of adoption. *Reinders v. Koppelman*, 68 Mo. 482, 497, 30 Am. Rep. 802.

#### ARSON.

See "Attempt to Commit Arson."

"Arson" at common law is defined by Lord Coke to be the malicious and voluntary burning of the house of another by night or by day. *State v. Laughlin*, 53 N. C. 455, 457 (citing 1 Hale, P. C. 566); *State v. Fish*, 27 N. J. Law (3 Dutch.) 323, 324; *State v. McGowan*, 20 Conn. 245, 246, 52 Am. Dec. 336; *People v. Myers*, 20 Cal. 76, 78; *People v. Fanshawe*, 32 N. E. 1102, 1103, 137 N. Y. 68, 73; *Hester v. State*, 17 Ga. 130, 132.

"Arson" at common law is usually defined as the willful and malicious burning of the house or outhouse of another man. *Graham v. State*, 40 Ala. 659, 664; *Harrison v. State*, 55 Ala. 239, 241; *Giddens v. Mirk*, 4 Ga. 364, 368; *Mary v. State*, 24 Ark. 44, 45, 81 Am. Dec. 60; *McClaine v. Territory*, 25 Pac. 453, 455, 1 Wash. St. 345; *State v. Hannett*, 54 Vt. 83, 86; *State v. Dennin*, 32 Vt. 158, 162; *State v. McCoy*, 62 S. W. 991, 992, 162 Mo. 383.

"The offense of arson is deemed at common law to be the voluntary and malicious burning of the house or barn of another." *People v. Gates* (N. Y.) 15 Wend. 159, 161 (quoting 3 Chit. Cr. Law, 1104).

Arson at common law was the malicious and willful burning of the house or outhouse of another; and whether the house was a dwelling house or an outhouse, though not contiguous to the dwelling, nor under the same roof as a barn or stable, its burning might, at common law, constitute arson. *Allen v. State*, 10 Ohio St. 287, 300.

The following definition of the offense at common law is given by Sir Matthew Hale: "The felony of arson or willful burning of houses is described by Lord Coke to be the malicious and voluntary burning of the house of another by night or by day. It extendeth not only to the very dwelling house, but to all houses that are a part thereof, though not contiguous to it, or under the same roof, as in case of burglary, the barn, stable, cow house, sheep house, dairy house, milk house; but if the barn be not parcel of the dwelling house, it is not felony unless the barn have hay or grain in it." *State v. Porter*, 90 N. C. 719, 720.

"Arson as well by the statutes of this state as by the common law is an offense against property. It consists in destroying the property of another through the agency of fire. The burning of a man's own house is not a felony at common law. But if a man set fire to his own house maliciously, intending thereby to destroy an adjoining house, if the latter is burned, it is a felony; if not it is a great misdemeanor." *People v. Henderson* (N. Y.) 1 Parker, Cr. R. 560, 561 (quoting 1 Hale, P. C. 568, 2 East, P. C. 1027).

The burning of any building so situated as to endanger a dwelling house was felonious arson at common law. *Hill v. Commonwealth*, 98 Pa. 192, 195.

At the common law "arson" was defined to be the willful and malicious burning of the dwelling house of another. The statutes have left the definition of the crime as it stood at common law. The offense is a crime against the security of a dwelling house as such, and not against the building as property. *State v. Hannett*, 54 Vt. 83, 86.

"Arson" is defined under the common law to be the willful and malicious burning of the house of another, and under Sand. & H. Dig. § 164, as the willful and malicious burning of the house or other tenements of another. While other sections of the statute make it arson to burn structures not subjects of arson at the common law, still the definition of arson at common law was not in other respects changed by the statute. *State v. Snellgrove* (Ark.) 71 S. W. 266.

The burning of a stack of hay is not arson at the common law, nor under the statutes of Illinois. *Creed v. People*, 81 Ill. 565, 571.

Willfully and maliciously setting fire to or burning a corn crib is not arson, within

Cr. St. § 140, declaring that the willful and malicious setting fire to or burning any barn, stable, coachhouse, ginhouse, storehouse, or warehouse shall be deemed arson. *State v. Jeter*, 24 S. E. 889, 890, 47 S. C. 2.

Pen. Code, art. 651, defines "arson" as being the willful burning of any house included within the meaning of article 652, and article 652 defines a "house" as any building or structure inclosed with walls and covered, whatever may be the material used for the building. Held that, since a building ceases to be a building or structure after it is torn down, the burning of the material of which it was formerly composed would not constitute the burning of a house, and was therefore not arson. *Mulligan v. State*, 7 S. W. 664, 25 Tex. App. 199, 8 Am. St. Rep. 435.

Arson is the willful, malicious burning of a building with intent to destroy it. Rev. Code S. D. § 7382. In subsequent sections arson is divided into four degrees, with a different punishment for each, but each degree comes clearly within the general definition of arson, so that an information which accuses the defendant of the crime of arson, and charges facts constituting arson in the third degree, does not accuse the defendant of one crime and state facts constituting a different crime. *State v. Young*, 82 N. W. 420, 421, 9 N. D. 165.

Code, § 137, *Purd. Dig.* p. 144, pl. 248, provides that any person maliciously attempting to burn a barn that is a parcel of a dwelling shall be guilty of felonious arson. *Commonwealth v. Weiderhold*, 4 Atl. 345, 112 Pa. 584.

#### **Completeness of burning.**

Arson is the setting fire to a dwelling house inhabited at the time, though only a part of it is consumed. *People v. Butler* (N. Y.) 16 Johns. 203.

"The willful setting on fire of an inhabited dwelling house, though the fire should afterwards go out of itself or be extinguished by another, constitutes the crime of arson." *People v. Cotteral* (N. Y.) 18 Johns. 115, 116.

In order to constitute arson there must be an actual burning of some portion of the building; but it was not necessary at common law that the building should be wholly consumed. If any portion of the building was burned the offense was complete. *State v. Dennin*, 32 Vt. 158, 162.

"The burning of a house, necessary to constitute arson at common law, must be an actual burning of the whole or some part of the house; but it is not necessary that every part of the house should be wholly consumed, or that the fire should have any continuance, and the offense will be complete, though the fire should be put out or go out itself." *Peo-*

*ple v. Fanshawe*, 19 N. Y. Supp. 865, 869, 65 Hun, 77.

#### **Not limited to dwellings.**

In this country the English law of arson has been considerably changed by modifying the statute, and it was competent for the Legislature to make it arson to willfully burn any boat, vessel, railroad car, etc., though the statute omitted the element of malice. *State v. McCoy*, 62 S. W. 991, 992, 162 Mo. 383.

The definition of "arson" according to Blackstone is the malicious and willful burning of the house or outhouse of another man. But according to Wharton's Criminal Law, upon authority of Hale's Pleas of the Crown, it is said to be arson at common law to maliciously burn another's barn stored with hay or grain. So an indictment charging arson or barn burning does not charge separate offenses, though the Code prescribes a less punishment for barn burning than for arson. *Sublett v. Commonwealth* (Ky.) 35 S. W. 543.

In the common law arson was a crime against the habitation rather than against property rights, but under statutes a greater number of things are embraced which were not subjects of arson at the common law, and the language employed evidences its intention to enlarge its common-law meaning. Thus the phrase, "the property of any other person," relates to and qualifies dwelling house, and indicates that it constitutes arson to burn a storehouse or any other building the property of another person just as certainly as it does the dwelling house the property of any other person. *Lipschitz v. People*, 53 Pac. 1111, 1112, 25 Colo. 261.

#### **Intent to destroy.**

Pen. Code, § 447, defines "arson" as the willful and malicious burning of a building with intent to destroy it. Under such definition there can be no arson in the absence of this intent to destroy. *People v. Mooney*, 59 Pac. 761, 762, 127 Cal. 339.

Arson is the willful and malicious burning of a building with intent to destroy it. There must be, to constitute the crime of arson, the malicious and willful burning of a building and an intent to destroy it. To constitute arson, where the action is sufficient in other respects, it is immaterial whether the motive be revenge or any other kind of malicious mischief. *People v. Fong Hong*, 53 Pac. 265, 266, 120 Cal. 685.

Gen. St. c. 29, art. 7, § 1, prescribes the punishment for arson, but it does not define the offense. The common law therefore controls in this respect. The felony of arson at common law is the malicious and voluntary burning of the house of another by night or by day. It must be a willful and malicious burning, otherwise it is not felony, but only

a trespass. And therefore negligence or mischance does amount to arson. *Aikman v. Commonwealth*, 18 S. W. 937, 13 Ky. Law Rep. 894.

#### **As offense against habitation.**

"Arson" as defined by the common law is an offense against the security of the habitation rather than against the property which was burned. *State v. Gilligan*, 50 Atl. 844, 845, 23 R. I. 400.

The gist of the offense is the danger to the life of persons who were dwelling in the house. It was an offense against the habitation, and regarded the possession rather than the property, and when the burning of any other house than a dwelling was included within the offense, as the burning of barns and other outhouses, it was on the theory that the flames would extend to the dwelling and endanger the habitation. At the common law there was no question of value. It mattered not whether the house burned was worth thousands of dollars or only a few shillings, or whether it was a palace or not. It was the safety of the inhabitants of the structure that the law sought to protect. *McClaine v. Territory*, 25 Pac. 453, 455, 1 Wash. St. 845.

Arson is the burning of any house, edifice, structure, vessel, or other erection capable of affording shelter for human beings. It is not necessary that the house, edifice, structure, vessel, or other erection should have been intended for or had been used as a habitation, but it is sufficient if it be capable of affording shelter for human beings, and for that reason the willful and malicious burning of a building which was not intended or was not used as a habitation is an offense against the person rather than the property, and in that respect differs from arson as defined by the common law, which was an offense against the security of the habitation rather than against the property which was burned. *People v. Fisher*, 51 Cal. 319, 320.

#### **As offense against possession.**

The distinguishing characteristic of arson at common law is that it is an immediate offense against a possession; and therefore, if a tenant, however short his term, set fire to a house he occupied, it was not arson. *State v. Moore*, 61 Mo. 276.

"Arson" is defined by Pen. Code, § 447, as the willful and malicious burning of a building with intent to destroy it. By section 452 it is provided that it is not necessary that a person other than the accused should have ownership in the building set on fire; it is sufficient that at the time of the burning another person was rightfully in possession. Under such provision an owner of a building who was in possession could not be convicted of arson for burning it, though the building was so situated as to endanger the lives of

inhabitants of other buildings. *People v. De Winton*, 45 Pac. 708, 709, 113 Cal. 403, 33 L. R. A. 374, 54 Am. St. Rep. 357.

"The offense is a crime against the security of the dwelling house as such, and not against the dwelling as property. In case where the ownership is in one and the occupancy in another, the indictment properly avers that the dwelling house belongs to the latter. If the occupant is in possession rightfully, and burns the house, he cannot in legal sense be guilty of burning the dwelling of another; he burns his own dwelling house." *State v. Hannett*, 54 Vt. 83, 86.

If the landlord or reversioner sets fire to his own house, of which another is in possession under lease, etc., it is arson, for during the lease the house is the property of the tenant. *Harris' Case*, Foster, 113; 4 Bl. Comm. 222; *Roscoe's Cr. Ev.* 199. So if it is in the possession of a copyholder. *Spaulding's Case*, 1 East, P. C. 1025; 1 Leach, Cr. Law, 218. The principle of the rule is that it was for the protection of the person in the actual and immediate possession of the house. The offense is against the possession of another. *Breeme's Case*, 1 Leach, 220; 2 East, P. C. 1026; *Pedley's Case*, 1 Leach, 235; 1 Hale, P. C. 567, note; 3 Chitty, Cr. Law, 1106. And the court will not inquire into the estate or interest which such person has in the house burned. It is enough that it was his actual dwelling at the time. *People v. Van Blaricum* (N. Y.) 2 Johns. 105; *State v. Roe*, 12 Vt. 93; *State v. Fish*, 27 N. J. Law (3 Dutch.) 323, 324.

### **ARSON IN THE FIRST DEGREE.**

Arson in the first degree consists in willfully setting fire to or burning in the nighttime a dwelling house in which there shall be at the time some human being, whether the house belongs to the person setting fire to it or not. *Shepherd v. People*, 19 N. Y. 537, 540; *Woodford v. People* (N. Y.) 2 Cow. Cr. R. 123, 125.

### **ARSON IN THE SECOND DEGREE.**

"Every person who shall willfully set fire to or burn, in the nighttime, any shop, warehouse, or other building, not being the subject of arson in the first degree, but adjoined to or within the curtilage of any inhabited dwelling house, so that such house shall be endangered, shall upon conviction be adjudged guilty of arson in the second degree." *People v. Durkin* (N. Y.) 5 Parker, Cr. R. 243, 248 (quoting 2 Rev. St. p. 666, § 2).

### **ARSON IN THE THIRD DEGREE.**

"A person who willfully burns or sets on fire either a vessel or other vehicle, a building, structure, or other erection which is at

the time insured against loss or damage by fire, with intent to prejudice the insurer thereof, is guilty of arson in the third degree." Pen. Code, § 488. *People v. Fanshawe*, 19 N. Y. Supp. 865, 868, 65 Hun, 77.

In common law the crime of arson consisted in the malicious and willful burning of the house or outhouse of another. By Rev. St. 1899, § 1875, it is provided that every person who shall willfully set fire to or burn any house, building, barn, stable, boat, or vessel of another, or any office or depot or railroad car of any railroad company, or any house of public worship, college, academy, or school house or building used as such, or any public building belonging to the United States or this state, or to any county, city, town, or village, not the subject of arson in the first or second degree, shall on conviction be adjudged guilty of arson in the third degree. *State v. McCoy*, 62 S. W. 991, 992, 162 Mo. 383.

By Crimes Act, § 57, it is provided that every person who shall burn any building, boat, or vessel, or any goods, wares, merchandise, or other chattels which shall at the time be insured against loss or damage by fire with intent to defraud or prejudice the insurer, whether the same be the property of such person or any other, shall, upon conviction, be adjudged guilty of arson in the third degree. *State v. Jessup*, 22 Pac. 627, 628, 42 Kan. 422.

## ART.

Art is the skillful and systematic arrangement or adaptation of means for the attainment of some desired end. *Suther v. State*, 24 South. 43, 45, 46, 118 Ala. 88.

Art is practical skill as directed by theory or science. It relates to practice or performance, and is a mere application of knowledge. Rifle shooting is an art as distinguished from a science. *Vredenburg v. Behan*, 33 La. Ann. 627, 637.

"Arts," as the term is used in the statement that seduction must be accomplished by means of temptation, deception, arts, etc., is skillful and systematic arrangement or adaptation of means for the attainment of some desired end. The arts of the seducer are crafty devices by words or acts or both which influence the female to yield to sexual intercourse. They need not be concurrent with the act of sexual intercourse. If her consent is attributable to the influence of the arts or deception, and the act follows as a result of the consent thus gained, the offense will be seduction. *Hall v. State*, 32 South. 750, 758, 134 Ala. 90.

"The word 'art' is sometimes used very broadly, as for instance when it is used in contradistinction to 'nature,' or as in the phrase 'the arts of war and peace.' But it is

also used, especially when used without any qualifying adjective or phrase, to signify art in its higher manifestations, or art par excellence, as represented in works of art by those who are distinctively denominated 'artists.' In this sense the word is used to designate the group of arts known as 'fine arts,' as distinguished from the useful or mechanical and industrial arts." *Almy v. Jones*, 21 Atl. 616, 17 R. I. 265, 12 L. R. A. 414.

### In apprenticeship.

A covenant to teach an apprentice the "art and mystery of the tanning business" means the covenantor is to make the apprentice as good a workman in the trade as those generally are who have regularly learned it. *Barger v. Caldwell*, 32 Ky. (2 Dana) 129, 131.

### In copyright law.

See "Works of Art."

A work on the subject of bookkeeping, though only explanatory of well-known systems, may be the subject of copyright, and, considered as a book conveying information and detailed explanations of the art, it may be a valuable acquisition to the practicable knowledge of the community, but there is a clear distinction between the book as such and the art which it is intended to illustrate. The same distinction may be predicated of every other art as well as that of bookkeeping. A treatise on the use of medicines, or the construction of plows or watches, would be the subject of copyright, but no one would contend that the copyright would give the exclusive right to the art or manufacture therein described. *Baker v. Seldon*, 101 U. S. 99, 102, 25 L. Ed. 841.

### In patent law.

See "Useful Art."

Process synonymous, see "Process."

"Art," as used in the patent acts, means a useful art or manufacture which is beneficial, and which is described with exactness in its mode of operation. *Smith v. Downing* (U. S.) 22 Fed. Cas. 511.

"Art," as used in Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382], authorizing the grant of a patent to any person who has invented or discovered any new or useful art, is synonymous with "process," which was defined in *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139, to be a mode of treatment of certain materials to produce a given result; an act or series of acts performed on a subject-matter to be transformed and reduced to a different state or thing. *Carnegie Steel Co. v. Cambria Iron Co.* (U. S.) 89 Fed. 721, 754.

Without attempting to define the term "art," as used in the patent act, with logical accuracy, we may take as examples of it

some things in their concrete form, exhibit what we all concede to come within a correct definition, such as the art of printing, that of telegraphy, or that of photography. The art of tanning leather might also come within the category, because it requires various processes and manipulation. *Jacobs v. Baker*, 74 U. S. (7 Wall.) 295, 297, 19 L. Ed. 200.

### ART INSTITUTE.

"Art institute," as used in a will bequeathing a fund for an art institute, means an institution or establishment resembling such as exist in Europe for the promotion of fine arts, or the art whose aim is beauty rather than utility, though not necessarily to the exclusion of utility when the two can be combined. *Almy v. Jones*, 21 Atl. 618, 17 R. I. 265, 12 L. R. A. 414.

### ARTESIAN WELL.

From Artesien of Artois, in France, where this kind of well was first made, an artesian well is a perpendicular perforation or burrowing into the ground, deep enough to reach a subterranean body of water whose sources are higher than the plain where the perforation is made, and so force up to the surface a constant stream of water. *Andrews v. Cross* (U. S.) 8 Fed. 269, 275.

An artesian well consists of a well pit sunk in the earth until a water-bearing stratum is reached where the water lies under pressure of such a head that when struck by the well pit it will come into the pit so rapidly that a stream of water is produced flowing by the force of its own current from the earth into and through the well pit to the surrounding surface. *Andrews v. Carman* (U. S.) 1 Fed. Cas. 868, 869.

A contract of a waterworks company with a city, requiring that artesian wells should be sunk to procure the water supply, means one the water of which comes from beneath the impermeable stratum, so as to be uncontaminated by surface matter, but it need not be a flowing well. In *Ure's Dictionary of Arts, Manufactures, and Mines* an artesian well is defined to be "a well or bore hole in which water is obtained by means of a perforation bored vertically down through impermeable strata into underlying strata of a more or less permeable character, such stratum to be charged with water. Properly speaking an artesian well is one in which the water from the lower stratum rises above the surface of the superincumbent impermeable strata, but by extension the phrase has been applied of late years to any wells in which waters of the lower stratum are enabled to rise sufficiently near to the surface to allow of their being economically used." *Foster v. City of Joliet* (U. S.) 27 Fed. 899, 905.

The primary definition in all the dictionaries of the word "artesian" indicates a well from which the water flows naturally without artificial pressure; but the secondary definition of this word in the *Century* and *Standard Dictionaries* and others seems to indicate that it may be applied also to wells from which the water is made to flow by artificial means. The word "artesian," therefore, becomes a term of equivocal significance, standing unexplained in a contract, and parol evidence is admissible to explain its meaning in a contract for the digging of an artesian well. *Hattiesburg Plumbing Co. v. A. E. Carmichael & Co.*, 31 South. 536, 537, 80 Miss. 66.

An "artesian well" is defined for the purpose of the act relating thereto to be any artificial well the waters of which if properly cased will flow continuously over the natural surface of the ground adjacent to such well at any season of the year; provided nothing of the act shall apply to water flowing from mining shafts. *Mills' Ann. St. Colo.* 1801, § 164.

### ARTFULLY.

The expressions "artfully and purposely framed," "unfairly and secretly computed," and "unjustly and unfairly attempted," used in a plea of justification in regard to the official act of a cashier, do not necessarily imply moral obliquity. *Kerr v. Force* (U. S.) 14 Fed. Cas. 386, 387.

### ARTICLE.

See "Single Article."

Other articles, see "Other."

Perishable articles, see "Perishable Property."

Proprietary articles, see "Proprietary."

"Article" is derived from the Latin word "articulus," meaning connecting two parts of the body; one of the parts thus connected; a separate member or portion of anything; a single clause in any writing; a particular item of several that make up an account; a portion of a complex whole; a distinct portion of an instrument; a distinct part. *Carter v. Wilmington & W. R. Co.*, 36 S. E. 14, 15, 128 N. C. 437.

As used in *Tariff Act* 1890, par. 373, relating to the duties on laces, tuckings, lace window curtains, and other similar tamboured articles, "article" should be construed in its general sense as indicating a commodity. *Field v. United States* (U. S.) 73 Fed. 808, 809, 20 C. C. A. 19.

"Article," as used in *Act March 3, 1883*, *Schedule N*, § 2502, levying a duty on articles composed of india rubber, is to be construed in its broad sense as meaning things manufactured, unmanufactured, or partially manu-

factured. In common usage "article" is applied to almost every separate substance or material, whether as a member of a class, or as a particular substance or commodity. *Junge v. Hedden* (U. S.) 37 Fed. 197, 198; *Id.*, 13 Sup. Ct. 88, 89, 146 U. S. 233, 36 L. Ed. 953.

The word "article" as defined by lexicographers is a distinct portion or part, a joint or a part of a member, one of various things. It is a word of separation to individualize and distinguish some particular thing from the general thing or the whole of which it forms a part, as an article in an agreement, an article of faith, an article of a newspaper, or an article of merchandise. It is derived from the Greek, the original or radical word meaning "to join" or "to fit to" as a part, and it is only very recently, as will be found by consulting the dictionary (see *Allison's Am. Dict.* 1813; *Worcester's Dict.* 1847), that it has been applied to denote such material or corporeal things as goods or physical property, and then only in the sense of something that is separate and individual in itself, as salt is a necessary article, or a hammer is a useful article. In *Earle v. Cadmus* (N. Y.) 2 Daly, 237, the defendant stipulated that he was not to be liable in the carriage of baggage for an amount exceeding \$50 upon any article, and it was held that the word "article" was properly used, and meant any article coming under the denomination of baggage. The term "article" in the receipt of a common carrier containing a clause limiting his liability to \$50 for the article forwarded, when the receipt was for one package which consisted of three cases of drugs strapped together, was construed to apply to each of the cases of drugs, and not to the entire package. *Wetzell v. Dinsmore* (N. Y.) 4 Daly, 193, 196.

#### Bottles.

The words "article" and "commodity" as used in the statute forbidding the purchase of them from any slave embrace most immovable things which can be the subject of commerce between white persons and slaves, and a black bottle comes clearly within the definition. *Shuttleworth v. State*, 35 Ala. 415, 417.

#### Growing crop.

Gen. St. 1878, c. 39, § 14, prohibits any person from selling any article of personal property after having conveyed the same by mortgage with intent to defraud, etc. Held, that the term "article of personal property" meant any personal property or any kind of personal property, and so applies to a growing crop. *State v. Williams*, 21 N. W. 746, 748, 32 Minn. 537.

#### Horse.

The term "goods or articles" includes a horse, as used in Gen. St. p. 503, § 15, relat-

ing to the receiving of stolen goods or articles. *State v. Ward*, 49 Conn. 429, 442.

As used in Act 21 & 22 Vict. 100, 105, enacting that every person who shall sell any article on which tolls are imposed, shall forfeit a certain sum, etc., and with a schedule annexed in which a toll was imposed on horses, the word "article" would include horses. *Llandaff & Canton District Market Co. v. Lyndon*, 8 C. B. (N. S.) 515, 523.

#### Money.

"Articles," as used in Bankr. Act 1897 (14 Stat. 522) § 14, providing for the setting apart to the bankrupt in addition to certain things of other articles and necessities to a certain amount, cannot be construed to include money, unless such money is the proceeds of specific things which ought to be set apart under the head of articles. In re *Welch* (U. S.) 29 Fed. Cas. 605.

#### Timber.

A municipal ordinance forbidding any person to incumber any street, etc., by placing thereon any building materials or any article or things whatsoever, will be construed to include a flagstaff. *Dreher v. Yates*, 43 N. J. Law (14 Vroom) 473, 477.

Laws 1883, c. 183, authorizing any corporation under its terms to appoint one or more persons to examine weights, scales, and measures to weigh, gauge, or inspect flour, produce, provisions, liquor, lumber, or any other article of produce or traffic commonly dealt in by the members of such corporation, will be construed to include floating logs; and hence the statute authorizes the appointment of persons to measure such logs. *State v. Lumbermen's Board of Exchange*, 23 N. W. 838, 839, 33 Minn. 468, 471.

#### Trunk.

The term "article," as used in a contract limiting the liability of the carrier to an amount not exceeding \$100 on any article, does not mean a trunk or piece of baggage, and its entire contents, in gross, but means any article contained in a piece of baggage. *Carter v. Wilmington & W. R. Co.*, 36 S. E. 14, 15, 126 N. C. 437; *Hopkins v. Westcott* (U. S.) 12 Fed. Cas. 495, 496.

#### Vessels.

"Articles," as used in Tariff Act Oct. 1, 1890 (26 Stat. 567), requiring duties to be levied on all articles imported from foreign countries and mentioned in schedules therein contained, does not include a pleasure yacht. While a vessel is an article of personal property as distinguished from real estate, it is not an article as the word is ordinarily used. *The Conqueror*, 17 Sup. Ct. 510, 512, 166 U. S. 110, 41 L. Ed. 937.

A provision of the federal constitution that no tax or duty shall be laid on articles

exported from any state does not apply to the imposition of taxes on foreign vessels engaged in export trade. *Aguirre v. Maxwell* (U. S.) 1 Fed. Cas. 212, 213.

#### Article of commerce and trade.

What is an article of commerce is determined by the usages of the commercial world, and does not depend upon the declaration of any state. *Bowman v. Chicago & N. W. R. Co.*, 8 Sup. Ct. 689, 698, 125 U. S. 465, 31 L. Ed. 700.

"Articles of trade and commerce," as used in Act March 7, 1846 (P. L. 78), authorizing the councils of the city of Pittsburgh to levy and assess an annual tax on goods, wares, and merchandise, and on all articles of trade and commerce sold in the city, including sales at auction or otherwise, should be construed to include butcher's meat sold by one who slaughters his own cattle and sells the fresh meat derived therefrom at a stall in the market in the city, for the use of which stall he pays an annual rental to the city. *City of Pittsburgh v. Kalchthaler*, 7 Atl. 921, 922, 114 Pa. 547.

Natural gas, when brought to the surface and placed in pipes for transportation, is an "article of commerce" as much as iron, ore, coal, petroleum, or any other of the like products of the earth. It is a commodity which may be transported, an article which may be bought and sold in the markets of the country. *State v. Indiana & Ohio Oil, Gas & Mining Co.*, 120 Ind. 575, 577, 22 N. E. 778, 6 L. R. A. 579.

#### Article of domestic or family use.

A will giving to a certain person all testator's plate, family jewelry, trinkets, and ornaments of the person, and all his furniture and other "articles of domestic use or ornament," should be construed to include books, for if they are used they are articles of domestic use, and if they are not used they are articles of domestic ornament. *Cornwall v. Cornwall*, 12 Sim. 298, 303.

Rev. Code, § 2376, providing that the wife's estate should be liable only on contracts for "articles of comfort and support of the household," suitable to the degree and condition in life of the family and for which the husband would be responsible at common law, does not apply to debts contracted by the husband for family supplies, and for materials for the improvement and benefit of the wife's estate. *Lee v. Sims*, 65 Ala. 248, 253.

The word "articles" within a statute making the separate estate of a wife liable for articles necessary for a family includes professional services of a physician and medicines furnished by him to the family. *May v. Smith*, 48 Ala. 483, 490.

"Article for family use" properly means articles for use or consumption in the family, and the phrase is not broad enough to include a watch ordinarily carried about the person of one member of the family. *Gooch v. Gooch*, 33 Me. 535.

#### Article of food or provision.

The act of July 6, 1812, provides that if any citizen of the United States or person inhabiting the same shall transport or attempt to transport over land or otherwise, in any wagon, cart, sleigh, boat, or otherwise, naval or military stores, arms, or munitions of war, or any articles of provision from the United States to Canada, etc., the thing by which the articles are transported together with the articles themselves shall be forfeited, and the person aiding or privy to the same shall forfeit a certain sum and be guilty of a misdemeanor. Held, that the act should be construed to include living fat oxen, they being articles of provision within the true intent and meaning of the act. *United States v. Sheldon*, 23 U. S. (10 Wheat.) 119, 120, 4 L. Ed. 199.

The term "articles of food" in the by-law of October 6, 1802, making it unlawful for any person to buy up any provision or article of food coming to market, does not include rye chop, which is a food for horses only. *Botelor v. Washington* (U. S.) 3 Fed. Cas. 962.

Rye chop, which is a food for horses, is not an "article of food" within a law making it unlawful to buy up any provision or article of food coming to market. *Botelor v. Washington* (U. S.) 3 Fed. Cas. 962.

#### Article of which gas is component part.

The phrase, "article of which compressed gas forms a component part," in Pen. Code, § 389, as amended by Laws 1900, c. 494, prohibiting the manufacture of compressed gas in a tenement or dwelling house, or of any article of which such gas forms a component part, includes the manufacture of soda water. *People v. Lichtman*, 72 N. Y. Supp. 511, 512, 65 App. Div. 76.

#### Article of glass.

"Articles of glass cut, engraved, painted, or colored," as used in Tariff Act March 8, 1883, do not include merchandise consisting of glass disks of various colors and sizes colored and cut in imitation of precious stones. *United States v. Popper* (U. S.) 66 Fed. 51, 52, 13 C. C. A. 825.

#### Article of iron.

The manufactures, articles, or wares not specifically enumerated, composed wholly or in part of iron and steel, etc., in Tariff Act 1883, fixing a duty thereon, includes iron and steel wire hair pins, which are not dutiable as pins, solid head and others, as the latter



class of pins have been distinguished in former tariff acts from hair pins. *Robertson v. Rosenthal*, 10 Sup. Ct. 120, 121, 132 U. S. 460, 33 L. Ed. 392.

#### Article of lace.

Lace aprons are dutiable as articles of wearing apparel under Tariff Act 1890, par. 349, and not as articles made wholly or in part of lace under par. 373. In *re Boyd* (U. S.) 55 Fed. 599, 600, 5 C. C. A. 223.

#### Article of manufacture.

St. 5 & 6 Vict. c. 100, requiring that every "article of manufacture" containing the designs described by registration shall contain certain marks as a caution to the public that the design has been registered, did not fix any limit to the size of the article put forth for trade, and anything so put forth was equally an article of manufacture whether manufactured and sold as a pattern or for actual use, and could not be construed to mean only such articles as were the subjects of sale and not the patterns thereof. *Heywood v. Poetter*, 1 El. & Bl. 439, 447.

"Articles of gold and silver manufacture," as used in Laws 1864, c. 318, which provides that no innkeeper in this state who shall constantly have in his inn an iron safe in good order, and suitable for the safe custody of money, jewelry, and articles of gold and silver manufacture, and who complies with the requirements of this act, shall be liable for the loss of such articles by any guest, includes all articles of gold and silver manufacture which may be in the possession of the guest, whether they are such as are usually worn by a guest on his person or not; hence they would include a watch and chain which is usually worn by a guest. *Stewart v. Parsons*, 24 Wis. 241, 242.

The term "articles of gold manufacture," in a statute providing that no innkeeper who constantly has in an iron safe suitable for the custody of articles of gold and silver manufacture, etc., shall be liable for the loss of any such article by any guest, etc., includes a watch and chain. *Lang v. Arcade Hotel Co.*, 9 Ohio Dec. 372, 376.

#### Article of measurement.

"Articles of measurement," as used in a charter of the railroad company providing that for the transportation of goods, produce, merchandise, and other articles it should not charge more than 50 cents per 100 pounds for each 100 miles on heavy articles, and 15 cents per cubic foot on articles of measurement, cannot be construed as a matter of law to include cotton packed in bales in the manner used for the purpose of transportation, but it must be determined by the custom or usage prevailing among carriers at the date of the charter. *Bonham v. Charlotte, C. & A. R. Co.*, 13 S. C. 267, 276.

#### Article of merchandise.

The expression, "article of merchandise," as used in title 11 of the Penal Code, signifies any goods, wares, work of art, commodity, compound, mixture, or other preparation or thing which may be lawfully kept or offered for sale. Pen. Code N. Y. 1903, § 365.

#### Article of personal use and ornament.

A will giving to testator's widow all his clothing, household and kitchen furniture, linen, china, plate, plated ware, jewelry, pictures, engravings, books, bric-a-brac, and "articles of personal use and ornament," cannot be construed to include a yacht, but were meant to embrace articles of personal use and ornament in the house like unto those enumerated. In *re Parry's Estate*, 41 Atl. 448, 449, 188 Pa. 33, 49 L. R. A. 444, 68 Am. St. Rep. 847.

St. 1879, c. 133, enacting that the wearing apparel and articles of personal ornament of a married woman, and "articles necessary for her personal use," acquired by gift from her husband, not exceeding \$2,000 in value, shall be and remain her sole and separate property, includes articles the use of which is attended with pleasure and enjoyment, as books, music, or a musical instrument, or which might be used as a means of education or perhaps of obtaining a livelihood, as well as those which minister only to strictly physical comfort. *Hamilton v. Lane*, 138 Mass. 358, 360.

#### Article of wood.

Const. art. 207, releasing from taxation for 20 years the capital, machinery, and other property employed in the manufacture of furniture and other "articles of wood," refers to particular substances or commodities manufactured from lumber by hand, by art or machinery, ready for immediate, convenient, and general use, complete in themselves without further manipulation or work on them, such as shingles, laths, posts, and cross-ties, dressed lumber planed, tongued, and grooved, weatherboards planed, dressed, and ready for general use, moldings, sashes, doors, and blinds, boxes, pickets, and turned stairwork; but not such as planks, joists, sills, etc., which are intended for parts of a particular structure. *Carpenter v. Brusle*, 12 South. 483, 484, 45 La. Ann. 456; *Rosedale Cypress Lumber & Shingle Co. v. Brusle*, 12 South. 484, 485, 45 La. Ann. 459.

"Articles of wood," within the meaning of Const. art. 207, includes shingles, laths, pickets, cross-ties, dressed flooring, molded window cases, dressed and beveled weather boarding, car roofing and car siding cut to any length. *White Castle Lumber & Shingle Co. v. Browne*, 12 South. 485, 45 La. Ann. 454; *Plaquemine Lumber & Implement Co. v. Browne*, 12 South. 485, 486, 45 La. Ann. 459.

"Articles of wood," within the meaning of Const. art. 207, includes shooks, which are pieces of wood cut or sawed into sizes and shapes by means of machinery, to be put together into boxes; but the term does not include paper boxes. *Washburn v. City of New Orleans*, 9 South. 37, 39, 43 La. Ann. 220.

The term "articles of wood," as used in Const. art. 230, cannot be construed to include weather boarding, ceiling, flooring, molding, and other like lumber products needing to be further manipulated, cut, or trimmed to be fitted into place. The readiness for immediate use of an article of wood which has been manufactured has been uniformly held the test of the constitutional exemption from taxation. *Globe Lumber Co. v. Clement*, 34 South. 595, 110 La. 438.

#### Article used in packing.

Under an insurance policy covering a packing house and "articles used in packing," whatever coal was in the yard for the purpose of the packing business, and necessary to be used in it, was covered by the terms of the policy. *Home Ins. Co. of New York v. Favorite*, 46 Ill. 263, 270; *Phoenix Ins. Co. v. Same*, 49 Ill. 259, 261.

#### ARTICLED CLERK.

"Articled clerk" does not prima facie mean an articulated clerk to an attorney. There are other trades and professions to which such a term may be as properly applicable as to the profession of an attorney or solicitor. *Queen v. Reeve*, 4 Q. B. 211, 212.

#### ARTICLES OF INCORPORATION.

The instrument by which a private corporation is formed is called "articles of incorporation." Civ. Code Idaho 1901, § 2088; Civ. Code Mont. 1895, § 402; Civ. Code S. D. 1903, § 404; *People v. Golden Gate Lodge No. 6*, 60 Pac. 865, 866, 128 Cal. 257.

#### ARTICULATE SPEECH.

An application for a patent for a telephone stated that the object was to produce vocal sounds, and it was contended in an action for infringement that "vocal sounds" and "articulate speech" were not convertible terms, either in acoustics or in telegraphy. The court said articulate speech necessarily implies a sound produced by the human voice, and as the patent on its face is for the art of changing the intensity of a continuous current of electricity by the undulations of the air caused by sonorous vibrations, and speech can only be communicated by such vibrations, the transmission of speech in this way must be included in the art. The question is not whether "vocal sounds" and "articulate speech" are used synonymously as scientific terms, but whether the sound of articulate

speech is one of the vocal or other sounds referred to in this claim of the patent. We have no hesitation in saying that it is, and that if the patent can be sustained to the full extent of what is now contended for, it gives to Bell and those who claim under him the exclusive use of his art for that purpose, until the expiration of the statutory term of his patented rights. *Dolbear v. American Bell Tel. Co.*, 8 Sup. Ct. 778, 781, 126 U. S. 1, 31 L. Ed. 863.

#### ARTIFICE.

Any scheme or artifice to defraud, see "Any."

"Artifice" is defined as a subtle or deceptive or any contriving trickery, cunning, strategy, finesse, as lure by artifice, so that its use in the definition of seduction as the act or persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of artifice, persuasions, or wiles which are calculated to have or do have that effect, and which result in her ultimately submitting herself to the sexual intercourse of the person accused, shows that deception is an essential element of the crime of seduction. *State v. Hamann*, 80 N. W. 1064, 1065, 109 Iowa, 646.

If the means used to accomplish a seduction were calculated to overcome the will of a young girl, and were intended to create in her mind an affection for her seducer, and had that effect, and under that influence she yielded her person to him, it constituted an "artifice" within the law. *Hawn v. Banghart*, 39 N. W. 251, 253, 76 Iowa, 683, 14 Am. St. Rep. 201.

"Artifice," as defined by Webster, is a trick or fraud by which a thing desired by a person exercising a fraud is accomplished; thus the representations of a seducer that there was nothing wrong in the act and that no one would ever find it out, which proved false by reason of the woman becoming a mother, were sufficient to constitute an artifice within the seduction laws. *State v. Hemm*, 48 N. W. 971, 974, 82 Iowa, 609.

#### ARTIFICER.

An artificer is one who buys goods to reduce them by his own art and industry into other forms. *Lansdale v. Brashear*, 19 Ky. (3 T. B. Mon.) 330, 335.

A framework knitter working as a weaver of gloves for a subcontractor, in frames provided by him, at an agreed gross price per dozen pairs, was an "artificer," within the meaning of St. 1 & 2 Wm. IV, c. 37, requiring employers to pay artificers in the current coin of the realm. *Chawner v. Cummings*, 8 Q. B. 311, 321.

In construing a statute exempting the tools of a mechanic, who is defined by Dr. Johnson as a manufacturer, an artificer, the court gives Dr. Johnson's definition of an artificer as one by whom anything is made. *Parkerson v. Wightman* (S. C.) 4 Strob. 383, 385.

#### **Contractor.**

"Artificer," as used in Truck Act (St. 1 & 2 Wm. IV) c. 37, prohibiting the payment of artificers in anything other than current coin of the realm, means a person actually engaged in performing labor, and does not apply to persons taking contracts for labor to be done by others, or persons who speculate on the labor market. *Ingram v. Barnes*, 7 El. & Bl. 115, 135; *Sharman v. Sanders*, 18 C. B. 166, 174.

### **ARTIFICIAL**

"Artificial" is defined in one sense as being artful, subtle, crafty, and ingenious, and is so nearly like that of "artifice" that a distinction would be without a difference, and hence its use in an instruction that in order to constitute seduction there must be some artificial or false promise, etc., is not erroneous, though "artificial" has acquired other meanings. *State v. Hamann*, 85 N. W. 614, 113 Iowa, 367.

#### **ARTIFICIAL CAUSE.**

There is an observable distinction between "natural" and "artificial" causes of injury; that is, those resulting in ordinary course from causes beyond human control, and those created by voluntary choice or agency. Thus, if a person is taken sick and dies in his own house he is entitled to appropriate attendance therein and burial therefrom, and no one will be heard to complain, for the consequences are natural, unavoidable, and such as every neighbor must in the nature of things expect and submit to. This is a lawful thing. But where the occupant of a house advertises and invites persons in all parts of the country to send dead bodies to his establishment to be temporarily stored, cut up, artistically confined, and furnished with elaborate funeral outfits, services, hearses, and carriages, human agency, acting in choice, makes a business of other people's misfortunes, and parades death in the presence of the neighbors to their pleasure or discomfort according to the view in which they regard such displays. This is objectionable and illegal. *Rowland v. Miller*, 15 N. Y. Supp. 701, 702.

#### **ARTIFICIAL COLORING MATTER.**

Where in the manufacture of vinegar low wine formed from fermented grain is previously to its acetification passed through roasted malt, not for the purpose of adding any substantial ingredient to the vinegar,

but for the purpose of giving it color as well as aroma and flavor, and without this treatment it would be colorless, the vinegar so produced contains artificial coloring matter within the meaning of 85 Ohio Laws, p. 259, § 2, enacted to prevent the adulteration of vinegar. *Weller v. State*, 40 N. E. 1001, 1002, 53 Ohio St. 77.

#### **ARTIFICIAL FLOWERS.**

"Artificial flowers or parts thereof," as used in Tariff Act Oct. 1, 1890, para. 355, 425, include artificial leaves made to resemble leaves of oak, ivy, currant, etc., and manufactured of colored cotton cloth, metal, and wax, cotton being the component material of chief value. In *re Zeimer* (U. S.) 66 Fed. 740, 741.

#### **ARTIFICIAL FORCE.**

An artificial force is a natural force so transformed in character or energies by human power as to possess new capabilities of action. This transformation of a natural force into a force practically new involves a true inventive act. *Wall v. Leck* (U. S.) 66 Fed. 552, 555, 13 C. C. A. 630 (citing 1 Rob. Pat. §§ 92, 96, 99, 103).

#### **ARTIFICIAL GRAINS.**

Grass piquets consisting of stalks of oats or wheat and grass dyed to imitate their natural color are properly assessed as artificial or ornamental grains and flowers, under Act July 24, 1897, c. 11, § 1. Schedule N, par. 425, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1675]. *Herman & Guinzeberg v. United States* (U. S.) 121 Fed. 201, 202.

#### **ARTIFICIAL PERSONS.**

Artificial persons are such as are created and designed by human laws for the purpose of society and government, which are called corporations or bodies politic. *Chapman v. Brewer*, 62 N. W. 320, 322, 43 Neb. 890, 47 Am. St. Rep. 779 (citing 1 Bl. Comm. 123).

Artificial persons are persons created by law for the purpose of society and government. "The plain and broad distinction between a natural and an artificial person is that while the former may do any act which he is not prohibited by law from doing, the latter can do none which the charter giving it existence does not expressly or by inference to enable it to perform these functions authorize it to do, and when it transcends the limits within which it is confined by its charter these acts are void." *Smith v. Alabama Life Ins. & Trust Co.*, 4 Ala. 553, 568.

#### **ARTIFICIAL PRESUMPTION.**

Artificial presumption is where the existence of the one fact is not direct evidence of the existence of the other, but the one fact

existing and being proved the law raises an artificial presumption of the existence of the other. Thus forbearance to enforce a pecuniary demand for 20 years is not direct evidence that the money has been paid, but on the fact of forbearance the law raises a presumption that the demand has been satisfied, since it wisely supposes a man will sooner recover and enjoy what belongs or is due to him unless prevented by some impediment. The law gives to the evidence a technical efficacy beyond its simple and natural force and operation. *Gulick v. Loder*, 18 N. J. Law (1 J. S. Green) 68, 72, 23 Am. Dec. 711.

### ARTIFICIAL ROADS.

In an act prohibiting a street railway company from using "artificial roads," it is manifest that the term expressed more than was expressed in the act by the words railroads and turnpikes. Nothing else than graded and paved streets seem to meet the description, unless it be plank roads, and if such alone were intended it would have been natural to have named them with railroads and turnpikes, rather than to have used the more comprehensive term. *Commonwealth v. Central Pass. Ry.*, 52 Pa. (2 P. F. Smith) 506, 516.

### ARTIFICIAL SUCCESSION.

Artificial succession is the succession between predecessors and successors in a corporation aggregate or sole. *Thomas v. Dakin* (N. Y.) 22 Wend. 9, 100.

### ARTIFICIAL WANTS.

The distinction between natural and artificial wants, to satisfy which water is used, seems to be derived from a distinction which has sometimes been designated as a difference between the use of water for ordinary and extraordinary purposes. The real difference here pointed out between the classes of uses is that, as is assumed, water of a stream may be used for ordinary purposes, without regard to the effects of such use, in case of deficiency below, while with reference to extraordinary uses the effects on those below must always be considered in determining its reasonableness. *Lux v. Haggin*, 10 Pac. 674, 762, 69 Cal. 255.

### ARTIFICIAL WATER COURSE.

A water pipe through which water is conducted from a reservoir to a mill is an "artificial water course." *Standard v. Round Valley Water Co.*, 19 Pac. 689, 690, 77 Cal. 399.

### ARTISAN.

Laws 1897, c. 418, § 70, entitled "Artisan's lien on personal property," and pro-

viding that one who makes, alters, or repairs personal property at the request or consent of the owner shall have a lien on such article, refers to skilled labor, and not to common labor, as cutting, skidding, and drawing logs, since "artisan" signifies one skilled in some kind of mechanical craft. *O'Clair v. Hale*, 54 N. Y. Supp. 386, 387, 25 Misc. Rep. 31.

The term "artisan, builder, and mechanic," in Gould's Dig. c. 112, § 1, giving a mechanic's lien to all artisans, builders, and mechanics of every description who shall perform any work and labor on any building, edifice, or tenement, does not include one selling lumber to be used in the construction of a dwelling house. *Duncan v. Batesman*, 28 Ark. 327, 328, 79 Am. Dec. 109.

The term "artisan, mechanic, or tradesman," in the statute giving a lien to any mechanic, artisan, or tradesman on any article of value altered or repaired by him, includes a civil engineer, and he is entitled to a lien on field notes, maps, charts, and drawings made by him. *Amazon Irr. Co. v. Briesen*, 41 Pac. 1116, 1119, 1 Kan. App. 758.

### ARTIST.

See "Professional Artist."

"Artist," as used in Act Feb. 26, 1885, c. 164, 23 Stat. 333 [U. S. Comp. St. 1901, p. 1290], prohibiting the immigration of aliens under contract to perform labor and exempting from the operation of the statute professional artists, etc., does not include milliners, dressmakers, tailors, cooks, and barbers. In this connection the word "artist" should be taken in its popular sense, as meaning a person skilled in the fine arts. *United States v. Thompson* (U. S.) 41 Fed. 28, 29.

A daguerreotypist or ambrotypist is rather an artisan than an artist. His labor is more manual than mental. He works more by rule than under the inspiration of genius. The process by which he accomplishes his undertaking is mainly mechanical, and success in his vocation demands, not creative power, but dexterity, contrivance, and the skillful application of fixed rules. He follows an art, but not one of the fine arts, and he alone is an artist in the appropriate sense of the word who professes and practices one of the latter. *Barnes v. Ingalls*, 39 Ala. 193, 201.

### ARTISTS' COLORS.

"Artists' colors," within Act Oct 1, 1890, par. 61, imposing a duty on artists' colors of all kinds, are such colors as are named in paragraphs 50-60 inclusive (paint and color schedule), when of a fine grade and specially prepared and put up for the use of artists. *Rich v. United States* (U. S.) 61 Fed. 501.

**AS.**

"As they now lie," as used in a bill of sale of all the boats, canoes, sails, oars, paddles, fittings, and fixtures of every kind as they now lie at Winter Harbor, refer to quality or condition rather than to quantity and number. *Neal v. Flint*, 33 Atl. 609, 673, 88 Me. 72.

**As near as.**

"The phrase 'as this plaintiff is able to determine,' in an affidavit in attachment stating indebtedness at a sum ascertained as near as may be and as this plaintiff is able to determine, means as near as this plaintiff is able to determine. Such an affidavit is sufficient, though the statute requires that the amount of indebtedness be stated as near as may be." *Hawes v. Clement*, 25 N. W. 21, 23, 64 Wis. 152.

**As being or is.**

When used in an indictment charging that the defendant as the commissioner of city works entered into a conspiracy, "as" will be regarded as used in the sense of being, so that the charge in substance is that he entered into the conspiracy while he was commissioner of city works, and hence the indictment is not defective. *People v. Willis*, 54 N. Y. Supp. 642, 647, 34 App. Div. 203.

Under an instrument providing that a gift shall take effect at the maker's death, "until then the property to remain as my own," the word "as" is the qualifying word, and shows that the donor did not intend to hold the property absolutely up to the period to which he had postponed the enjoyment of the interest he had given, and until the death of the donor the property was to remain, not his own, but as his own. *Elmore v. Mustin*, 28 Ala. 309, 313.

The word "as" means "like," it does not mean the thing itself, but something like it; and hence an averment that a draft drawn and sold and a requisition obtained as false pretenses does not constitute an averment that the letters, draft, and requisition were false pretenses. *United States v. Watkins* (U. S.) 28 Fed. Cas. 419, 428.

An allegation that defendant "as a regular practicing physician" gave a prescription is not a sufficient allegation that the defendant was a regular practicing physician or was a physician at all. It is indirect and inferential, and was not sufficient to support an indictment under Pen. Code, art. 405, which prohibits any physician giving a prescription to one not actually sick and without making a personal examination; the word "as" not being in effect "is." *McQuerry v. State*, 51 S. W. 247, 248, 40 Tex. Cr. R. 571.

The use of the words "as the property," in a return on an execution reciting the levy

on certain real property as the property of a certain person, is to be construed as showing a levy on the entire estate which such person owns in the property. *Longworthy v. Featherston*, 65 Ga. 165, 166.

As used in a will bequeathing to testator's wife a third of the remainder of his real and personal estate, "as and for her right of dower" during her life, should be construed to mean the whole right which she should have or be entitled to on his death. *Steele v. Fisher* (N. Y.) 1 Edw. Ch. 435, 437.

**As for the purpose.**

Code, § 1020, provides that every estate in land is to be taken as a fee simple, though the words necessary to create a fee are not used, unless it appears that a similar estate was intended. Section 1048 declares that where an absolute power of disposition was given, not accompanied by a trust, and no remainder is limited on the donee's estate, he is entitled to a fee. Section 1049 recites that a power of disposition is deemed absolute if the donee is enabled in his lifetime to dispose of the fee for his own benefit. A will bequeathed to testatrix's husband her residence "as a home" with power to sell and convey the same at his discretion. Held, that the phrase "as a home" did not operate to limit the interest given to him to a life estate. *Smith v. Phillips*, 30 South. 872, 873, 131 Ala. 629.

In order that any pistol should be concealed as a weapon within the meaning of a statute making it a misdemeanor to wear any pistol concealed as a weapon, it must be carried for the purpose of having it convenient for use in fight. *Carr v. State*, 34 Ark. 448, 450, 36 Am. Rep. 15; *Lemmons v. State*, 20 S. W. 404, 405, 56 Ark. 559.

The owners of land leased to a club all their grant in a certain section for and during the existence of the club, with the clause whenever said club shall cease to exist as now organized this lease shall be determined and cease. Held, that the words "as now organized," as so used, referred to the purpose of organization of the club and not to its mode of organization, and, therefore, the fact that the club became incorporated, the corporation taking the property and assuming the debts of the club as it had previously existed, did not work a forfeiture of the lease. *Alexander v. Tolleston Club of Chicago*, 110 Ill. 65.

**As in the character of.**

"As," when preceding a word indicating representative character, such for instance as agent, trustee, etc., means "in the character of." *Hayes v. Crane*, 50 N. W. 925, 48 Minn. 39.

Covenant that the grantor would warrant and defend the premises as executors are bound by law to do will be held to mean that

the grantor only warranted the title in so far as executors could do so by law, and that he did not mean to bind himself personally. *Glenn v. Allison*, 58 Md. 527, 530; *Day v. Brown*, 2 Ohio (2 Ham.) 345, 348; *Thayer v. Wendell* (U. S.) 23 Fed. Cas. 905.

One binding himself on a note "as principal" renounces the character of surety with the privileges attached thereto. *McMillan v. Parkell*, 64 Mo. 286, 288.

Where, in an action to recover goods held by defendant as trustee for the benefit of creditors, it was adjudged that plaintiffs recover of the defendant "as trustee" the costs incurred by them, the quoted words are only descriptive of the capacity in which the defendant received the goods for which he was sued, but have no legal effect upon the judgment, and may be construed as surplusage. *Sass v. Hirschfield*, 56 S. W. 941, 942, 23 Tex. Civ. App. 396.

Rev. St. U. S. § 4281 [U. S. Comp. St. 1901, p. 2942], providing that if any shipper of certain articles which are specifically named, and among which are pictures, shall lade them as freight or baggage on any vessel without at the time giving notice to its owner, master, or agent of the true character and value of the property shipped, and having the same entered upon the bill of lading, the master and owner of such ship or vessel shall not be liable as carriers thereof in any form or manner, cannot be construed as relieving the carrier from all liability for loss, but only relieves him from his liability as carrier, and not as bailee of the goods. It relieves him from his liability only as an insurer, and not as an ordinary bailee. "Liable as carrier" can only mean the liability attached by law to that public employment. *Wheeler v. Oceanic Steam Nav. Co.*, 26 N. E. 248, 125 N. Y. 155, 21 Am. St. Rep. 729.

In a will giving property to a wife, for her benefit during her natural life, as trustee for testator's children, the words "as trustee for testator's children" were not intended to restrict the beneficial use of the property to the children during the widow's lifetime, but that the widow was to have the beneficial use of the property for life when at the same time holding it in trust for the children who were to be entitled to it at her death. *Fisher v. Fisher*, 2 Atl. 608, 41 N. J. Eq. (14 Stew.) 16.

A written undertaking given by the solicitor of the assignee of a bankrupt tenant on whose lands a distress had been put by the landlord, conditioned that "we, as solicitors to the assignees, undertake," etc., bound those who personally signed it; the term "as solicitors" being merely descriptive of the character which they fill and which induced them to undertake. *Burrell v. Jones*, 3 Barn. & Ald. 47.

A will in which the testator gave to his widow an estate for life in all his property, real and personal, the wife being named as executrix of the will, and testator providing that, if the executrix should find it necessary or if she should see fit to dispose of any part or all of the estate, she should have power as executrix to sell and dispose of it, implies a fiduciary disposition of the proceeds realized from the sales inherent in the office by virtue of which she was to exercise the power; but she is not thereby authorized to sell and dispose of the testator's property for her own use. *Pratt v. Douglas*, 38 N. J. Eq. (11 Stew.) 516, 534 (cited and approved in *Stevens v. Flower*, 19 Atl. 777, 779, 46 N. J. Eq. [1 Dick.] 340).

The words "as such," in Rev. St. art. 2248, providing that in any actions by and against executors, administrators, or guardians in which judgment may be rendered for or against them as such neither party shall be allowed to testify, etc., limited the application of the law to those cases in which judgment could be rendered for or against the guardian in his representative capacity, that is to say, a judgment which is in effect a judgment in favor of or against his ward, and which does not affect him personally. *Jones v. Parker*, 3 S. W. 222, 225, 67 Tex. 76.

#### As in same or like manner.

The word "as" is defined in the last edition of Webster's Dictionary as follows: "Like; similar to; of the same kind; in the same manner; in the manner in which." This is obviously the ordinary import of the word in a bill of lading restricting the carrier's liability "except as forwarder." The carrier's liability was to be "similar to that of forwarders," or "of the same kind." They were liable in the same manner, or in the manner in which forwarders are liable. *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11, 30, 85 Am. Dec. 211.

Const. 1895, art. 5, § 25, provided that each of the justices of the Supreme Court and the judges of the circuit court should have the same power at chambers to issue writs of habeas corpus, etc., as when in open court. It was held that the phrase "as when in open court" meant that each of the justices and judges mentioned should have the same power at chambers to issue the writ specified as all of the judges might issue when in open court. *Salinas v. C. Aultman & Co.*, 27 S. E. 385, 387, 49 S. C. 325 (quoted and approved in *La Motte v. Smith*, 27 S. E. 933, 934, 50 S. E. 558).

1 Rev. St. 1876, pp. 142, 147, providing that in voluntary assignments no party aggrieved shall be deprived from having an appeal as in other civil actions, do not give the appeal of itself, but merely provide that nothing in the act contained shall prevent the appeal as

in other civil actions, and, therefore, whether the appeal lies depends on whether in civil actions the appeal lies in the case. *Cravens v. Chambers*, 55 Ind. 5, 6.

2 Rev. St. p. 176, § 635, providing that in sales in cases of foreclosure a copy of the order of sale and judgment shall be issued, etc., to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and cost as upon execution, means that the law regulating sales on execution should apply to, in all respects, sales under a decree of foreclosure of a mortgage, and sale of the rents and profits is authorized thereby. *Brownfield v. Welch*, 9 Ind. 394, 396.

An agreement by B. to sell certain leases and good will in trade, as he holds the same, for the term of 28 years, held to be construed as meaning that the vendee is to purchase the leases without inquiring into the title of the lessor. *Spratt v. Jeffery*, 10 Barn. & C. 249, 258.

Civ. Code, § 230, providing that the father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such into his family, and otherwise "treating it as a legitimate child," thereby adopts it as such, means the treating of such child by its father as he would naturally treat his legitimate child, not as the majority of men in his financial circumstances would or should treat their children. Every man furnishes the rule by which he must be measured. No imaginary standard of excellence can be created. *Blythe v. Ayres*, 31 Pac. 915, 916, 96 Cal. 532, 19 L. R. A. 40.

The words "as if," and the words "in the same manner as if," mean exactly the same. *Suydam v. Voorhees* (N. J.) 43 Atl. 4, 6.

Code 1886, § 2590, providing that, when a personal injury is received by a servant or employé in the service of the master, the master is liable to answer in damages as if he were a stranger not engaged in such service or employment, literally interpreted would mean that the employé stood in the same position as a trespasser or a mere licensee, but it is apparent that such is not the intention, and the words must be construed only as protecting the employé against the special defense growing out of and incident to the relation of employer and employé, and as taking from the employer such special defenses, and leaving to him all the defenses, which he has by the common law against one of the public not a trespasser nor a mere licensee. *Mobile & B. Ry. Co. v. Holborn* (Ala.) 4 South. 136, 147.

The words "as if feme sole," when unrestricted by the context, have been quite uniformly considered by the courts, in construing statutes relating to married women, as giving the largest possible power, and practically emancipating the wife from contractual

limitations imposed upon her as a married woman with respect to the subject-matters of the act. In *Real Estate Inv. Co. v. Roop*, 19 Atl. 278, 132 Pa. 496, 7 L. R. A. 211, the Chief Justice specifically names these words as the proper ones for the Legislature to use if a limited power were intended to be given. And he says, "If, however, it was intended to confer this broad power, and place a married woman on the same plane as a feme sole, it could have been done in a few lines, declaring that hereafter a feme covert should have the same power to contract debts as a feme sole." Under Act April 9, 1873, § 9, as amended by Act April 27, 1879, providing that a married woman above the age of 21 years may give bond with or without warrant of attorney just "as if \* \* \* feme sole," a married woman may execute a bond to secure a debt not her own. *Warder, Bushnell & Glessner Co. v. Stewart* (Del.) 86 Atl. 88, 2 Marv. 275.

Where a corporation which is bound by its charter to keep certain roads and bridges in repair enters into an agreement with the state for the exchange of certain lands, and the agreement provides that until such exchange the corporation shall remain bound as now to keep the roads and bridges in repair, the phrase "bound as now" embraces no new obligation nor furnishes any new remedy, but is a mere statement of the obligation of the corporation, and hence no action lies on such contract against the corporation for failure to keep a bridge in repair. *Commonwealth v. Boston & Roxbury Mill Corp.*, 90 Mass. (8 Allen) 296, 297.

A constitutional provision that in order that no inconvenience may arise from the change from a territorial to a state government all suits, actions, etc., contracts, and claims shall continue as if no change had taken place, does not guaranty the same means of enforcing a judgment as that had before the Constitution, but its object was merely to save all contracts, judgments, etc., so far as the right to enforce them was concerned, leaving the means of enforcing and carrying them out subject to such changes as the adoption of the Constitution or the Legislature under it might make, and hence it does not exempt a judgment rendered prior to the Constitution from the operation of the homestead exemption clause therein. *Cusic v. Douglas*, 3 Kan. 123, 128, 87 Am. Dec. 458.

A will in which testator declared that his whole estate after his wife's death should be divided among his heirs or next of kin as though he had died intestate and unmarried should be construed as meaning that his estate should go as personalty to his next of kin under the intestate laws. *Appeal of Perot*, 102 Pa. 235, 244.

The word "as," in Laws 1876, c. 18, giving the police justice of Troy, appointed thereunder, the same powers as courts of spe-

cial sessions in towns, and further providing that they, as such courts of sessions, shall have jurisdiction of offenses of the grade of misdemeanors, is construed to mean "in like manner." *People v. Elliott* (N. Y.) 12 Hun, 364, 365.

The word "as," employed in a statute in the phrase "excepting proceedings as for contempt to enforce civil remedies," was manifestly used in what Lord Coke calls a similitudinary sense, to show that, while the proceedings referred to resembled proceedings for contempt, they are not the same thing, nil simile est idem. In *re Bolton's Estate* (Pa.) 13 Phila. 340, 346.

"As," as used in an indictment charging that certain letters and drafts were written, sent, drawn, and sold, and caused and procured to be issued without any authority therefor, and not for or on account of a public service, but for private gain and benefit of a certain person, and with intent to defraud the United States, and as false pretenses to enable him to obtain for his own use and benefit the same represented, thereby means like, not the thing itself, but something like it. *United States v. Watkins* (U. S.) 28 Fed. Cas. 419, 428.

#### As it, that, or which.

A statute prohibited the use of any instrument or the giving of any drug for the purpose of procuring an abortion, unless the same were done as necessary for the preservation of the mother's life. Held, that the word "as," used in this connection, is synonymous with "it." The court says: "Philologists give to 'as,' when used in the English language, where the context seems to require it, the same meaning as 'it' or 'that' or 'which.'" Thus the statute might be read, "unless the same were done, it were necessary," etc. *Beasley v. People*, 89 Ill. 571, 577.

In a complaint in an action for damages alleging that defendant refused and neglected to cut plaintiff's wheat as defendant had agreed and contracted, the word "as" cannot be construed to mean that the work was not performed in the manner agreed and contracted, in other words, was not well done, but means that the defendant did not cut the wheat at all. Worcester, in his dictionary, in a note to the word "as," remarks, "'as' sometimes takes the place of a relative pronoun, and is equivalent to 'who' or 'which,'" and this quality may properly be given to it in the connection in which it here used. So understood the allegation in effect is that such defendant refused and neglected to cut plaintiff's wheat which defendant had agreed and contracted to do. *Kelley v. Peterson*, 2 N. W. 346, 347, 9 Neb. 76.

#### As when, importing a contingency.

"As" is sometimes used for "when," and will be so construed when used in a mortgage

on crops securing advances as evidenced by book account or note. *Finance Co. of Iowa v. Anderson*, 76 N. W. 748, 749, 106 Iowa, 429.

A devise to certain children "as" they arrive at the age of 21 means "when" they arrive at such age. *Appeal of Seibert*, 13 Pa. (1 Harris) 501, 504.

A representation that a building was occupied as a storehouse, made to secure insurance, necessarily imports that the building is not occupied for any other purpose. *Wall v. East River Mut. Ins. Co.*, 7 N. Y. (3 Seld.) 370, 373.

A provision in a will ordering the executor to place a sum of money at interest sufficient to pay a certain sum to certain children as they severally arrived at age gave a vested right, notwithstanding the word "as" in such connection ordinarily imports a contingency. *Fisher v. Johnson*, 38 N. J. Eq. (1 Stew.) 46, 47.

Where a legacy is given to a person as he arrives at a certain age, and there is no other controlling evidence of intention, the word "as" is to be construed as meaning that the legacy is contingent. *Colt v. Hubbard*, 33 Conn. 281, 286.

#### AS A BEVERAGE.

See "Beverage."

#### AS AFORESAID.

Aforesaid equivalent, see "Aforesaid."

Const. art. 3, specified the residence in election districts necessary for voters, and a subsequent paragraph, relating to qualified voters removing out of the state and after returning, required an election in the election district as aforesaid. Held, that the words "as aforesaid" as so used referred to the former provision, and required a similar residence in the election district by former residence on their return to the district. *Fry's Election Case*, 71 Pa. (21 P. F. Smith) 302, 306, 10 Am. Rep. 698.

"As aforesaid," as used in a will relating to property devised and bequeathed as aforesaid, could only apply to previous clauses of the will, and it could not by implication be extended to subsequent provisions in a codicil. *Roberts v. Wills*, 20 N. J. Law (Spencer) 591, 598.

Testator gave to his wife all his personal estate, together with the premises in question for life. The will also recited: "I give, devise, and bequeath unto my only child A., now the wife of B., and to her heirs lawfully upon her body begotten, and assigns, forever, after the decease of my said wife, all my whole estate, both real and personal, which said estate, both real and personal, as aforesaid, I do hereby devise and bequeath unto my said daughter A. and to her heirs and



assigns as aforesaid after the decease of my said wife as aforesaid, exclusive of her said husband B., whom for certain reasons I do hereby exclude and forever debar of inheriting any part of my said estate." It was contended that the intention of the testator was to convey to his daughter the fee, on the ground that the words "as aforesaid" in the latter clause of the devise referred to and were substituted for the word "forever" in the first clause, so that it should be read, "which said estate I devise and bequeath to my said daughter A., her heirs and assigns, forever." Held, that while this construction and argument was ingenious, it was not sound, for instead of introducing a new devise in the will, the testator only recited the one already made for the purpose of coupling it with an exclusion of the husband, so that the words "as aforesaid" refer to and stand for the particular description of heirs before mentioned, and do not refer exclusively to the word "forever." *Doremus v. Zabriskie*, 15 N. J. Law (3 J. S. Green) 404, 411.

The words "as aforesaid," in Act March 24, 1835, c. 195, providing that any person may be arrested on mesne process on any contract, etc., and held to bail or committed to prison, etc., provided any creditor, his agent, or attorney shall make oath that he has reason to believe and does believe that such debtor is about to depart and take with him property or means as aforesaid, decidedly indicate that it is necessary to allege in the oath the fact of good reason to believe and the belief that the person to be arrested is about to depart, etc. *Whiting v. Trafton*, 16 Me. (4 Shep.) 398, 401.

#### As connecting clauses.

Certain tenements were devised to H. by name for her life, provided that S. and A., to whom and to whose children the reversion and inheritance of the premises were intended if H. should die without issue, should give H. £1,000 for life, then the testator devised all and singular the said estate and premises called, etc., to S. and A. for their lives, share and share alike, and on the death of either, their moiety unto and among the children of the survivor and their heirs as tenants in common, provided that if H. should die in possession of the premises, single and without issue, then he gave said estate to S. and A. and to the issue of their bodies lawfully begotten, and to their heirs and tenants in common as aforesaid. Held, that the words "as aforesaid" as they are used drew down to the second clause the limitations of the first, and showed that the testator meant that S. and A. and their children should take the same estate on H. dying in possession without issue as they would have done if the £1,000 had been paid. *Meredith v. Meredith*, 10 East, 503, 509.

In a will the expression "lawful issue as aforesaid" shows the intention of the testator that the general word "issue" should be qualified by attaching to it a meaning previously mentioned in the instrument; so that where the only previous meaning of "issue" was that of the children of testator's wife, the expression "lawful issue as aforesaid" should be construed to mean "children." *Walker v. Petchell*, 1 C. B. 651, 661.

"As aforesaid," as used in Sess. Laws 1891, p. 33, as amended by Sess. Laws 1893, p. 145, making it unlawful to catch salmon between 6 o'clock Saturday night and 6 o'clock Sunday night in any of the streams of the state between August 10th and September 10th, and making it unlawful to have in one's possession salmon which may have been caught as aforesaid, does not relate to the streams, but to the time and manner of taking the fish from them. "As" qualifies caught, making the sentence read by transposition, "caught as aforesaid in any of the streams," and means fish caught during the closed season aforesaid in any of the streams. *State v. McGuire*, 33 Pac. 666, 670, 24 Or. 366, 21 L. R. A. 478.

When used in a pleading alleging that after the execution by the defendant of the said deed of settlement, "as aforesaid" must be construed to refer to that which is necessary to make the defendant a party to the instrument; that is, that he not only sealed and delivered it, but that he also signed it. *Wills v. Sutherland*, 4 Exch. 211, 218.

#### AS BEST HE CAN.

See "Best He Can."

#### AS COLLATERAL.

The phrase "as collateral," as used in a letter wherein the writer promised to forward mortgaged notes as collateral, has a well known and unmistakable meaning, and is utterly inapt as descriptive of a mere accommodation lending. *Meyer v. Moss (La.)* 34 South. 332, 336.

#### AS CONVENIENT.

See "Convenience—Convenient."

#### AS THE CROW FLIES.

The phrase "as the crow flies" is a popular and picturesque expression to denote a straight line, which is the proper mode of measuring the distance from one given point to another. *Stokes v. Grissell*, 78 Eng. Com. Law, 678, 689.

#### AS CUSTOMARY.

A marine insurance policy, providing that the cargo was to be received and delivered at

ports of loading and discharging as customary, refers to the manner of receiving and delivering the cargo, and has no reference to a delay occasioned by the wharf at which the insured vessel was to unload being occupied by another vessel, or to a delay in consequence of a lack of teams to take the cargo away. *Davis v. Wallace* (U. S.) 7 Fed. Cas. 182, 185.

#### AS EARLY AS CONVENIENT.

See "Convenience—Convenient."

#### AS FAR AS.

A contract by the owners of a steamboat to tow a canal boat up a river "as far as the ice would permit" did not mean that they should take up the boat if it was physically possible, but required the steamboat to tow the canal boat as far as possible without imminent hazard from the ice. *Vanderslice v. Newton*, 4 N. Y. (4 Comst.) 130, 131.

#### AS FAST AS.

A contract of sale of certain barrels of whisky, one of the provisions of which was that 25 barrels be shipped by each steamer from P., "or as fast as that," imports an option on the part of the shippers as to the number they will ship at each time. *Peck v. Waters*, 104 Mass. 345, 350.

A charter party stipulating that the ship should be discharged "as fast as custom of the port will admit," and demurrage to be charged after the expiration of ten days, does not mean the time when the discharge of the vessel is to be begun, but means the process of discharging her. If there should be any special custom at the port at which the vessel was to be unloaded by which unloading the vessel would be delayed, the charterer was not to be accountable for it. It has reference to such custom as a custom of a particular port. It is not reasonable to regard the reference as applicable to a custom which is not peculiar to that port, but of general and universal prevalence, and hence as the custom is universal that a vessel seeking a berth to unload has no right to displace another which is in it before her, she must necessarily wait her turn. Such custom was not the one referred to in the charter party. *Futterer v. Abenheim* (Pa.) 10 Phila. 225.

A charter party providing that a ship should discharge her cargo as fast as she can deliver in ordinary working hours means that the delivery should be by every ordinary means at the disposal of the vessel; hence, a delivery from three hatches of a vessel constructed with four hatches was not a compliance with the terms. *Hine v. Perkins* (U. S.) 55 Fed. 998, 998, 5 C. C. A. 377.

The phrase "as fast as she can deliver," in the charter for a ship requiring her to

discharge her cargo as fast as she can deliver, is to be construed as entitling the ship to deliver at her greatest speed, without regard to any custom of the port of delivery. *The Glenfinlas* (U. S.) 48 Fed. 758, 1 C. C. A. 85.

#### AS FOLLOWS.

The use of the words "as follows," in a request to the court to charge the jury in writing and as follows, restricts the request to the written matter which follows, and would not indicate to the judge that he was expected to put the whole charge in writing. *Phillips v. Wilmington & W. R. Co.*, 41 S. E. 805, 806, 130 N. C. 582.

#### AS FULLY AS.

The Pennsylvania act giving to a municipal corporation authority to subscribe for stock in a railway company "as fully as an individual" is to be so construed as to give the city authority to issue its negotiable bonds in payment of the stock. *Selbert v. City of Pittsburgh*, 68 U. S. (1 Wall.) 272, 274, 17 L. Ed. 553.

The statute giving national banks power to sue in any court of law or equity as fully as natural persons must be construed as including all cases in which the court would have jurisdiction if the bank were a natural person. In other words Congress must be supposed to have assumed that these corporations should be regarded for jurisdictional purposes as citizens of the state where located. *St. Louis Nat. Bank v. Allen* (U. S.) 5 Fed. 551, 554.

#### AS GOOD AS.

A charge that another "as good as" stole is not equivalent to a charge of larceny, and therefore not slanderous per se. *Stokes v. Arey*, 53 N. C. (8 Jones, Law) 68, 67.

A bond to convey land by as "good a deed as can be had" means by a deed of general warranty, and is not fulfilled by a deed where two of the grantors, having no other interest than the dower right of one of them, warrant the title only against those claiming under them. *Day v. Burnham*, 11 S. W. 807, 89 Ky. 75.

#### AS HE MAY THINK BEST.

See "Think Best."

#### AS HE MAY THINK PROPER.

See "Think Proper."

#### AS HE SHALL THINK FIT.

See "Think Fit."

**AS HERETOFORE.**

In the provision in the Constitution that judicial power shall be vested in the Court of Errors and Appeals in the last resort in all things "as heretofore," the quoted phrase, if descriptive of the jurisdiction of the court, has no important signification, as the jurisdiction of all constitutional courts, by necessary antecedent, are established as they existed antecedent to the date of the Constitution. *Harris v. Vanderveers' Ex'r*, 21 N. J. Eq. (6 C. E. Green) 424, 428.

**AS HIS INTEREST MAY APPEAR.**

An insurance policy, providing that the loss should be paid to the mortgagee "as his interest may appear," means that the company will pay the mortgagee to the extent of his lien or charge on the premises. *Sias v. Rodger Williams Ins. Co.* (U. S.) 8 Fed. 187, 188; *Franklin Sav. Inst. v. Central Mut. Fire Ins. Co.*, 119 Mass. 240; *Foot v. Hartford Fire & Marine Ins. Co.*, Id. 259, 261.

The words "as their interest may appear," in a mortgage slip attached to a fire policy which makes the policy payable to the mortgagees as their interest may appear, which policy is assigned as collateral to the mortgagee, operate to extend the assignment to any interest subsequently arising and appearing at the time of the loss. *Ware v. Barnard & Leas Mfg. Co.*, 94 Ill. App. 493, 498.

**AS IF.**

The provision of a statute that, if there should be no property on which to levy an execution against a corporation, the stockholders designated in the act would be liable as if the contract had been made by them personally, the words "as if" mean "in the same manner and to the same extent"; that is, just as if the incorporators instead of the corporation had contracted the debt. *New England Commercial Bank v. Stockholders of Newport Steam Factory*, 6 R. I. 154, 187, 75 Am. Dec. 688.

**AS THE LAW DIRECTS.**

Where a testator devised land to his widow for life, remainder to his heirs, to be divided among them "as the law directs" in the case of dying intestate, such term should be construed to mean as the law was at the time of making the will, and not as it might be at the death of the tenant for life, and as by such limitation the estate may be given to persons who may not be the testator's heirs at law at the death of the life tenant, or in shares different from those prescribed by law at that time, such provision prevents the application of the rule in *Shelley's Case*. *Quick's Ex'r v. Quick*, 21 N. J. Eq. (6 C. E. Green) 13, 18.

**AS LIMITED BY LAW.**

See "Limited by Law."

**AS LONG AS.****As long as she keeps my name.**

A devise of property to testator's wife for her own use as long as she keeps my name is plainly a gift during widowhood, and therefore passes an estate for life, determinable on her second marriage. *Long v. Paul*, 17 Atl. 988, 991, 127 Pa. 456, 14 Am. St. Rep. 862.

**As long as she lives.**

A will wherein the testator directed that his real estate should remain the absolute property of his wife "as long as she lives" meant that the wife was given the life estate. *Modlin v. Kennedy*, 53 Ind. 267, 268.

"As long as she lives," as used in a devise of real property to testator's wife, limits the duration of the estate to her life. *Modlin v. Kennedy*, 53 Ind. 267, 268.

**As long as they can make it pay.**

The clause "as long as they can make it pay," in a contract to work in a mine for which the persons were to receive a certain sum for all the ore they produced, has no special signification. It is not in any sense ambiguous, and can have no different meaning when applied to mining than it has in any mechanical or agricultural employment. It is a term used daily in all the different enterprises and occupations in which men are engaged, and its scope is so well understood that no evidence is necessary to show what it is or that it means anything different in one case than in another. When a party agrees to sell articles of merchandise or deliver the productions of his labor to another at a certain price as long as he can make it pay, every one must clearly understand that the term is dependent on conditions over which the promisee has no control, and in so far as any one has the power to make the term effective it is lodged solely in the promisor, who, by judicious purchases or skillful manipulation of labor, may be able to make a transaction pay when a more careless, negligent, or improvident person would be unable to do so. This serious element of uncertainty destroys all mutuality in the contract, and gives the promisor full power to say when a further execution of the contract will not be advantageous because he cannot make it pay. *Davie v. Lumberman's Min. Co.*, 53 N. W. 625, 626, 93 Mich. 491, 24 L. R. A. 357.

**As long as wood grows and water runs.**

A lease of land to the lessee, his heirs and assigns, to hold as "long as wood grows and water runs," under certain conditions, should be construed as giving a fee in the

*The case cited in support of this is spurious against it!*

premises to the lessee determinable on a nonperformance of the conditions and duties named in the lease on his part to be performed, for the lease was not a lease for years merely. The term "as long as wood grows and water runs" extends as fully beyond the use of the land as the term "forever." *Arms v. Burt*, 1 Vt. 303, 18 Am. Dec. 630.

A conveyance to the grantee to "endure as long as the waters of the Delaware should run" is to be construed as conveying a life estate and not a fee. *Foster v. Joice* (U. S.) 9 Fed. Cas. 555.

#### AS NEAR AS MAY BE.

Rev. St. U. S. § 914 [U. S. Comp. St. 1901, p. 684], provides that in the Circuit Courts of the United States the practice, pleadings, forms, and modes of proceedings in civil causes shall conform as near as may be to the practice, pleadings, etc., existing at the time in like causes in the courts of record of the state within which such District or Circuit Courts are held. Held, that "as near as may be" does not mean "as near as may be possible," nor "as near as may be practicable"; the words are only directory and advisory, leaving it within the discretion of the court to reject any subordinate provision in the state statute which in their judgment would unwisely incur the administration of the law or tend to defeat the ends of justice in their tribunals. *Rock Island Nat. Bank v. Thompson*, 50 N. E. 1089, 1091, 173 Ill. 593, 64 Am. St. Rep. 137 (citing *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898); *Mexican Cent. R. Co. v. Pinkney*, 13 Sup. Ct. 859, 865, 149 U. S. 194, 37 L. Ed. 699; *Beardsley v. Littell* (U. S.) 2 Fed. Cas. 1178, 1179; *Phelps v. Oaks*, 6 Sup. Ct. 714, 715, 117 U. S. 236, 29 L. Ed. 888; *In re Rugheimer* (U. S.) 36 Fed. 369, 373.

The circuit courts are required by Rev. St. § 914, to conform as near as may be to the practice of the state courts. The words "as near as may be," in this act, impose a discretion and devolve a duty upon the judge not to allow justice to be delayed by the application of state court rules to cases for which they were not intended and to which they ought not to be applied. *Phoenix Ins. Co. v. Charleston Bridge Co.* (U. S.) 65 Fed. 628-632, 13 C. C. A. 58 (citing *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 301, 23 L. Ed. 898).

In Act Feb. 24, 1858, authorizing the release of a prisoner for debt on giving bond pending the question of his final acquitment, and providing that all subsequent proceedings should be in like manner as near as may be as if the debtor were actually in prison under the remand of the court, the phrase "as near as may be" manifestly contemplates some variation from the prescribed course.

*Potter v. Robinson*, 40 N. J. Law (11 Vroom) 114, 117.

#### AS NEAR AS PRACTICABLE.

In Laws 1875, c. 422, requiring that iron girders of an elevated railroad should be placed on each side of the streets as near as practicable on a line parallel with the curbstone, the phrase "as near as practicable" relates not to the curb and to the parallelism of the line of the columns with that of the curb, and means that the line of the columns must be parallel to the curb. *In re Brooklyn Elevated R. Co.*, 11 N. Y. Supp. 161, 163, 57 Hun, 590.

The incorporation of the words "as near as practicable" in an order of supervisors laying out a road, describing it as following a specified line as near as practicable, invalidates the location, as such order must definitely fix the location of the road. *Sonnek v. Town of Minnesota Lake*, 52 N. W. 961, 962, 50 Minn. 558.

#### AS NEARLY AS CAN BE CONVENIENTLY DONE.

The phrase "as nearly as the same can be conveniently done," in Rev. St. c. 7, § 27, making it the duty of the assessor to assess upon the polls one-sixth part of the whole sum to be raised as near as the same can be conveniently done, except, etc., operates as a modification of the rule that the polls shall be assessed an exact one-sixth part, and authorize such an assessment approximating a sixth part, which will avoid the minute divisions of small sums. *Goodrich v. Inhabitants of Lunenburg*, 75 Mass. (9 Gray) 38, 39.

#### AS NEARLY AS MAY BE.

"As nearly as may be," as used in Const. art. 3, § 4, providing the legislature shall so alter the senate districts that each shall contain as nearly as may be an equal number of inhabitants, meant as near as it may be practicable to make them, having regard to the number of inhabitants, and in effect deprives the legislature of any discretion. *People v. Monroe County Sup'rs*, 19 N. Y. Supp. 978, 985.

"As nearly as may be," as used in Const. art. 3, § 5, requiring the members of the assembly to be apportioned among the several counties as nearly as may be according to the number of their respective inhabitants, does not mean as nearly as a mathematical process can be followed. It is a direction addressed to the Legislature in the way of a general statement of the principle upon which the apportionment should be made. The legislative duty should be to make the district of an equal number of inhabitants as nearly as may be, and how far that may be carried out in actual practice must depend

generally upon the integrity of the Legislature. *People v. Rice*, 31 N. E. 921, 929, 135 N. Y. 473, 16 L. R. A. 836.

Const. art. 3, § 4, in declaring that each separate district shall contain an equal number of inhabitants as nearly as may be, meant that a discretion is conferred on the Legislature in making such apportionment, which discretion will not be reviewed. *People v. Rice*, 20 N. Y. Supp. 293, 297, 65 Hun, 236.

#### AS NEARLY AS POSSIBLE.

The chattel mortgage act, in requiring an affidavit of consideration by the holder of the mortgage stating the consideration of the mortgage and "as nearly as possible" the amount due and to grow due thereon, indicates that the act does not require precise and exact naming of a definite sum, but only a statement as nearly as possible of the amount due. *Green v. McCrane*, 37 Atl. 318, 321, 55 N. J. Eq. 436.

In Civ. Code, § 498, requiring street railway tracks to be placed "as nearly as possible" in the middle of the street, the quoted words are equivalent to "as nearly as practicable." "The use of the words 'as nearly' in connection with 'as possible' shows that it was foreseen that a location in the middle of the street could not always be made, and we think that from the nature of the case the meaning must be that the location must be controlled in some degree by the circumstances of the particular case." *Finch v. Riverside & A. Ry. Co.*, 25 Pac. 765, 766, 87 Cal. 597.

#### AS NEARLY AS PRACTICABLE.

Const. art. 4, § 23, in providing that the system of town and county government shall be "as nearly uniform as practicable," did not mean that the system shall be absolutely uniform, nor that the same state of things shall exist in all the counties, but rather that the general system should be the same, modified only by differences reasonable according to circumstances. *State v. Milwaukee County Sup'rs*, 25 Wis. 339, 350.

#### AS OF ANY TERM.

The phrase "as of any term," in a warrant of attorney authorizing judgment to be confessed on a note as of any term, does not authorize the confession of a judgment in vacation; the intention being clearly manifest that the judgment should be confessed at some term. *Whitney v. Bohlen*, 42 N. E. 162, 163, 157 Ill. 571.

#### AS OF RIGHT.

"As of right," as used in St. 2 & 3 Wm. IV, c. 71, § 5, providing that in all pleadings to actions of trespass and in all other plead-

ings wherein before the passing of the act it would have been necessary to allege a right of easement (set up as a defense) to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right, the party who avers the right must mean such as could be inferred to exist by custom, prescription, or nonexistent grant. *Kinlock v. Neville*, 6 Mees. & W. 795, 806.

#### AS PER.

A recital in a deed that it was made as per agreement of certain date means nothing more than that the deed was a satisfaction of the contract, and the grantee in the deed is not affected by the preliminary contract. *Close v. Burlington, C. R. & N. Ry.*, 19 N. W. 880, 888, 64 Iowa, 149.

In a claim filed against an estate for work and labor done and for board, care, and money expended "as per contract," the phrase did not restrict the claimant to proof of a special express contract, but included not only an express but an implied contract, and hence claimant was entitled to recover on proof that the services had been rendered and that they were not mere gifts. *Harrison v. Lindley*, 104 Ill. 245, 248.

The words "as per statement," when attached to an aggregate sum, import that an itemized or more particular statement has been furnished the party charged with the aggregate amount of the demand, and that he is in possession of the information which a statement in detail would furnish him. *Albion Phosphate Min. Co. v. Wyllie (U. S.)* 77 Fed. 541, 545, 23 C. C. A. 276.

#### AS PROVIDED BY LAW.

"As provided by law," as used in Code, § 310, providing that plaintiff may at any time in three years after the active energy of a judgment lien has expired revive the judgment by service of summons on the debtor as provided by law, does not mean simply that the manner of service on the debtor should be legal, but it should be construed as used to meet the condition brought about by the death of the debtor or defendant in execution, making it necessary to revive the judgment against his executor as provided by law, and it having been provided in another section of the Code that an execution could be renewed, providing that it might be renewed by service on the debtor, his heirs, executors, and administrators, as provided by law, should be construed to mean service on the debtor, his executors, or administrators, since the right to revive an execution necessarily involves the right to revive a judgment. *Chester & C. R. Co. v. Marshall*, 18 S. E. 247, 248, 40 S. C. 59.

#### AS SECURITY.

See "Held as Security."

**AS SHALL SEEM BEST.**

See "Seem Best."

**AS SOON AS.**

"As soon as" means immediately at or after another event, hence the promise to pay plaintiff an additional salary as soon as the company's affairs were straightened up was dependent upon the straightening up of the affairs of the company and not an absolute promise. *Blodgett v. Hall*, 32 N. Y. Supp. 788, 790, 11 Misc. Rep. 626.

The phrase "as soon as collected," as used in an instrument reciting a certain amount due A. "to be paid as soon as collected from my accounts," is "not intended to show that the debt was conditional, depending for its existence as valid demand against the makers upon the fact that the sum to be paid could be collected out of the accounts referred to, but only to prescribe the time of payment by reference, not to days and years, but to a reasonable time for the collection of the accounts." *Ubsdell v. Cunningham*, 22 Mo. 124, 126.

The use of the words "as soon as circumstances will permit," in an instrument for the payment of a sum of money as soon as circumstances will permit, prevents the instrument from being a promissory note, and a recovery cannot be had on such instrument without proof of the ability of the maker to pay. *Salinas v. Wright*, 11 Tex. 572, 577.

A promise to pay as soon as the promisor receives funds as an assignee makes the promise conditional, and is very different from a promise to pay forthwith or generally. *Cartledge v. West* (N. Y.) 2 Denio, 377, 379.

Plaintiff agreed to sell defendants certain stock, and defendants agreed to take it, and pay plaintiff a specified amount therefor; such payments to be made "as soon and fast as they were able, financially, to do so, without sacrificing their interests in, or the property of," such company. Held, that defendants were bound to perform such contract within such time as was reasonable for the disposition of their property. *Fisher v. Chadwick*, 34 Pac. 899, 4 Wyo. 379; *Chadwick v. Hopkins*, Id.

**AS SOON AS CAN BE.**

A contract for the purchase of cotton on a certain plantation to be delivered "as soon as it can be picked out" and shipped does not mean as soon as it can possibly and by any number of hands be picked, but it means the time in which it will or may with ordinary diligence be picked out by the hands belonging to the plantation, and not by the largest number which the proprietor could employ. In other words the picking was to be in con-

venient season, according to the usual operations of agriculture. *Waddell v. Reddick*, 24 N. C. 424, 429.

Where a paper promised to pay, with interest, a specified sum of money "as soon as the crop can be sold or the money raised from any other source," such phrase meant that the maker should have a reasonable amount of time within which to procure in one mode or the other the means necessary to meet the liability, and could not be construed to mean that if the crop should never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. *Nunez v. Dautel*, 86 U. S. (19 Wall.) 560, 562, 22 L. Ed. 161.

A notice of motion to amerce, given for a day specified, at a certain hour, or as soon thereafter as the court can attend to the same, means the day following the one mentioned if such day was a legal holiday, for that such day was a legal holiday the party receiving the notice must be legally presumed to have knowledge, and that the court would not be held on the day named, and that the day following was intended. *White v. Rockefeller*, 45 N. J. Law (16 Vroom) 299, 301.

Notice of an intended motion for a certain day in term, without saying "or as soon thereafter as counsel can be heard," is sufficient, as the words are superfluous, and the party may make his motion on any other day in term. *Anonymous* (N. Y.) 1 Johns. 143.

A note in which the maker promises to pay "as soon as I can" is to be construed as a promise to pay presently. *Kincade v. Higgins*, 4 Ky. (1 Bibb) 396, 397.

**AS SOON AS CONVENIENT.**

See, also, "Convenience—Convenient."

An estate devised in trust to be sold "as soon as convenient," or with all possible diligence, is to be sold within a reasonable time after the testator's death, and is considered by the court as sold the moment the testator is dead; for where there is a trust, that is always considered as done which is ordered to be done, and the court cannot measure the time, and the trust is vested for the purposes thereof from the death of the testator. *Hutchinson v. Mannington*, 1 Ves. Jr. 360, 367.

"As soon as convenient," as used in a trust providing that the trustees as soon as convenient after the testator's death should sell and dispose of the property, either by public or private sale, and stand possessed of the proceeds on certain trusts for certain persons, required a sale of the property within a reasonable time, and vested the cestui que trust with an estate, as and from

the date of the death of the testator. *Walker v. Shore*, 19 Ves. 387, 390, note.

The use of the phrase "as soon as they can conveniently locate and construct," in the charter of a railroad company authorizing them as soon as they conveniently can to construct a road with one or more tracks, and to make or erect warehouses, etc., is not a limitation upon the power to compel the company to exercise its whole authority in the very beginning. It would be an unreasonable construction of its charter to require provision to be made for all the unknown wants of the future. The increase in trade and business and the changes taking place often require new and increased facilities. *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. (4 P. F. Smith) 103, 107.

A direction that certain bequests of money in trust shall be paid out of the income of the estate "as soon as convenient" after one year after testator's death, or sooner if the executor has funds, did not mean that the legacy should not bear interest after one year from the testator's death. *Gillon v. Turnbull* (S. C.) 1 McCord, Eq. 148, 149.

#### AS SOON AS MAY BE

"As soon as may be," as used in St. 1864, c. 111, § 1, providing that exceptions are required to be transmitted to this court as soon as may be, if question of law is reserved, means a reasonable time. *Bentley v. Ward*, 116 Mass. 333, 334.

A covenant whereby the covenantors agreed to sell a certain vessel "forthwith as soon as may be, for the largest sum that we can reasonably obtain," allows a reasonable latitude as to the time and manner of making the sale. *Adams v. Foster*, 59 Mass. (5 Cush.) 156, 157.

#### AS SOON AS POSSIBLE

The expression "as soon as possible," in a contract by one person to convey certain lands to another as soon as possible, means, under the circumstances, as soon as it shall be within the vendor's power, or as soon as he has the ability to convey. *Snodgrass v. Wolf*, 11 W. Va. 158, 164, 165.

It was contended that the words "as soon as possible" in a contract did not mean within a reasonable time, but meant as quickly as the work can be done with the best appliances, unlimited facilities, and the utmost diligence; the word "possible" being synonymous with the word "practicable." It was held that without being understood as conceding this argument has any force it may be noted that it does not avail to import into the writing the expression of a fixed time for the completion of the work.

*Williams v. Rittenhouse & Embree Co.*, 64 N. E. 995, 997, 198 Ill. 602.

Where a debtor whose debt was barred by the statute of limitations said to his creditor "I will pay it as soon as possible," the words "as soon as possible" did not constitute any restriction or limitation of the meaning and force of the acknowledgment of the existence of the debt. *Norton v. Shepard*, 48 Conn. 141, 143, 40 Am. Rep. 157.

The phrase "as soon as possible," or the word "forthwith," has a meaning as strong as the word "immediately," which is defined by Bouvier as implying strictly not deferred by any lapse of time, but as usually employed meaning rather within a reasonable time, having due regard to the nature and circumstances of the case. *Fidelity & Deposit Co. of Maryland v. Courtney* (U. S.) 103 Fed. 599, 607, 48 C. C. A. 331.

A contract by a manufacturer to furnish certain specified goods "as soon as possible" means within a reasonable time, regard being had to the manufacturer's ability to produce them, and the orders he may already have in hand. *Atwood v. Emery*, 1 C. B. (N. S.) 110, 115; *Florence Gas, Electric Light & Power Co. v. Hanby* (Ala.) 13 South. 343, 348; *Hinds v. Kellogg*, 13 N. Y. Supp. 922; *Hydraulic Engineering Co. v. McHaffie*, 29 Moak, Eng. R. 102, 105; *Arthur v. Wright*, 10 N. Y. Supp. 368, 369, 57 Hun, 22.

A contract of sale whereby the vendors agreed to ship the property sold "as soon as possible" from Glasgow, which required transportation by water, means shipment as soon as possible by any of the ordinary modes of transportation, and cannot be construed as meaning as soon as possible by sail or any other special mode of transportation. *Pope v. Filley* (U. S.) 9 Fed. 65, 66.

The words "as soon as possible," in a contract by which one agreed to complete shipments of goods sold as soon as possible on the opening of navigation, were equivalent in their legal effect and meaning to the words "with all reasonable diligence," or "without unreasonable delay." *Rhodes v. Cleveland Rolling Mill Co.* (U. S.) 17 Fed. 426, 431.

"As soon as possible," as used in a bill of lading requiring delivery "as soon as possible," is equivalent to a provision for quick dispatch, and requires the consignee to make use of all means of discharge readily available, and does not admit of a detention of the vessel to suit the convenience or business purposes of consignor and consignee. *Egan v. Barclay Fibre Co.* (U. S.) 61 Fed. 527.

"As soon as possible," as used in a contract, means that the thing agreed to be done shall be done with all possible expedition. *Sentenne v. Kelly*, 13 N. Y. Supp. 529, 531, 59 Hun, 512.

An order for threshing machinery, requiring its delivery as soon as possible, requires delivery at the earliest moment of time practical to meet the purchaser's object in making the order. *Robinson v. Brooks* (U. S.) 40 Fed. 525, 527.

The phrase "as soon as possible," in a fire policy requiring proofs of loss to be furnished as soon as possible after the fire, means that the insured must do all that he can toward having proofs presented promptly. *Brink v. Hanover Ins. Co.*, 80 N. Y. 108, 118.

"As soon as possible," as used in insurance policies requiring the assured to give notice of loss as soon as possible, construed to mean as soon as could be under the circumstances, or within a reasonable time, or as soon as practicable. As soon as possible cannot mean instantly or directly, for it might be impossible to do the act instantly. *Palmer v. St. Paul Fire & Marine Ins. Co.*, 44 Wis. 201, 208; *McPike v. Assur. Co.*, 61 Miss. 37, 43; *Ben Franklin Fire Ins. Co. v. Flynn*, 98 Pa. 627, 634; *Columbia Insurance Co. v. Lawrence*, 35 U. S. (10 Pet.) 507 513, 9 L. Ed. 512; *Home Ins. Co. v. Davis*, 98 Pa. 280, 283; *Scammon v. Germania Ins. Co.*, 101 Ill. 621, 624; *State Ins. Co. v. Maackens*, 38 N. J. Law (9 Vroom) 564, 569.

The phrase "as soon as possible," in an insurance policy requiring that notice of loss, accident, or death should be given to the insurer as soon as possible, means with due diligence, or without unnecessary procrastination or delay under the circumstances of the case. *Edwards v. Baltimore Fire Ins. Co.*, 8 Gill, 176, 186; *Phillips v. Protection Co.*, 14 Mo. 220, 231; *Providence Life Ins. & Inv. Co. v. Martin*, 32 Md. 310, 315; *Provident Life Ins. & Inv. Co. v. Baum*, 29 Ind. 236, 241; *Konrad v. Union Casualty & Surety Co. (La.)* 21 South. 721, 722. Notice was held to have been given immediately, within the meaning of an accident policy, of a death by drowning occurring on February 26th, by a notice given on or after April 20, 1896, the body of deceased not having been found until 15 days after his death, and the beneficiary having no notice of the existence of the policy till April 20th. *Konrad v. Union Casualty & Surety Co. (La.)* 21 South. 721, 722.

#### AS SOON AS PRACTICABLE.

"As soon as practicable after death," as used in a will directing the executors to dispose of certain property as soon as practicable after testator's death, does not prevent the direction to sell from being imperative, but only gives the executors a certain discretion as to the time or times of such sale. *Ford v. Ford*, 33 N. W. 188, 196, 70 Wis. 19, 5 Am. St. Rep. 117.

"As soon as practicable," as used in a contract requiring that it should be performed

as soon as practicable, is practically synonymous with "speedily." It does not, however, require that the contract should be performed directly, and perhaps not within a reasonable time, but as soon as conditions warranted under all the circumstances. *Duncan v. Topham*, 8 O. B. 225, 230.

The word "practicable" means "feasible." An act is practicable of which conditions or circumstances permit the performance. Thus in an act requiring the city council to call an election to fill a vacancy in the office of mayor as soon as practicable, until legally in session, it is, of course, impracticable for it to order the election; but at its first regular meeting after the vacancy occurs there is no reason why it should not proceed to the ordering of an election, and hence it may be compelled to do so. *Rizer v. People* (Colo.) 69 Pac. 315, 316.

#### AS SPEEDILY AS CAN BE.

"As speedily as the same can be done," as used in St. 1784, c. 2, relating to the distribution of insolvent estates, and providing that when an executor or administrator of an insolvent estate is dissatisfied with the allowance of a claim by the commissioners, the creditor shall commence his action at common law as speedily as the same can be done after notice of such dissatisfaction, does not mean that the action should be brought in all cases to the term of court next succeeding the notice, but means that the action should be brought as speedily as possible, having regard to the place of residence and other circumstances of the party in each particular case. *Guild v. Hale*, 15 Mass. 455, 457.

#### AS SPEEDILY AS POSSIBLE.

An agreement of liquidation which provided that the firm was to be closed up "as speedily as possible" meant that it was the duty of the liquidating partner to sell within a reasonable time. *Smith v. Underhill*, 19 N. Y. Supp. 249, 252, 64 Hun. 639.

"As speedily as possible," means within a reasonable time or without unreasonable delay, so that where a landlord fails to repair premises within a reasonable time, where the lease requires repairs as speedily as possible, the tenant may surrender the premises. *Bacon v. Albany Perforated Wrapping Paper Co.*, 49 N. Y. Supp. 620, 621, 22 Misc. Rep. 592.

#### AS SPEEDILY AS PRACTICABLE.

Rev. St. § 7087, in providing that a list of school books, selected by a majority of the board, shall be transmitted to the clerks, who shall record the same, and thereafter, "as speedily as practicable," the books used in the necessary schools shall be made to



conform to the list as adopted, requires the duty to be performed not when they may think best, nor when they may conceive it to be for the interest of the people, but with all practicable speed. *State ex rel. Roberts v. School Directors of City of Springfield*, 74 Mo. 21, 23.

## ASCERTAIN—ASCERTAINMENT.

According to Worcester, "ascertain" is to make sure or certain; to fix; to establish; to determine; to settle. *Brown v. Lyddy* (N. Y.) 11 Hun, 451, 456.

"Ascertained," as used in St. 9 Geo. IV, c. 40, § 41, relating to the settlement of an insane pauper, which "cannot be ascertained" by the justices, reasonably means "cannot be decided on." *Reg. v. Inhabitants of Heyop*, 8 Adol. & El. (N. S.) 547, 559.

A provision in a lease that, if a renewal was refused by the lessor, he should pay to the lessee the value of a certain building, to be "ascertained" by disinterested persons, meant made sure, fixed, established, determined, and would seem to demand the observance of the usual mode of investigation in order to establish, to determine, to settle the value. *Brown v. Lyddy* (N. Y.) 11 Hun, 451, 456.

The word "ascertain," as used in a contract providing that the buyer of growing hops, if he should ascertain that they were not in the condition required, might terminate the contract, reserves the right to the buyer merely to acquire information, not to decide as to the condition of the hops. *Lilienthal Bros. v. Stearns* (U. S.) 121 Fed. 197, 198.

Webster, in defining the word "ascertain," gives, among others, the following definition: "To make certain to the mind; to make sure of; to determine." The use of the word in instructions in an action against a vendee of land purchased under a bond of title, defended on the ground that the vendor did not have title, that the verdict should be for the defendant if he had "ascertained" that representations made by plaintiff as to his title were false, is erroneous; the issue involved being whether plaintiff had title in fact. *Pughe v. Coleman* (Tex.) 44 S. W. 576, 578.

By the phrase, used in reference to vested remainders, that "the person must be ascertained" before the remainder is vested, is meant "that the person must be one to whose competency to take no further or other condition attaches; one in respect to whom it is not necessary that any event shall accrue or condition be satisfied, save only that the precedent estate shall determine." *Bunting v. Speck*, 21 Pac. 288, 291, 41 Kan. 424.

## Arbitration implied.

The words "valuation to be ascertained by two persons, whose decision shall be final," in a contract for the lease of certain lands, which provides that at the expiration of the term of the lease the owner of the buildings may remove them, or defendant may purchase them at a valuation to be ascertained by two persons, whose decision shall be final and binding, is to be construed as only an agreement for the purpose of valuation, and not as a submission to arbitration. *California Annual Conference of M. E. Church v. Seitz*, 15 Pac. 839, 841, 74 Cal. 287.

A policy of insurance, providing that the loss should be "ascertained and settled by a committee," did not mean that the loss should be submitted to arbitration in its proper sense, but it was merely a condition precedent to the insured's right of action on the policy that the loss had been determined at least by a committee. *California Annual Conference of M. E. Church v. Seitz*, 15 Pac. 839, 841, 74 Cal. 287.

The word "ascertain," as used in Const. art. 11b, § 4, providing that in all cases of claims against corporations the exact amount shall be first ascertained before action against the original subscribers for their individual liability, means judicially ascertained, and to judicially ascertain the amount due from a corporation to a creditor means to have the finding and judgment of a court as to such amount. *German Nat. Bank of Lincoln v. Farmers' & Merchants' Bank of Holstein*, 74 N. W. 1086, 54 Neb. 593 (citing *Globe Pub. Co. v. State Bank of Nebraska*, 41 Neb. 175, 59 N. W. 683; *Commercial Nat. Bank v. Gibson*, 37 Neb. 750, 56 N. W. 616; *Farmers' Loan & Trust Co. v. Funk*, 49 Neb. 353, 68 N. W. 520; *State v. German Sav. Bank*, 50 Neb. 734, 70 N. W. 221); *New Hampshire Sav. Bank v. Richey* (U. S.) 121 Fed. 956, 962, 58 C. C. A. 294.

## As judicially ascertained.

Comp. St. c. 10, § 17, provides that, when the incumbent of an office is re-elected or reappointed, he shall qualify by taking the oath and giving the bond as required, but, when such officer has had public funds or property in his control, his bond shall not be approved until he has produced and fully accounted for such funds and property, and, when it is "ascertained" that the incumbent of an office holds over by reason of the non-election or nonappointment of a successor, or of the neglect or refusal of the successor to qualify, he shall qualify anew within 10 days from the time at which his successor, if elected, should have qualified. Held, that "ascertained" means found out, or learned for certainty, by trial, examination, or experiment, and hence, where the returns of an election at which the officer's successor was

to be chosen showed that a certain person had received a plurality of the votes, whether he was elected depended upon whether he was eligible to be elected, which could only be determined by judicial inquiry, and the officer is not debarred from holding over by failure to requalify within 10 days from the time when his successor should have qualified; for he could not determine whether such successor was elected or not, and he is only required to requalify within 10 days from the "ascertainment" of the fact that his successor is ineligible. *State v. Boyd*, 48 N. W. 739, 754, 31 Neb. 682.

**As learn in any manner.**

A tax collector "ascertains" who are the insolvent or defaulting taxpayers in his county, when he finds out who they may be. *Perry County v. Selma, M. & M. R. Co.*, 58 Ala. 546, 565.

"Ascertain," within the meaning of a statute providing that, on an application for the probate of a will, the surrogate shall ascertain whether any of the persons interested are minors, and, if so, their names and places of residence, and, if there be such, appoint a special guardian to take care of their interests, is not limited to an ascertainment by means of an examination of the original petition, containing the requisite information, though it is the common way of furnishing such information; but when, after proceedings to probate are actually begun, a minor becomes interested by reason of the death of one of the parties, and the surrogate ascertains that fact, it is his right and duty to bring in such minor and appoint a guardian for him, and how the surrogate ascertains the fact is immaterial. *Russell v. Hartt*, 87 N. Y. 19, 23.

**ASCERTAINMENT.**

"Ascertainment," as used in Rev. St. § 2931, requiring notice of an intention to recover a tax alleged to have been wrongfully collected, to be given within 10 days from the "ascertainment and liquidation" of the same, means the ascertaining, and demanding and receiving the same, necessarily implying payment. *Laidlaw v. Abraham* (U. S.) 43 Fed. 297, 299.

Act Cong. 1864, § 14, declares that the decision of the Collector of Customs is conclusive, unless the party, if dissatisfied with his decision, gives notice thereof within 10 days after the "ascertainment and liquidation of the duties by the proper officers of the customs," and within 30 days after the date of such ascertainment and liquidation appeals therefrom to the Secretary of the Treasury. Held, that "ascertainment and liquidation" is synonymous with the decision of the Collector of Customs. Such ascertainment and liquidation of the duties by the proper officers of the customs—that is, the proper offi-

cers in the collector's office or department—is the decision of the Collector. When the duties are ascertained and liquidated in the usual manner by such officers, and the usual indicia thereof by checks and stamps are placed on the usual papers in the Collector's office, such transaction is the decision of the Collector of Customs in the premises. *United States v. Cousinery* (U. S.) 25 Fed. Cas. 677, 679.

**ASHES.**

In the metropolitan paving act (St. 57 Geo. III, c. 29), relating to the removal of "dust, clinders, or ashes," this phrase cannot be construed to include the refuse in which metal remained, after a brass founder had extracted a quantity of metal from the ashes, which fell into the ash pit during the process of casting, and which he gave to his apprentices, by whom it was sold to brass refiners, who extracted from the ashes a further quantity of metal; for such ashes were valuable for commercial purposes. *Law v. Dodd*, 1 Exch. 845, 849.

**ASKED.**

The word "asked," as used in the records of court, as follows: "The defendants were then asked by the court if they had secured the aid of counsel, and of their right to be represented by counsel," is equivalent to saying that they were informed of their right, as the word "informed" is used in Pen. Code, § 987, providing that, if a defendant appear for arraignment without counsel, he must be informed that it is his right to have counsel. *People v. Miller*, 70 Pac. 735, 737, 137 Cal. 642.

**ASPHALT.**

"Asphalt," as used in a patent in reference to pavements, is not limited in meaning to the Trinidad deposit, or to the so-called "American mixture," but includes as well the bituminous paving material used in France and elsewhere, comprising natural rock, asphalt, and compositions of bitumen and lime or sand particles. *United States Repair & Guaranty Co. v. Assyrian Asphalt Co.* (U. S.) 96 Fed. 235, 236.

**ASPHALT PAVING.**

"Ordinary paving, called 'asphalt,' is overlaying of a mixture of asphalt, lime, and sand upon a body of rock and stone." *Olsson v. City of Topeka*, 21 Pac. 219, 220, 42 Kan. 709.

**ASPHYXIA.**

Asphyxia was originally a want of pulse or cessation of the motion of the heart and

arteries; as now used, apparent death or suspended animation, particularly from suffocation or drowning or the inhalation of gases. *State v. Baldwin*, 12 Pac. 318, 328, 36 Kan. 1.

## ASPORTATION.

"Asportation" is a taking out of the possession of the owner without his privity and consent. *Wilson v. State*, 21 Md. 1, 9.

"Asportation," as used in reference to larceny, means the removing of the property alleged to have been stolen from the place where it was put. Any removal with intent to steal will constitute an asportation, if its location be appreciably changed, as where an article is moved from one part of the room to another part of the same room. *State v. Higgins*, 88 Mo. 354, 355.

"Asportation," in larceny, is a removing of the property alleged to have been stolen from that place where it was before; but it is not necessary, in order to constitute asportation, that it be quite carried away. Where a person had lifted a bag from the bottom of the boot of a coach, and was detected before he got it out of the boot, it was held a complete asportation. *Rex v. Walsh*, 1 Moody, Cr. Cas. 14, 15.

## ASS.

The word "ass," as used in a provision of the Code punishing the felonious taking or stealing of any horse, mule, or ass, includes animals of both sexes and all ages embraced under such terms. *Shannon's Code Tenn.* 1896, § 6553.

## ASSAILANT.

The word "assailant," as used in Code 1886, § 3727, providing that, when the killing in any sudden encounter or affray is caused by the "assailant" by the use of a deadly weapon which was concealed before the commencement of the fight, his adversary having no deadly weapon drawn, such killing is murder, means only the one who commits the first assault; and this section has no application where the assailant is killed by the assailed. *Scales v. State*, 11 South. 121, 124, 96 Ala. 69.

## ASSAULT.

See "Aggravated Assault"; "Felonious Assault"; "Indecent Assault"; "Secret Assault"; "Simple Assault."

The term "assault," when used in statutes without qualification, is to be understood according to its established meaning in the criminal law. *Smith v. State*, 78 N. W. 1059, 1060, 58 Neb. 531.

"Assault" seems to be a generic term, applying to and embracing all offenses of personal violence, not amounting to a felony, done or admitted to be done to another in his presence. *Hardy v. Commonwealth (Va.)* 17 Grat. 592, 601.

An assault is an attempt to commit a violent injury upon the person of another. *Goodrum v. State*, 60 Ga. 509, 510; *Groves v. State*, 42 S. E. 755, 757, 116 Ga. 516, 59 L. R. A. 598; *Johnson v. State*, 14 Ga. 55, 59; *Sweeden v. State*, 19 Ark. 205, 213 (citing 3 Greenl. Ev. § 59); *State v. Harrigan (Del.)* 55 Atl. 5, 6.

An assault is an offer or attempt to strike the person of another. *State v. Myerfield*, 61 N. C. 108, 109; *Same v. Hampton*, 63 N. C. 13, 14; *State v. Gladden*, 73 N. C. 150, 155.

"An assault is an attempt or offer by force and violence to do a corporal injury to another." *State v. Wyatt*, 41 N. W. 31, 32, 76 Iowa, 328; *State v. Shields (Ohio)* 1 West. Law J. 118, 119; *Hays v. People (N. Y.)* 1 Hill, 351, 352; *State v. Godfrey*, 20 Pac. 625, 627, 17 Or. 300, 11 Am. St. Rep. 330. As by striking at him with a weapon or without a weapon, being within striking distance, or presenting a gun at him at a distance the gun will carry, or pointing a pitchfork at him, being within reach of it. *People v. Lee (N. Y.)* 1 Wheeler, Cr. Cas. 364, 365. And when the assault is consummated it becomes a battery. *List v. Miner*, 49 Atl. 856, 858, 74 Conn. 50; *Lewis v. Hoover (Ind.)* 3 Blackf. 407, 408.

"An assault is an attempt or offer to beat another, without touching him, as if one lifts up his cane or his fist in a threatening manner to another, or strikes at him, but misses him." *Prince v. Ridge*, 32 Misc. Rep. 666, 66 N. Y. Supp. 454 (citing 3 Bl. Comm. 120).

An assault is an intentional attempt to strike, within striking distance, which falls of its intentional effects either by preventive influence or by misadventure. *Lane v. State*, 85 Ala. 11, 14, 4 South. 730.

An assault is defined "as an unlawful setting upon one's person." *Geraty v. Stern (N. Y.)* 30 Hun, 426, 427.

An assault is an attempt to commit a violent injury. Consequently an assault with intent to commit any specified crime constitutes an attempt to commit that crime. *Johnson v. State*, 14 Ga. 55, 59.

"Assault or beating," as used in admiralty rule 16, declaring that, in all suits for an "assault or beating" on the high seas, the suit shall be in personam only, means any case in which the gravamen of the action is an assault or beating, although the injuries alleged arise, not only from assaults and beatings, but also injuries from every treatment and all cases of actionable personal

abuse. *Smith v. The Challenger*, 7 Pac. 851, 853, 2 Wash. T. 447.

#### **Affray distinguished.**

An assault is an unlawful attempt or offer to do personal injury to another. An assault is entirely distinct from affray; the peculiar characteristic of the latter being its publicity, while an assault may be a complete offense without regard to the place where it is committed. *Commonwealth v. Simmons*, 29 Ky. (8 J. J. Marsh.) 614, 616; *Childs v. State*, 15 Ark. 204, 205; *State v. Brewer*, 33 Ark. 178, 178; *State v. Sumner* (S. C.) 5 Strob. 53, 56.

The qualities that distinguish an affray from an assault and battery are that two or more persons must be engaged in the same combat and in a public place. *Thompson v. State*, 70 Ala. 28, 28.

#### **Battery distinguished.**

An assault "is an offer or attempt by force to do a corporal injury, as if one person strike at another with his hands or with a stick, and miss him; for, if the other be stricken, it is a battery, which is an offense of a higher grade, or if he shake his fist at any person, or present a gun or other weapon within such distance as that a hurt might be given, or the drawing of a sword and brandishing it in a menacing manner. But it is essential, to constitute an assault, that an intent to do some injury should be coupled with the act, and that intent should be to do a corporal hurt to another." *United States v. Hand* (U. S.) 26 Fed. Cas. 103, 104.

An "assault" is defined to be "any attempt to commit a battery or any threatening gesture, showing in itself or by words accompanying it an immediate intention, coupled with an ability, to commit a battery." A "battery" is defined as "the use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of violence used, thus making it necessary that two things should concur; one physical, and the other mental—an act and an intent accompanying it." *McKay v. State*, 44 Tex. 43, 48.

#### **As attempt to commit a battery.**

"Assault" is any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention coupled with an ability to commit a battery. *Garnet v. State*, 1 Tex. App. 605, 607, 28 Am. Rep. 425.

An assault is an act done toward the commission of a battery, and must immediately precede the battery. *Fox v. State*, 84 Ohio St. 377, 380.

"Any attempt to commit a battery, or any threatened gesture, showing in itself or by words accompanying it an immediate inten-

tion, coupled with ability, to commit a battery, is an assault." *Farrar v. State*, 15 S. W. 719, 720, 29 Tex. App. 250.

In committing an assault, it is sufficient that there be an act done indicating an intention to commit a battery immediately, coupled with the ability to do it. This, of course, must not be an act of preparation for some attack in an intended difficulty not then pending in fact. *Higginbotham v. State*, 23 Tex. 574, 577.

An "assault" is made by one who, in striking distance of another, attempts to strike at him or hit him. An assault is an attempt to strike. *Commonwealth v. Brungess*, 23 Pa. Co. Ct. R. 13, 14.

#### **Execution of attempt.**

An assault may be committed without inflicting any personal injury. Any act tending to infringe the sacredness of the person of another constitutes an assault. *State v. Myers*, 19 Iowa, 517, 518.

To constitute an assault, it is not necessary that the attempt be actually executed on the person. The attempt by the use of a weapon or missile, whether the object is reached or not, is an assault, if the attempt is actually made to do the injury. *State v. Jones* (Del.) 47 Atl. 1006.

According to Whart. Cr. Law, to constitute an "assault," there must be some movement toward physical violence. It must amount to an attempt; for the purpose to commit violence, however fully indicated, if not accompanied by an offer to carry it into immediate execution, falls short of an actual assault. *Cutler v. State*, 59 Ind. 300, 302.

To constitute an assault, there must be a use of some unlawful violence on the person of another with intent to injure such person, or some threatening gesture, showing in itself or by words accompanying it an immediate intention to commit a battery. *Carroll v. State*, 6 S. W. 190, 24 Tex. App. 366.

"Neither a purpose to make an assault nor any amount of preparation for doing so will constitute an assault, unless followed by some hostile demonstration against the person toward whom the purpose is contemplated. If the defendant had gone and procured a gun for the express purpose of taking the life of a person, but after coming up with such person made no demonstration toward the accomplishment of that purpose, he would not have been guilty of an assault with intent to kill." *State v. Painter*, 67 Mo. 84, 89.

There may be an assault without personal injury, since any unlawful attempt, coupled with a present ability to commit a violent injury, is an assault, and this, although the assailant failed to commit the injury intended, owing to the interference of

others or otherwise. *State v. Smith* (Del.) 33 Atl. 441, 9 Houst. 588.

#### Force.

An assault implies some unlawful physical force, partly or fully put in motion. *Jambor v. State*, 75 Wis. 664, 676, 44 N. W. 963, 967.

Though force and violence are included in all definitions of assault, or assault and battery, yet, where there is a physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts. If one should hand an explosive to another, and induce him to take it by misrepresenting its qualities, and the other in ignorance should receive it and cause it to explode, and be injured, the offending party would be guilty of a battery, that would necessarily include an assault. *Commonwealth v. Stratton*, 114 Mass. 303, 305, 20 Am. Rep. 350.

#### Gestures or menace.

An assault is an attempt unlawfully to apply any actual force to the person of another, directly or indirectly; the act of using gestures toward another, giving him reasonable ground to believe that the person using the gestures meant to apply actual force to his person. *Malland v. Malland*, 86 N. W. 445, 83 Minn. 453; *Morgan v. O'Daniel* (Ky.) 53 S. W. 1040.

"An assault is an attempt or offer to do another personal violence, without actually accomplishing it. A menace is not an assault; neither is a conditional offer of violence. There must be a present intention to strike. To constitute an assault, it is not necessary that the defendant actually strike at the person on whom the assault is charged to have been committed. Raising a stick with intention to strike, so near to the party assailed as to endanger his person, and forcing him, under a well-grounded apprehension of personal injury, to strike in self-defense or to save himself by flight, is an assault." *Johnson v. State*, 35 Ala. 363, 365.

"In order to constitute an assault, there must be something more than a mere menace. There must be violence begun to be executed. But where there is a clear intent to commit violence, accompanied by acts which, if not interrupted, will be followed by personal injury, the violence is commenced, and the assault is complete." *People v. Yslas*, 27 Cal. 630, 633.

"Any gesture or violence, exhibiting an intention to assault, is an assault, unless immediate contact is impossible." *Bishop v. Ranney*, 7 Atl. 820, 821, 59 Vt. 316.

"A menace is not an assault; neither is a conditional offer of violence. There must be

a present intention to strike." *Simpson v. State*, 59 Ala. 1, 18, 31 Am. Rep. 1.

An assault is an attempt to commit a battery, or any threatening gesture showing in itself, or by words accompanying it, an immediate intention, coupled with an ability, to commit a battery; and, in order to constitute an assault, the intention and ability to inflict an injury must concur. *Spears v. State*, 2 Tex. App. 244, 245.

A motion of the hand to strike a person, even though the motion or movement falls short of actual contact, constitutes an assault. *Norris v. Whyte*, 57 S. W. 1037, 1040, 158 Mo. 20.

#### Direction against the person unnecessary.

To constitute an assault, it is not necessary that the party assailing should have an intention to hurt the person assaulted, or that he should lay his hands upon him; and hence, where one met another driving a team of horses, and seized the lines in front of such person and prevented them being driven by plaintiff, so that another person could take them by the heads and turn them around, the person so seizing the lines was guilty of an assault, for the force which he applied to the horses and sleigh just as effectually touched the person of the driver as if he had taken him by his ears or shoulders and turned him right about face. The horses and sleigh were the instruments with which he directed and augmented his personal and physical force against and upon the body of the driver. The driver received bodily harm, for one receives bodily harm in a legal sense when one touches his person against his will with physical force intentionally hostile and aggressive, or projects such force against his person. For the moment the driver was deprived by the defendant of his own control of his own person and was controlled, intimidated, and coerced by the hostile, aggressive, physical force of the defendant. *People v. Moore*, 3 N. Y. Supp. 159, 160, 50 Hun, 356.

An "assault" is an attempt, or the unequivocal appearance of an attempt, with force or violence, to do a corporal injury, and may consist of any act which shall convey to the mind of the person set upon a well-grounded apprehension of personal violence. Thus, where defendant went to plaintiff's home, where she was alone with her children, and told her to move out, as he intended to burn the house, and plaintiff found that defendant had poured kerosene oil on the house and was striking a match as about to set fire thereto, and he pointed a pistol at her, and said that, if she did not go back in the house, he would shoot her and the children, he was guilty of an assault. *Kline v. Kline*, 64 N. E. 3, 158 Ind. 602, 58 L. R. A. 897.

An "assault" is defined to be an attempt with force or violence to do a corporal injury

to another; and the kicking and striking of a person's horse with a board several times, while holding it while such person was sitting in the wagon, would be an assault upon such person, for it would probably result in a corporal injury to him. *Clark v. Downing*, 55 Vt. 259, 262, 45 Am. Rep. 612.

#### Intent.

"An assault is an intentional attempt by force or violence to injure the person of another." *Cluff v. Mutual Ben. Life Ins. Co.*, 95 Mass. (13 Allen) 308, 317; *State v. Foreman* (Del.) 41 Atl. 140, 1 Marv. 517; *Garnet v. State*, 1 Tex. App. 605, 607, 28 Am. Rep. 425; *State v. Godfrey*, 20 Pac. 625, 627, 17 Or. 300, 11 Am. St. Rep. 830; *Stewart v. Hunter*, 16 Pac. 876, 880, 16 Or. 62, 8 Am. St. Rep. 267.

An assault necessarily imports an intent to do personal violence to another. *Murdock v. State*, 65 Ala. 520, 522; *People v. McMakin*, 8 Cal. 547, 548.

It may consist of any act tending to such corporal injury, accompanied with such circumstances as denote, at the time, an intention, coupled with a present ability, of using actual violence against the person. *Hays v. People* (N. Y.) 1 Hill, 351. An assault is defined to be an attempt with force or violence to do a corporal injury to another, and may consist of any act tending to such corporal injury, accompanied with such circumstances as denoted at the time an intention, coupled with a present ability, of using actual violence against the person. *Degenhardt v. Heller*, 68 N. W. 411, 412, 93 Wis. 662, 57 Am. St. Rep. 945; *Tarver v. State*, 43 Ala. 354, 366.

An "assault" is an intent by violence to do an injury to the person of another. It must be intentional, for if it can be collected, notwithstanding appearances to the contrary, that there is not a present purpose to do an injury, there is no "assault." *State v. Davis*, 23 N. C. 125, 127, 35 Am. Dec. 735; *Smith v. State*, 39 Miss. 521, 525.

An intent to do violence is an essential ingredient to the offense, but the degree of violence, of course, is immaterial. The least or slightest wrongful and unlawful touching of the person of another is an assault. *Malland v. Malland*, 86 N. W. 445, 83 Minn. 453.

"Most of our decisions recognize the view of the text-books that there can be no criminal assault without present intention, as well as present ability of using some violence against the person. 1 Russ. Crimes (9th Ed.) 1019; *State v. Blackwell*, 9 Ala. 79; *Tarver v. State*, 43 Ala. 354. In *Lawson v. State*, 30 Ala. 14, it was said that to constitute an assault there must be the commencement of an action which, if not prevented, would produce battery." *Chapman v. State*, 78 Ala. 463, 465, 56 Am. Rep. 42.

An assault is an inchoate violence to the person of another, with the present means

of carrying the intent into effect. The essence of an assault is the intention to do harm. *Perkins v. Stein*, 22 S. W. 649, 650, 94 Ky. 433, 20 L. R. A. 861.

An assault is an intentional attempt by violence to do injury to another. If there is no such intention, no present purpose to do such injury, there is no assault. Thus, where a verdict finds that, in an action for assault, the defendant did not aim or present the revolver at plaintiff, as charged, when discharged or immediately thereafter, and discharged the same with the intention of frightening the plaintiff, but without intending to do him any bodily harm, the verdict acquits him of assault. *Degenhardt v. Heller*, 68 N. W. 411, 412, 93 Wis. 662, 57 Am. St. Rep. 945.

Where defendant raised his hand against prosecutor within striking distance, and at the same time said that, if it was not for prosecutor's advanced age, he would strike him, etc., there was no "assault," because the words explained the action and took away the idea of his intention to strike. *Commonwealth v. Eyre* (Pa.) 1 Serg. & R. 347.

#### Lying in wait.

We are aware that it is said in some of the books that lying in wait or besetting a man's house is an assault, but this must be understood where the lying in wait or besetting a man's house is done with intention to beat him or to do some other violence to his person, and so we find the law to be laid down in 2 Com. Dig. 130. This is, indeed, implied in the very nature of the offense, for an "assault" is defined to be an attempt, with force or violence, to do a corporal injury to another. *Metcalfe v. Conner*, 16 Ky. (Litt. Sel. Cas.) 370, 372.

#### Present ability to commit.

An assault is an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another. *State v. McCune*, 51 Pac. 818, 819, 16 Utah, 170; *State v. Mills* (Del.) 52 Atl. 266, 267, 3 Pennell, 508; *State v. Di Guglielmo* (Del.) 55 Atl. 350; *United States v. Barnaby* (U. S.) 51 Fed. 20; *Harrison v. Ely*, 11 N. E. 334, 120 Ill. 83; *Stevens v. People*, 158 Ill. 111, 117, 41 N. E. 856; *Hunt v. People*, 53 Ill. App. 111, 112; *Bloomer v. State*, 35 Tenn. (3 Sneed) 66, 68; *People v. Helbing*, 61 Cal. 620, 621; *People v. Stanton*, 39 Pac. 525, 526, 106 Cal. 139; *Maxey v. State*, 52 S. W. 2, 4, 66 Ark. 523; *Pratt v. State*, 49 Ark. 179, 181, 4 S. W. 785; *State v. Sullivan*, 24 Pac. 23, 24, 9 Mont. 490; *Bryant v. State*, 51 Pac. 879, 881, 7 Wyo. 311; *Chander v. State*, 89 N. E. 444, 446, 141 Ind. 106; *Woodworth v. State*, 43 N. E. 933, 145 Ind. 276; *State v. Trulock*, 46 Ind. 289, 290; *Greathouse v. Croan* (Ind. T.) 76 S. W. 273, 276; *People v. Ryan*, 27 N. Y. St. Rep. 916, 918, 8 N. Y. Supp. 241 (citing *Hays v. People*, 1 Hill, 351); *State v. Warren*, 5

Pac. 134, 136, 18 Nev. 459; *Bodeman v. State* (Tex.) 40 S. W. 981, 982; *Donnelley v. Territory* (Ariz.) 52 Pac. 368, 370.

The term "assault" has a legal meaning, and has been defined to be an inchoate violence to the person of another, with the present means of carrying the intention into effect, or an unlawful setting on one's person, or an unlawful effort or attempt, with force or violence, to do a corporal hurt to another. *Stivers v. Baker*, 9 S. W. 491, 492, 87 Ky. 508; *People v. Lilley*, 5 N. W. 982, 985, 43 Mich. 521; *Bishop v. Ranney*, 7 Atl. 820, 821, 59 Vt. 316; *Perkins v. Stein*, 22 S. W. 649, 650, 94 Ky. 433, 20 L. R. A. 861.

An assault is an attempt to do violence to the person of another with the means at hand to carry that intention into effect. *State v. Burton* (Del.) 47 Atl. 617, 619, 2 Pennewill, 472, 499; *State v. Lewis* (Del.) 55 Atl. 3, 4; *State v. Lockwood* (Del.) 1 Pennewill, 76, 89 Atl. 589.

An "assault" is defined to be an inchoate violence to the person of another, with the means of carrying the intent into effect. *State v. Smith*, 80 Mo. 516, 518.

An assault consists of an offer to do bodily harm by a person who is in a position to inflict it. *State v. Hunt* (R. I.) 54 Atl. 773.

An assault is the attempt of a person in a rude and revengeful manner to do an injury to another person, coupled with the present ability to do it. *Hendle v. Geller* (Del.) 50 Atl. 632.

An assault is an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound any other person, coupled with present ability to carry such attempt into execution. *Ballinger's Ann. Codes & St. § 7055*. And hence the word "assault," as used in an information charging that the defendant an assault did make in and upon the person of another, is sufficient to charge defendant's present ability to carry his attempt into execution, the word "assault" including all the elements of the statutory definition. *State v. Levan*, 63 Pac. 202, 203, 23 Wash. 547.

Assault is not only the felonious striking of another with intent to injure, but any attempt or offer, with force and violence, to do some bodily hurt to another, whether from wantonness or malice, by some means calculated to produce the end if carried into execution, as by striking at him with a stick or other weapon, or without a weapon, although the person assaulted be not struck, or even by raising up the arm or a cane in a menacing manner, or any similar act, accompanied with circumstances denoting intention, coupled with a present ability of using actual violence against the person of another, constitutes an assault. *Davis, Cr. Law*, pp. 353, 354. Although there must be

present ability to inflict an injury, yet if a man is advancing in a threatening attitude to strike another, so that the blow can almost immediately reach him if he were not stopped, it constitutes an assault. *Berkeley v. Commonwealth*, 14 S. E. 916, 88 Va. 1017 (citing *Russ. on Crimes*, 363).

#### Putting in fear of violence.

An assault is an unlawful attempt, by force or violence, to do an injury to the person of another, and may be proved by evidence of striking at another with or without a weapon or missile, and whether the aim be missed or not, or by evidence of striking, kicking, or pushing at another with the fists, feet, privy member, or any portion of the assailant's body, and the like, in a manner which conveys to the mind a well-grounded apprehension of personal violence; the person so assaulted being within probable reach of the assailant or of the weapon or missile. *State v. Smith* (Del.) 33 Atl. 441, 9 Houst. 588.

An instruction that an assault is an unlawful attempt to commit violence on the person of another, with the present ability to do so, is not erroneous in leaving out the words, "with full force and violence," since the element of violence is clearly indicated. *State v. Cody*, 62 N. W. 702, 703, 94 Iowa, 169.

The offense may consist also in putting another in fear of violence. *State v. Baker*, 38 Atl. 653, 654, 20 R. I. 275.

There need not be even a direct attempt at violence, but any indirect preparation towards it would be sufficient; hence one having another in his power, and within reach, threatening and exerting the means to accomplish meditated violence upon the person, is guilty of an assault. *Hays v. People* (N. Y.) 1 Hill, 351, 352.

#### Unlawful arrest.

An action for malicious prosecution, and not an action for assault and false imprisonment, is the proper remedy when an arrest is made by a duly qualified officer, under process fair on its face, and issued from a court of competent jurisdiction, the suit being based on a failure to enter the writ in court. *Lisabelle v. Hubert*, 50 Atl. 837, 23 R. I. 456.

#### Unlawful attempt.

An "assault," as ordinarily defined, is any unlawful attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness. *State v. Baker*, 38 Atl. 653, 654, 20 R. I. 275. An assault is an attempt or offer, with force and violence, to do injury to a person, either from malice or wantonness. *Commonwealth v. Ruggles*, 88 Mass. (6 Allen) 588, 590 (citing 1 East, P. C. 406); *Smith v. State*, 39 Miss. 521, 525; *Tarver v. State*, 43 Ala. 354, 366.

ignominious corporal penalties, where they are connected with any intent to murder. *Cornellison v. Commonwealth*, 2 S. W. 235, 240, 84 Ky. 583.

"An assault is any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being; as raising a cane to strike him, pointing in a threatening manner a loaded gun at him, and the like." *Stewart v. Hunter*, 16 Pac. 876, 880, 16 Or. 62, 8 Am. St. Rep. 267. It is any unlawful physical force, partly put in motion, and creating a reasonable apprehension of an immediate physical injury. *State v. Aleck*, 5 South. 639, 41 La. Ann. 83; *State v. Gorham*, 55 N. H. 152, 168; *State v. Baker*, 38 Atl. 653, 654, 20 R. I. 275.

An "assault" is defined as an unlawful offer or attempt, with force or violence, to do a corporal hurt to another. *Tomlin v. Hildreth*, 47 Atl. 649, 651, 65 N. J. Law, 438.

"To constitute an assault, there must be an attempt to inflict violence upon the person, or the accused must make a threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with the ability, to inflict unlawful violence upon the person." An instruction, in a prosecution for an assault with intent to commit murder, that if defendant cut prosecutor with a knife it was an assault, is erroneous, in not stating that the violence must have been unlawful. *Ponton v. State*, 34 S. W. 950, 35 Tex. Cr. R. 597.

An assault may be entirely lawful, as either excusable or justifiable, and it involves, as defined in *Tomlins' Law Dictionary*, every "attempt or offer, with force or violence, to do a corporal hurt to another"; and hence an instruction defining an assault as an attempt "with unlawful force to inflict bodily injury" was erroneous. *Drew v. Comstock*, 23 N. W. 721, 723, 57 Mich. 176.

#### Use of dangerous weapons.

The use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object, constitutes an assault. *Hunt v. State (Tex.)* 13 S. W. 858, 859.

An assault is an unlawful attempt or offer, with force and violence, to do bodily injury to another. An assault may be completed without touching the person of the one assaulted, as by lifting a cane, clinching the fists, or pointing a gun at him; but words alone, however abusive, cannot amount to an assault. Where a person stands near another with a rifle in his hands, and pointed down, with his hand on the lock, and, a part of the time at least, the gun cocked, and which could be raised in a position to shoot quick as a flash of lightning, constitutes noth-

ing short of a malicious assault. *State v. Hatfield*, 37 S. E. 626, 631, 48 W. Va. 561.

An assault is an intentional attempt by violence to do an injury to the person of another. *State v. Davis*, 23 N. C. 125, 35 Am. Dec. 735. It is an attempt unlawfully to apply any—the least—actual force to the person of another, directly or indirectly. Where defendants, one with a pistol in his hand, one with a drawn sword, one with a pistol in his pocket, went to the door of the prosecutor's house, where he was sitting, with the admitted purpose of compelling him to accompany them, and ordered him to go with them, they were guilty of assault, though they were prevented from actually doing violence to his person by the interference of others. *State v. Reavis*, 18 S. E. 388, 113 N. C. 677.

"To constitute an assault, it is not necessary that serious bodily injury be inflicted upon the person assaulted. The drawing of a gun or a pistol on another with intent to use it is an assault." *United States v. Reeves (U. S.)* 38 Fed. 404, 409.

An "assault" is defined as follows: Whoever, having present ability to do so, unlawfully attempts to commit a violate injury on the person of another, is guilty of assault. Thus where the prosecuting witness, on coming out of her house at night, was confronted by a man who pointed a gun at her, which was afterwards found on the ground loaded, and accused, to whom it was found to belong, was found in the house and ordered to retire, and upon being seen on the street attempted to escape, he was guilty of assault. *Bryant v. State*, 51 Pac. 879, 881, 7 Wyo. 311.

To constitute an assault with a gun or pistol, it is necessary that the weapon be presented at the party, charged to be assaulted, within a distance to which a gun or pistol may do execution. *Tarver v. State*, 43 Ala. 354, 356.

Pointing a gun at another person within shooting distance may constitute an assault. *State v. Lightsey*, 43 S. C. 114, 115, 20 S. E. 975.

The drawing of a pistol on another, accompanied with a threat to use it unless the other immediately leave the spot, is an assault, although the pistol is not pointed at the person threatened. *People v. McMakin*, 8 Cal. 547, 548.

Flourishing a cocked pistol in an angry manner, and pointing it at a person, constitutes an assault, although the person flourishing the pistol may have no special ill will against the person at whom it is pointed. *Justice v. Phillips*, 7 Ky. Law Rep. 439.

#### What of consent imported.

"Assault," as used in Pen. Code, § 240, defining an "assault" as an unlawful attempt,



coupled with a present ability, to commit a violent injury on the person of another, means an attempt to commit a violent injury without the consent of the party assaulted. *People v. Gordon*, 11 Pac. 762, 70 Cal. 467.

An assault implies force upon one side and repulsion, or at least want of consent, upon the other. An assault upon a consenting party would therefore be a legal absurdity. *Wait, Act. & Def. p. 334, § 11.* "Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to." *Cooley on Torts.* Harm suffered by consent is not in general a basis of a civil action. If the defendant is guilty of no wrong against the plaintiff, except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of the wrongful act should be permitted to profit by it. *Courtney v. Clinton*, 48 N. E. 799, 801, 18 Ind. App. 620 (citing 1 Jagg. Torts). It must be without the consent of the person assaulted, or with consent if it be obtained by fraud. It is not necessary that there be an intention to strike, it being sufficient that gestures are used giving reasonable grounds of belief that force will be applied. *Morgan v. O'Daniel (Ky.)* 53 S. W. 1040.

An "assault" is defined as an attempt unlawfully to apply any—the least—actual force to the person of another, directly or indirectly, without the consent of the person assaulted, or with such consent if it is obtained by fraud. *Liebscher v. State (Neb.)* 95 N. W. 870, 871.

#### Words or threats.

It is not every threat, when there is no actual personal violence, that constitutes an assault. There must in all cases be the means of carrying the threat into effect. *Ford v. Schliessman*, 83 N. W. 761, 763, 107 Wis. 479 (citing *Stephens v. Myers*, 4 Car. & P. 348).

Mere threats are not sufficient, but there must be violence actually offered within such a distance of the person menaced that harm might ensue if the one committing the assault were not prevented. *People v. Lilley*, 5 N. W. 982, 985, 43 Mich. 521 (citing 2 Greenl. Ev. §§ 59, 82, 1 Bish. Cr. Law, § 419).

Mere words cannot constitute an assault. *Prince v. Ridge*, 66 N. Y. Supp. 454, 32 Misc. Rep. 666.

"Words alone cannot constitute an assault. They may endanger the public peace, but do not break it. There is no assault unless there be some act amounting to an attempt or offer to commit personal violence, and hence where one, being within striking distance, raises a weapon for the purpose of

striking another, at the same time declaring that if such other will perform a certain act he will not strike him, and such other performed the required act, in consequence of which no blow was given, there is an assault." *State v. Morgan*, 25 N. C. 186, 188, 38 Am. Dec. 714.

An assault includes threatening words, accompanied by advances in a threatening attitude; but mere words do not amount to an assault, and, though they may mitigate, they do not justify, an assault. *Keyes v. Devlin (N. Y.)* 3 E. D. Smith, 518, 523.

The gist of the offense of assault is the intent with which the injury is inflicted or attempted, and while not every threat when there is no actual violence, constitutes an assault unless the threat is carried into effect, yet if the accused approaches within striking distance, and has the ability to strike and commit injury, and intends so to do, such conduct will constitute an assault, though no actual injury occurred. *State v. Malcolm*, 8 Iowa (8 Clarke) 413, 415.

It is said that a mere purpose to commit violence, however plainly declared, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault. Hence no words can amount to an assault. *Smith v. State*, 39 Miss. 521, 525.

Every laying on of hands upon the person of another, and every blow or push, constitutes an assault, in respect of which an action for damages is maintainable. Every attempt, also, to offer with force and violence to do hurt to another, constitutes an assault, such as striking at a person with or without a weapon, or advancing with the hand uplifted in a threatening manner with intent to strike, although the person is stopped before he gets near enough to carry the intent into effect. But as regards threatening gestures, if the parties, at the time the gestures are used, are so far distant from each other that immediate contact is impossible, there is no assault. A mere threat, unaccompanied by an offer or threat to strike, is not an assault. The mere touching of a person, without threats or violence, is not an assault unless it is done in a hostile or insulting manner. *Clayton v. Keeler*, 42 N. Y. Supp. 1051, 1053, 18 Misc. Rep. 488.

#### ASSAULT IN THE FIRST DEGREE.

An assault in the first degree is when a person, with intent to kill or commit a felony on the person or property of another, assaults him with a deadly weapon, or by other means or force likely to produce death. *Pen. Code, § 217.* *People v. Rockhill*, 10 N. Y. Cr. R. 584, 586, 26 N. Y. Supp. 222; *People v. Terrell*, 11 N. Y. Supp. 364, 365, 58 Hun, 602; *People v. Dartmore*, 48 Hun, 321, 322, 2 N. Y. Supp. 310.

**ASSAULT IN THE SECOND DEGREE.**

A person who willfully or wrongfully wounds another with or without a weapon, or willfully or wrongfully assaults by the use of anything likely to produce bodily harm, under circumstances not amounting to assault with intent to kill, shall be guilty of assault in the second degree. Pen. Code, § 218. *People v. Cole*, 2 N. Y. Cr. R. 108, 112; *People v. Terrell*, 11 N. Y. Supp. 364, 365; *People v. Connor*, 6 N. Y. Supp. 220, 53 Hun, 352; *People v. Terrell*, 11 N. Y. Supp. 364, 365, 58 Hun, 602; *People v. McKenzie*, 6 App. Div. 199, 200, 39 N. Y. Supp. 951, 952; *People v. Dartmore*, 48 Hun, 321, 322, 2 N. Y. Supp. 310; *People v. Hannigan*, 58 N. Y. Supp. 703, 704, 42 App. Div. 617.

**ASSAULT AND BATTERY.**

An assault and battery is the use of any unlawful violence upon the person of another with intent to injure him, whatever the object, means, or degree of violence used. *Garnet v. State*, 1 Tex. App. 605, 007, 28 Am. Rep. 425; *Foster v. State*, 8 S. W. 664, 665, 25 Tex. App. 543.

Assault and battery "is a violent attempt, coupled with a present ability, to do a bodily injury, resulting in a battery." *Harrison v. Ely*, 11 N. E. 334, 120 Ill. 83.

An assault and battery is a successful attempt to commit violence on the person of another. *Razor v. Kinsey*, 55 Ill. App. 605, 614.

An assault and battery is an unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent. *Tomlin v. Hildreth*, 47 Atl. 649, 651, 65 N. J. Law, 438.

"To constitute an assault and battery, unlawful violence must be inflicted upon the person charged to have been assaulted; not merely violence, but it must be unlawful violence." *Ponton v. State*, 34 S. W. 950, 35 Tex. Cr. R. 597.

Rev. St. 1894, § 1983, provides that whoever, in a rude, insolent, or angry manner, unlawfully touches another, is guilty of assault and battery. *Chandler v. State*, 39 N. E. 444-446, 141 Ind. 106.

An assault and battery is the beating of another person, and a person is a human being, and includes a slave. *Commonwealth v. Lee*, 60 Ky. (3 Metc.) 229, 230.

An "assault and battery" may be defined to be any touching of the person of an individual in a rude or angry manner, without justification. To be an assault and battery, it is not necessary that the person who sustains it should be a citizen of the government. All natural persons who by law are entitled to protection may be the subject of assault

and battery. Slaves are chattels, and their right to protection belongs to the master. Free negroes without any of the political rights which belong to a citizen are still regarded by the law as possessing both natural and civil rights, and an indictment will lie for an assault and battery committed on a free negro. *State v. Harden* (S. C.) 2 Speers, 152, 153, note.

Crimes Act, § 43, imposes a penalty for assault and battery and beating another. Held that, where an indictment alleged that the accused committed an "assault and battery" on the person of M., the allegation was sufficient, inasmuch as "assault and battery" convey the same meaning as "assault and beat." *State v. Beverlin*, 2 Pac. 630, 631, 30 Kan. 611.

"Assault and battery," when used in an indictment or information, mean a simple battery where the necessary acts and facts constituting a more serious assault are not set forth. *Key v. State*, 12 Tex. App. 506, 513.

St. 3 and 4 Wm. IV, c. 42, § 21, enact that it shall be lawful for defendant in all personal actions, except actions for assault and battery, false imprisonment, libel, slander, malicious prosecution, or criminal conversation, by leave of any court where such action is pending, to pay into court a sum of money by way of compensation, in such a manner as the judge may direct. Held, that "actions for assault and battery," as used in the statute, meant assaults committed on the persons of the plaintiff and his wife, and hence battery of a son or servant was not included. *Newton v. Holford*, 6 Q. B. 921, 925.

That which would be an assault and battery in a drawingroom or in the streets of a city cannot be so considered among the rough inmates of a ship at sea. If striking at a man without touching him or holding up the fist at him, or any rude or angry touching of the person, would be considered an assault and battery on board ship, no vessel could arrive without a plentiful crop of actions equally injurious to both parties. Generally speaking, a seaman should recover damages for an assault and battery from an officer of a ship: First, where personal violence was inflicted on him, although not excessively, but wantonly and without any provocation or cause; second, where there was provocation or cause given by the seaman, but the punishment was cruel and excessive, having no reasonable proportion to the provocation or fault for which it was inflicted; third, the employment of a deadly or dangerous weapon; the instrument used should be that which is ordinarily used for such occasions. *Forbes v. Parsons* (U. S.) 9 Fed. Cas. 417, 419.

**As criminal offense.**

See "Criminal Offense."

**As infamous crime.**

See "Infamous Crime."

**Intent.**

Assault and battery is where one intentionally inflicts unlawful violence on another. *The Lord Derby* (U. S.) 17 Fed. 265, 266.

To constitute an assault and battery, unlawful violence must be used on the person of another, and such violence must be used with the intent to injure the person on whom it is inflicted, and if the violence is unaccompanied by such intent it does not constitute the offense. *Ware v. State*, 7 S. W. 240, 241, 24 Tex. App. 521 (citing *Willson*, Tex. Cr. Laws, §§ 809, 811).

Assault and battery is the use of any unlawful violence on the person of another. It is not necessary, to constitute an assault and battery, that there be a specific intention of striking or otherwise injuring the person injured, but if one of two persons, fighting, unintentionally strikes a third, the person so striking is liable in an action by the third person for an assault and battery. *James v. Campbell*, 5 Car. & P. 372.

An assault and battery is an unlawful attempt or offer, with force or violence, to inflict a bodily hurt upon another, or the using of wrongful physical violence or constraint on such person, without his consent, with an intent to injure such person. The intent to injure must appear from the facts and circumstances surrounding the transaction, which does not appear from the mere pushing down of the assaulted person. If this was done in anger it would be ample evidence of the intent to injure, but the mere pushing down of one person by another does not make such person guilty of an assault, for it might have been an accident or in play; but intent to injure can be presumed from the fact of an actual injury to the person charged to have been assaulted by being pushed down, where an injury is caused by violence to the person. *Rutherford v. State*, 13 Tex. App. 92, 94.

An assault and battery is the use of any violence on the person of another with intent to injure. To constitute the offense, two acts must concur, one physical, the other mental; that is, there must be a physical act done by the assailant which takes effect on the person of the party assailed, and also an intention on the part of the assailant to inflict an injury; and, if the natural consequences of the act or violence is an injury, the law presumes that the injury was intended, unless it be shown that the intention was innocent and not culpable. *Donaldson v. State*, 10 Tex. App. 307, 312.

"An assault and battery is where one intentionally inflicts unlawful violence upon

another." In *Leane v. Bray*, 3 East, 593, it is said: "Whenever one willfully or negligently puts in motion any force, the direct result of which is an injury, it constitutes an assault and battery. Being bitten by a dog is not an assault and battery, within the meaning of admiralty rule 16, requiring that proceedings in case of assault and battery shall be in personam only, and hence a pilot who is bitten by a dog" may maintain an action in rem against the vessel. *The Lord Derby* (U. S.) 17 Fed. 265, 266.

**Negligence or defective appliances.**

An unintentional case of injury occurring through negligence and without design, even when trespass would lie, is not an assault and battery within the meaning of Gen. St. c. 10, § 1, providing that a right of action for assault and battery shall cease or die with the person injuring or the person injured. *Perkins v. Stein*, 22 S. W. 649, 650, 94 Ky. 433, 20 L. R. A. 861.

"Assault and battery," in Code Civ. Proc. § 3228, subd. 3, providing that if the plaintiff in an action for assault and battery recovers less than \$50 he shall have costs not to exceed the amount of his recovery, means an act vi et armis, and does not include an action by an employé for injuries sustained by reason of the defective appliance. *Rieger v. Fahys Watch-Case Co.*, 13 N. Y. Supp. 788, 789.

**ASSAULT TO DO SERIOUS BODILY HARM.**

Assault with intent to murder distinguished, see "Assault with Intent to Commit Murder."

**ASSAULT TO HAVE IMPROPER CONNECTION.**

Assault with intent to commit rape distinguished, see "Assault with Intent to Commit Rape."

**ASSAULT TO MURDER.**

The phrase "assault to murder," in a recognizance, is a sufficient designation of the offense of assault with intent to murder. *Wills v. State*, 4 Tex. App. 613, 615.

**ASSAULT WITH DANGEROUS WEAPON.**

To constitute an assault with a dangerous weapon, it is necessary that the weapon should be presented at the party intended to be assaulted within the distance at which it may do execution. Firing a pistol at another who is within shooting distance, or in the direction where he is standing, merely with intent to frighten him, is an assault with a dangerous weapon. *State v. Baker*, 38 Atl. 653, 654, 20 R. I. 275.

**ASSAULT WITH INTENT TO COMMIT MURDER.**

The intent is an essential ingredient of a correct definition of "assault with intent to murder." *Johnson v. State*, 1 Tex. App. 609, 610.

To constitute an assault with intent to murder, the specific intent must exist, and it does not exist unless, if death had ensued, the consummated offense would have been murder. *Smith v. State*, 8 South. 551, 552, 83 Ala. 26.

"To constitute an assault with intent to murder, an assault and battery, or an assault, must be committed; that is, the violence inflicted or attempted to be inflicted must be unlawful, and to this must be added the specific intent to kill, and, in addition to this, the accused must be prompted by malice." *Ponton v. State*, 84 S. W. 950, 85 Tex. Cr. R. 597.

An assault becomes and is an "assault with intent to murder" when it is committed with a deadly weapon and with intent to kill the person assaulted, done unlawfully and intentionally and with malice aforethought, and under such circumstances that, had death resulted therefrom to the person assaulted, the killing would have been murder. *Alvarez v. State* (Tex.) 58 S. W. 1013, 1014.

The essential elements of the statutory offense of an assault with intent to murder, that which converts it into a felony, is the intent to take the life of the person assailed. Unless, if the attempt had been consummated, the offense would have been murder in the one or the other of its degrees, there can be no conviction of the felony. When there is evidence of the assault upon the particular person named in the indictment, the determination of the guilt or the innocence of the felony necessitated the inquiry whether, if death had ensued, the offense would have been murder. *McCormick v. State*, 15 South. 438, 439, 102 Ala. 156 (citing 1 Whart. Cr. Law [9th Ed.] § 641; *Lawrence v. State*, 84 Ala. 424, 5 South. 33; *Meredith v. State*, 60 Ala. 441).

To constitute the offense of assault with intent to commit murder, there must be an actual intent to kill, and that under such circumstances as would make the killing murder. *People v. Ochotski*, 73 N. W. 889, 891, 115 Mich. 601.

Assault with intent to murder includes the additional attempt with violence to do an injury to the person of another, with the added intent to commit murder. In order to support the verdict, the jury must find not only the assault, but that if the injured person had died from the effects of the wounds, the person would then have committed the crime of murder. *State v. Foreman* (Del.) 41 Atl. 140, 1 Marv. 517.

An assault with intent to murder may be committed by administering poison in coffee of the person against whom the attempt is made, for such an assault may be committed without the use of a weapon of any kind. *Johnson v. State*, 17 S. E. 974, 975, 92 Ga. 36.

**Ability to commit.**

"The authorities agree that to constitute this offense the ability to kill must concur with the intention to murder. Some authors insist that the personal ability to perform the deed must be commensurate with the intention, both being defeated by some special cause independent of the offender and the instruments or means attempted to be used." *Mullen v. State*, 45 Ala. 43, 45, 6 Am. Rep. 691.

"An assault to commit murder is an unlawful intent, coupled with a present ability, to kill a human being, with malice aforethought, and with an unlawful attempt to commit such crime." *People v. Devine*, 59 Cal. 630.

A definition of "assault to commit murder" as "the attempt to kill a person, coupled with the present ability to do so," is not a full definition of the crime. *People v. Ye Park*, 62 Cal. 204, 206.

**Consummation necessary.**

To constitute the offense of assault with intent to commit murder, there must coexist a consummated assault, as contradistinguished from a mere attempt, and a specific intent, to commit murder. *State v. Fearmster*, 41 Pac. 52, 53, 12 Wash. 461.

Act 1829, c. 23, § 52, declares that whoever shall feloniously and with malice aforethought assault any person with intent to commit murder, etc., shall be punished. Held, that the term "assault" as there used meant an actual assault on the person, coupled with a felonious intent, and that a mere constructive assault, such as besetting the house of another, was not such an assault as was contemplated by the section. *Evans v. State*, 20 Tenn. (1 Humph.) 394, 396; *State v. Freels*, 22 Tenn. (3 Humph.) 228, 229.

**Assault with intent to kill distinguished.**

An assault with intent to murder is such an assault that, if death had been caused by it, the assailant would have been guilty of murder as made with an intent, the result of malice, and aforethought, and, so far as the motive gives character to the offense, an assault with intent to murder is a crime of deeper turpitude and deserving of more severe punishment than an assault with intent to kill. An assault with intent to murder includes intent to kill, and if the former is proved it merges the latter, and, if the former is not and the latter is proved, there may be a conviction of the lower offense. *State v. Reed*, 40 Vt. 603, 607.

**Assault to do serious bodily harm distinguished.**

In order to authorize a conviction for an assault with intent to murder, it must appear that at the time of the assault it was the intent of the accused to kill the injured party. Hence an instruction that where an assault is made by one person upon another with a deadly weapon, or such weapon as by its use as a weapon is calculated to produce death or serious bodily harm, and under such circumstances as, had death ensued to the person assaulted, would be murder, such assault would be an assault to murder, was erroneous, because omitting the indispensable element of a specific murderous intent. *Courtney v. State*, 13 Tex. App. 502, 505.

To justify a conviction for assault with intent to murder, it must be shown that it was the object and intent of the assault. An intent to inflict serious bodily injury, and the infliction of serious bodily injury without such intent, is not sufficient. Whilst it is true that, if an assault be committed with intent to inflict serious bodily injury from which death might likely ensue, the offense will be murder, still, where such was the intent, and death does not ensue, the assault cannot be said to be an assault with intent to murder. In other words, the intent to murder is the gist of the offense, and no intent short of that will sustain a conviction for assault with intent to murder. *Harrell v. State*, 13 Tex. App. 374, 377; *Gillespie v. State*, 13 Tex. App. 415.

**ASSAULT WITH INTENT TO COMMIT RAPE.**

An assault with intent to rape on a woman is any attempt to have carnal knowledge of a woman without her consent by force, threats, or fraud. Or an assault with intent to rape is constituted by the use of any threatening gesture, showing in itself, or by words accompanying, an immediate intention, coupled with an ability, to have carnal knowledge of a woman, without her consent, by force, threats, or fraud. *Jones v. State*, 18 Tex. App. 485, 488.

In cases of assault with intent to commit rape, the intent with which the assault was made is of the essence of the offense, and in order to justify a conviction the jury must be satisfied, not only that the prisoner had the ability and intended to gratify his passions on the person of the woman assaulted, but that he intended to do so at all events, and notwithstanding any resistance she might make. *State v. McCune*, 51 Pac. 818, 819, 16 Utah, 170; *Shields v. State*, 23 S. W. 893, 895, 82 Tex. Cr. R. 498; *Dunn v. State*, 79 N. W. 719, 721, 58 Neb. 807; *Stevens v. People*, 41 N. E. 856, 858, 158 Ill. 111.

To constitute the crime of assault with intent to commit rape, there must have been an intent to commit rape, and that intent

must have been manifested by an assault for that purpose upon the person of the prosecutrix. Both of these ingredients are necessary to constitute the offense. An assault in such case may imply force upon one side and a want of assent upon the other. The jury must be satisfied that the accused did use force, and that against the will of the prosecutrix, in an attempt to have sexual intercourse with her. *Garrison v. People*, 6 Neb. 274, 282, 283.

If the defendant did in fact intend forcibly to know a female carnally and against her will, and the effort be made to accomplish his purpose, the mere desisting from further effort on account of resistance and inability to overcome the resistance, or from fear, does not relieve him from the guilt of an assault with intent to rape. *Taylor v. State*, 50 Ga. 79, 81.

Where one makes an assault upon a woman with intent to ravish her, he is guilty of an assault with intent to commit rape, though, when the woman resists, he changes his purpose and desists from the attempt. *State v. Ellick*, 52 N. C. 68, 70.

A verdict that the defendant is guilty of an "assault with attempt to commit rape" is tantamount to saying that he is guilty of an assault with "intent" to commit a rape. *Prince v. State*, 35 Ala. 367, 369.

Rape necessarily includes an assault and battery. To sustain an indictment for assault with intent to commit a rape, it is not necessary to allege or prove a battery. But a battery may be one of the facts by which the offense is made out. It then constitutes a part, though not an essential part, of the offense. If not alleged, there is no variance; if alleged, there is no duplicity. *Commonwealth v. Thompson*, 116 Mass. 346, 348.

Laws 1868-69, c. 167, par. 2, provides that every person who is convicted of ravishing and carnally knowing any female over the age of 10 years by force and against her will, or of carnally knowing and abusing any female child under the age of 10 years, shall suffer death; and paragraph 3 provides that every person convicted of an assault with intent to commit rape shall be imprisoned, etc. Held, that under these provisions rape is the carnal knowledge of any woman above the age of 10 years against her will, and of a woman child under the age of 10 years with or against her will, and that therefore an assault with intent to carnally know and abuse a female child under the age of 10 years is an assault with an intent to commit rape. *State v. Johnston*, 76 N. C. 209, 211.

Pen. Code 1895, art. 633, defines "rape" as the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud, or of a female under the age of 15 years, other than the wife of the person, with or without her consent, and with or without

the use of force, threats, or fraud. Article 608 provides that, if any person shall assault a woman with intent to commit the offense of rape, he shall be punished, etc. Article 611 defines an "assault with intent to commit" a crime as the existence of facts which bring the offense within the definition of an "assault," coupled with the intent to commit such other offense. Article 587 defines an "assault" as an attempt to commit a battery, etc. Article 640 provides that if, on the trial of an indictment for rape, that offense, though not committed, was attempted by the use of any means spoken of in articles 634 to 636 (viz., force, threats, or fraud), but not such as to bring the offense within the definition of "assault with intent to commit rape," the jury may convict of an attempt to commit the offense. Held, that there could be no assault of a female consenting to sexual intercourse, though under 15 years of age, and therefore, rape not having been consummated, a defendant could not be convicted of an assault with intent to rape; nor, since there was no force, threats, or fraud used, was he guilty of an attempt to commit the offense as provided in article 640. *Hardin v. State*, 46 S. W. 803, 804, 39 Tex. Cr. R. 426.

An assault, it is said, implies force upon one side and resistance on the other, and it is a legal anomaly to charge the defendant with an assault with intent to commit rape upon a female child under 10 years of age, who in law has neither power to resist nor assent thereto. But under Rev. St. c. 164, § 41, providing, if any person shall assault any female with intent to commit the crime of rape, he shall be punished, etc., which section has direct reference to the two sections preceding it, and was designed to embrace assaults upon females, whether upon one of the age of 10 years or more, or upon one under 10 years of age, with intent to commit the substantive crime, an indictment alleging an assault with intent to carnally know and ravish, by force and against her will, a female child under 10 years of age, is good. *Fizell v. State*, 25 Wis. 364, 368.

Hill's Ann. Laws, § 1733, provides that any person over 16 years who shall carnally know any female under 16, or any person who shall forcibly ravish any female, shall be deemed guilty of rape. Section 1740 provides for the punishment of an assault with intent to rape, and the statutes were enacted at the same time. Held, that they will be interpreted in pari materia, and hence one may be guilty of an assault with intent to rape a female under 16 who consented. *State v. Sargent*, 49 Pac. 889, 890, 32 Or. 110.

#### Consent of person assaulted.

An assault with intent to commit rape is necessarily an assault with intent to carnally know and ravish by force and against the will of the prosecutrix, and the fact that the

act is without the consent of the prosecutrix is a necessary ingredient of the offense; hence it is held that a charge that, for the purpose of prosecution for assault with intent to rape, it was immaterial whether the prosecutrix did actually consent or not, and that the evidence upon that point was only relevant in so far as it tended to show what the intention of the accused was, is erroneous. *Hull v. State*, 22 Wis. 580.

While it is true that if the liberties taken with a prosecutrix for rape, and the ensuing intercourse, were with her consent, there can be no conviction either of rape or of assault with intent to commit rape, yet an assault may be made by the prisoner with intent to commit rape which will justify a conviction for such crime, though it may not appear that at the time of the consummation of the prisoner's purpose there was such want of consent as to constitute the higher crime. *State v. Cross*, 12 Iowa, 66, 68, 79 Am. Dec. 519.

The common-law definition of "rape" is "the carnal knowledge of a woman forcibly and against her will." The same definition is adopted by our statute. Under this definition an assault is a necessary ingredient of every rape or attempted rape. But it is not a necessary ingredient of the crime of carnally knowing a child under the age of 12 years, with or without her consent, defined in the statute, and also called "rape." Here are two crimes, differing essentially in their nature, though called by the same name. To one, force and resistance are essential ingredients, while to the other they are not essential; they may be present or absent without affecting the criminality of the fact of carnal knowledge. So, under an indictment charging rape upon a female under the age of 12 years, where the offense was not fully committed, the defendant may be convicted of an attempt to commit rape, though the child consented to all he did; but in such case he cannot be convicted of assault with intent to commit rape. There can be no assault upon a consenting female, although there may be what the statute designates "rape." *State v. Pickett*, 11 Nev. 255, 257-259, 21 Am. Rep. 754.

#### Assault to have improper connection distinguished.

There is a distinction between an "assault to commit a rape" and an "assault with an intent to have improper connection." Any such obscene or indecent familiarity with the person of a female against her will, when the latter is the extent of the purpose and intent of the aggressor, is an aggravated assault, and whatever may be the cause, or brutal, abusive character of the assault, if it appear from the evidence that it was not the object or intent of the aggressor to accomplish his desired purpose by force, against the will, and without consent, then the more

aggravated offense has not been committed. *Irving v. State*, 9 Tex. App. 66, 69; *Pefferling v. State*, 40 Tex. 486, 493.

**Attempt to commit rape distinguished.**  
See "Attempt to Commit Rape."

**Rape distinguished.**

By the common law "rape" is a crime, and "assault with intent to commit rape" is a crime. Each has a well-defined meaning, which has not been altered by statute. The latter crime is properly designated either as an "attempt to commit rape" or an "assault with intent to commit rape." Both names have received the sanction of this court, and each is a correct legal designation of the crime. The words "an assault with actual violence upon the body of a female, with intent to commit rape," found in Gen. St. § 1407, mean the same as "an attempt to commit rape," which legally designate a common-law crime. *Rookey v. State*, 38 Atl. 911, 912, 70 Conn. 104.

**ASSAULT WITH INTENT TO KILL.**

Assault with intent to murder distinguished, see "Assault with Intent to Commit Murder."

"Assault with intent to kill," as used in Hill's Code, § 1740, providing that if any person shall assault another with the intent to kill he shall be punished, etc., implies an unlawful and felonious attempt to take the life of another, and in general the verb "to kill" in such a connection requires only intent to do what would constitute, if done, either murder or manslaughter. *State v. Lynch*, 26 Pac. 219, 20 Or. 389.

An instruction that, to constitute the offense of assault with intent to kill, the jury must find and believe that defendant, intending to kill the prosecuting witness, assaulted her with a deadly weapon, and that the assault was made with the intent upon the part of defendant, on purpose and with malice aforethought, to kill said witness, is not wrong because not stating that the cutting was done feloniously. *State v. Miller*, 6 S. W. 57, 60, 93 Mo. 263.

"An assault with intent to kill is such an assault as that, had death ensued, the crime would have been manslaughter, and the intent is the result of sudden passion or emotion, without time for deliberation or reflection." *State v. Reed*, 40 Vt. 603, 607.

**As felony.**

See "Felony."

**As infamous crime.**

See "Infamous Crime."

**ASSAULT WITH INTENT TO ROB.**

Pen. Code, § 99, defines "assault with intent to rob" as where any person shall with

any fixed weapon unlawfully and maliciously assault another, or by menaces, or in any forcible manner, demand money, goods, or chattels, with intent to commit robbery. *Erwin v. State*, 43 S. E. 719, 117 Ga. 296.

The expression "an assault with intent to rob" necessarily comprehends and embraces all that is meant by "an assault with intent to commit the offense of robbery," and therefore might be used interchangeably in instructions; "rob" and "robbery" being synonymous in meaning. *Robinson v. State*, 11 Tex. App. 309, 313.

**ASSEMBLE.**

The word "assembled" in the bankruptcy act, providing that a resolution must be adopted by a certain proportion of the creditors assembled, includes every creditor who appears at any session of the meeting and proves his debt, though at the time the vote is taken he is not present or represented by proxy. *In re Richmond*, 14 N. Y. Daily Reg. 869, 7 Cent. Law J. 435.

A school is not in session at the time of an interruption complained of where it has "assembled" together, there being a clear distinction between the assembling of the individual members of a collective body and their due organization as such. All the pupils of a school may have assembled in a schoolroom, ready to enter upon the duties of the day, their teacher may also be among them, and yet it may be that school is not in session. *State v. Gager*, 28 Conn. 232, 233.

Pen. Code, art. 180, prohibits the making of any noise which shall willfully disturb any congregation assembled for religious worship. Held, that the words "assembled for worship," as there used, did not limit the statute to a disturbance while services were actually being conducted, but that the congregation should be held to be "assembled" so long as any persons composing it remained on the premises after the services were concluded. *Dawson v. State*, 7 Tex. App. 59, 60.

"Assembled," as used in an indictment for disturbing the peace, stating that the disturbance occurred at a place where people "commonly assembled," is equivalent to the words "commonly resort" as used in the statute relating to such offenses. *Hammond v. State (Tex.)* 28 S. W. 204.

**ASSEMBLY.**

See "General Assembly"; "Public Assembly"; "Religious Assembly"; "Riotous Assembly"; "Tumultuous Assembly"; "Unlawful Assembly"; "Worshipping Assembly."

"Assembly," as used in St. 1849, c. 59, providing that for every person who shall willfully disturb any school or other "as-

sembly" of people met for a lawful purpose, etc., is not confined to assemblies for school or educational purposes, but includes meetings assembled for the discussion of subjects of temperance, or political gatherings, or meetings for amusement, and all public meetings held for lawful purposes. *Commonwealth v. Porter*, 67 Mass. (1 Gray) 476, 477.

Code, § 3257, providing punishment for interrupting or disturbing an "assembly of people met for religious worship," includes an interruption made after the conclusion of the services and the dismissal of the congregation, but while a portion of the people still remain in the house, and but a reasonable time has elapsed for their dispersion, it not being necessary that the interruption or disturbance should be made during the progress of the religious services. *Kinney v. State*, 38 Ala. 224, 225. See, also, *Dawson v. State*, 7 Tex. App. 59, 60.

The words "assemblage engaged in religious worship," in a statute forbidding the disturbance of an assemblage engaged in religious worship, will not be limited in meaning to an assemblage which is actually engaged in worship at the time of the disturbance, but includes the time within which the congregation is coming together at the appointed place, and all times thereafter until there is a final dispersion. *Lancaster v. State*, 53 Ala. 398, 399, 25 Am. Rep. 625.

A religious congregation is a religious assembly within the act relating to the disturbance of public worship, though the congregation assembled had been dismissed and the church authorities were engaged in a trial of a member of the church for certain offenses. *Hollingsworth v. State*, 37 Tenn. (5 Sneed) 518, 519.

#### ASSEMBLY OF DELEGATES.

An "assembly of delegates," within the meaning of acts regulating caucuses and nominations for office, is an organized assemblage of delegates representing a political party or principle which cast 5 per cent. of the total number of votes cast for member of Congress at the last general election. Rev. Codes N. D. 1899, § 498.

#### ASSEMBLY OF ELECTORS.

An "assembly of electors," within the meaning of an act relating to the nomination of candidates, is an organized body of not less than 100 electors of the state, or electoral division thereof for which the nomination is made. B. & C. Comp. Or. 1901, § 2791.

### ASSENT.

See "Express Assent"; "Mutual Assent."

"Assent" is defined as to admit a thing is true; to express one's agreement, acquiesce, concurrence; to yield, agree, ap-  
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prove, accord; the act of the mind in admitting or agreeing to anything; concurrence with approval; consent. *Norton v. Davis*, 83 Tex. 32, 36, 18 S. W. 430 (citing *Webst. Dict.*).

"Lexicographers define 'assent' as the act of the mind 'in agreeing to, or assenting to a thing; consent or agreement.'" *Hawkins v. Carroll County Sup'rs*, 50 Miss. 735, 759.

"Assent," as used in Act May 29, 1885 (P. L. 29), declaring that natural gas companies shall not enter on or lay down their pipes on any street of any borough or city without the "assent" of the council of such borough or city by ordinance duly approved, is used in its ordinary sense as consenting or agreeing to accept some proposition. *Appeal of City of Pittsburg*, 7 Atl. 778, 781, 115 Pa. 4.

Where an act authorized the construction of a railroad, and required it to "assent" to certain provisions of the law, the term is one purely appropriate to contract. The assent of the company was essential to give the law binding and obligatory force. An act of incorporation is nothing more than an offer until consummated by acceptance, and in that case and for that purpose the word "assent" was manifestly used. *State v. Baltimore & O. R. Co. (Md.)* 12 Gill. & J. 399, 433, 38 Am. Dec. 319.

"Assent" means to approve, ratify, and confirm. It is the very language of contract. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. (Md.)* 4 Gill. & J. 1, 180.

A person does not "assent" to the offer of another party so as to constitute a contract unless the assent comprehends the whole of the proposition. It must be exactly equal to it in extent and terms, and must not qualify it by any new matter. A proposal to accept, or an acceptance of an offer on terms varying from those proposed, is not an "assent," but a rejection of the offer. *Baker v. Johnson County*, 37 Iowa, 186, 189.

To constitute an "assent," the proposition of one party must be met by an acceptance of the other, which corresponds with it, which cannot be the case when the proposition is misunderstood by the party to whom it is made. *Hartford & N. H. R. Co. v. Jackson*, 24 Conn. 514, 517, 63 Am. Dec. 177.

"Assent," as used in a special issue submitted to a jury requiring them to find whether plaintiff assented to the sale of a steamer to a corporation at or before the sale and the filing of a lien, while not synonymous with the word "consent" as used in a requested finding, had practically the same meaning, and could not have been understood in that connection by the jury as meaning anything different than "consent." *Kornegay v. Styron*, 11 S. E. 153, 154, 105 N. C. 14.



To "assent" is to give one's approval to a thing, to agree thereto, to concur therein, to confirm the idea that the party does not wish to retract; and the words, used in a certificate of acknowledgment of a married woman, that she "assents" thereto, are equivalent to the statutory words that she "wishes not to retract the same." *Norton v. Davis*, 83 Tex. 32, 36, 18 S. W. 430.

Assent is evidenced by a proposition emanating from one side, and an acceptance of it on the other, the proposition and acceptance together constituting what is sometimes called a "meeting of minds." *Fuller v. Kemp*, 16 N. Y. Supp. 158, 160.

According to Crabb's English Synonyms, there may be a recognized and real difference between the words "assent," "consent," "permit," and "allow." He says: "As the act of an equal, we 'consent' to that in which we have a common interest with others; we 'permit' or 'allow' what is for the accommodation of others; we 'allow' by abstaining to oppose; we 'permit' by direct expression of our wills." Contracts are formed by the consent of the parties who are interested. "Assent" may be given to anything, whether positively proposed by another or not; but "consent" supposes that what is consented to is proposed by some other person. *Cowen v. Paddock*, 17 N. Y. Supp. 387, 388, 62 Hun, 622.

A man cannot be said to assent to a contract unless he is endowed with such degree of reason and judgment as will enable him to comprehend the subject of negotiation. *Jacks v. Estee*, 73 Pac. 247, 249, 139 Cal. 507.

Assent is evidenced by a proposition emanating from one side, and acceptance on the other, the proposition and acceptance together constituting what is sometimes called a "meeting of the minds." Assent may sometimes be inferred from conduct, but in the interpretation of the person's contractual intentions we comprehend conduct to include the aggregation of the acts of a person respecting the subject-matter of the alleged contract. It would be manifestly unfair to single out one of a series of acts which, standing alone, would be indicative of intention to assent, and to exclude from consideration all other acts which unequivocally point to refusal, and unmistakably qualify the former. *Fuller v. Kemp*, 16 N. Y. Supp. 158, 160.

#### Affirmative act implied.

The word "assent," as used in Const. 1865, art. 11, § 14, relating to the assent of the qualified voters before a municipal subscription can be made to the stock of the corporation, means an affirmative, positive act, and mere inaction of voters by failing to vote does not express their assent within the meaning of the section. *State ex rel. Woodson v. Brassfield*, 67 Mo. 331, 339.

#### Carried out not synonymous.

To "assent" to a thing is not synonymous with "to perform" it. Assent to a proposition creates, but does not carry out, a contract. Without assent there is no contract. To assent is not performance. Until assent there is no contract to perform. Hence "assent" is not synonymous with "carried out," as used in an agreement which was to be "carried out" within a certain time. *Cartmel v. Newton*, 79 Ind. 1, 5.

#### Consent distinguished.

Consent distinguished, see "Consent."

#### Knowledge implied.

"Assent" implies knowledge of some kind in the party assenting to that to which he assents. He cannot well be said to assent to or dissent from something of which he is supposed to be in ignorance, so that, where a creditor has no knowledge of the assignment for the benefit of creditors, his act in attempting to secure his own claim cannot be held to show assent or dissent to the assignment, so as to entitle him to or preclude him from sharing in the assignment. *National Bank of Commerce v. Graham* (Colo.) 66 Pac. 684, 686.

Assent is the act of the mind, that intelligent power in man by which he conceives, reasons, and judges, and of which it is a primary, invariable, and most familiar law that it cannot act with reference to external objects until, through the medium of its senses, it is impressed with or knows their existence. Hence, without such impression or knowledge, there can be no assent. *Welch v. Sackett*, 12 Wis. 243, 257.

Assent is primarily an act of the understanding. It presupposes that the person to be affected has knowledge of his right, as such is its use in the rule that waiver implies assent. *Hanscom v. Home Ins. Co.*, 38 Atl. 324, 326, 90 Me. 333.

Assent implies permission, so that, where a sheriff did not know that a prisoner had been absent from the jail until informed of it after his death, he will not be held to have assented to an escape. *Cortis v. Dailey*, 47 N. Y. Supp. 454, 456, 21 App. Div. 1.

#### Implied from knowledge.

The assent in writing of the husband to a mortgage by his wife, as required in Gen. St. c. 108, § 3, is given by the husband signing the mortgage note as guarantor, on the face of which was a memorandum that it was secured by mortgage on the land, for by signing the note described as secured by the mortgage delivered with it he recognized the existence of the mortgage. *Cormerais v. Wesselhoeft*, 114 Mass. 550, 552.

In Gen. St. 1878, c. 84, § 142, providing that, if any corporation organized under the

authority of the act shall violate any of its provisions and thereby become insolvent, the directors ordering or "assenting" to such violation shall be jointly and severally liable for all such debts contracted after such violation, "assenting" should be construed to mean "failure to object to" transactions in violation of the statute. For executing accommodation papers and making loans, whereby the corporation became insolvent, and in which they acquiesced, something more than mere negligence would be necessary to amount to assent; that is, something amounting to wilful, or at least intentional, violation of the legal duty, either ordering the act done, participating in doing it, or assenting to its being done, with knowledge that it was being or about to be done. Such assent need not be expressed. If a director knew that a violation of law was being or was about to be executed, and did not object when he had the liberty of doing so, this would amount to assent. *Patterson v. Minnesota Mfg. Co.*, 42 N. W. 920, 927, 41 Minn. 84, 4 L. R. A. 745, 16 Am. St. Rep. 671.

**As permit.**

See "Permission—Permit."

**As vote for.**

In the Constitution of 1821, requiring the assent of two-thirds of the members elected to each branch of the Legislature to the passage of any bill creating, continuing, or altering any body politic or corporate, "assent" means that two-thirds of the members of each house shall agree to such measure by voting therefor. *Hawkins v. Carroll County Sup'rs*, 50 Miss. 735, 760.

Under a constitutional provision that a county, city, or town may not become a stockholder or lend its credit unless two-thirds of the qualified voters shall assent thereto, it is held that the word "assent" should be construed in its ordinary sense as meaning "agreeing" or "consenting to," and that this assent can be manifested in the election only by an affirmative action—by actually voting. *Hawkins v. Carroll County Sup'rs*, 50 Miss. 735, 755.

Const. art. 11, § 14, provides that the General Assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election held therein, shall "assent" thereto. Held, that "assent" should be construed to mean an affirmative, positive act by the voters, and not that if no one says "nay" all shall be taken as saying "yea"; that is, voters who do not vote at an election cannot be held to express an assent to the proposition voted on at such election. As defined by Webster, to "assent" is "to admit, yield, or concede, or to express

an agreement of the mind to what is alleged or proposed." One staying away from the polls does not express an agreement of his mind to a proper vote upon, or simply manifest thereby an indifference on, the subject. *State ex rel. Woodson v. Brassfield*, 67 Mo. 331, 335.

**ASSESS.**

"The primary meaning of the term 'assess' is to apportion the amount of a tax to be paid or contributed, and from this meaning has arisen a secondary or derivative use of the word, signifying the valuation of property for the purpose of forming the basis upon which the tax is to be computed. The term is also used at times to include all the steps involved in imposing a tax upon property. In the Century Dictionary, and also in the Imperial Dictionary, its primary meaning is given to be: To set, fix, or charge a certain sum by way of tax, as to assess each individual in due proportion. Skeat in his Etymological Dictionary defines the word: To fix a rate of tax. He also says: 'Assess and assessment are coined words due to the use of the law Latin assessor, one whose duty it was to assess, i. e. to adjust and fix the amount of the public tax.' In Murray's Historical Dictionary of the English Language the word is defined: To settle, determine, or fix the amount of (taxation, fines, etc.), to be paid by a person or community, or by each member of a community. In Abbott's Law Dictionary the term is defined: To determine by rules of law a sum of money to be paid; to rate the proportional contribution due from another person to a fund; to fix the amount payable by a person, or each of several persons, in satisfaction of an established demand. In Anderson's Law Dictionary it is defined: To rate or fix the proportion which each person is to pay of a tax; to tax; to adjust the shares of a contribution by several persons towards a common object, according to the benefit received; to fix the value or the amount of a thing; to determine by rules of law a sum to be paid; to rate the proportional contribution due to a fund." *Allen v. McKay*, 52 Pac. 828, 831, 120 Cal. 332.

The word "assess" is used as meaning to impose a tax. *People v. Priest*, 169 N. Y. 432, 435, 62 N. E. 567, 568.

To "assess" a tax is to declare a tax to be payable. *Valle v. Fargo*, 1 Mo. App. 344, 347 (citing *Bouv. Law Dict.*).

The word "assess," in a tax law requiring the supervisor to assess, means to set, fix, or charge a certain sum to each taxpayer. *Seymour v. Peters*, 67 Mich. 415, 418, 35 N. W. 62, 65.

An alternative writ of mandamus seeking to compel the collection of a special municipal tax to pay a judgment is not objec-

tionable for the use of the words "to assess, levy and cause to be collected a special tax," etc., though the municipal officers have nothing to do with the valuation of the property for taxing purposes and with the collection of taxes. The words "assess" and "levy" mean rather to lay a tax on the taxable property, as the same is already valued for ordinary taxing purposes, no matter whether such taxation tableau was made up by the state or city authority. *United States v. Port of Mobile* (U. S.) 12 Fed. 768, 770.

"Assessed," as used in Gen. St. 1878, c. 11, § 121, requiring notice to be given to the person in whose name lands are "assessed" for taxes in order to perfect a tax title, means the return of the assessment book by the assessor to the county auditor, properly filled out, showing lands assessed to the purported owner. The word "assessed" has several meanings, and there is a great difference between assessing the land and assessing the taxes. The lands are assessed at the time mentioned, while the taxes may not be assessed until the different equalization boards have acted on the property lists and values, and the taxes are actually apportioned and levied. *Elde v. Clarke*, 59 N. W. 484, 485, 57 Minn. 397.

#### As assessment.

The terms "assessment" and "assess" are not always used in the same sense. The accurate meaning of the word "assessment," doubtless is the determination of the liability of property to taxation, and its valuation for that purpose. But the term "assess" is also used as meaning to impose a tax. *People v. Priest*, 62 N. E. 567, 568, 169 N. Y. 432.

"Assessed," as used in Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502], providing that nothing in the national banking act shall prevent all the shares in any association from being included in the valuation of personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state within which such association is located, subject to the restriction that the taxation shall not be at a greater rate than is "assessed" on other moneyed capital in the hands of individual citizens, refers to the entire process of assessment, which in the case of national bank shares includes both their valuation and the rate of percentage on such valuation. *Boyer v. Boyer*, 5 Sup. Ct. 706, 709, 113 U. S. 689, 28 L. Ed. 1089.

#### As fix value.

"Assess," as used in P. L. 193, imposing a tax on debts owing to corporations, and requiring such tax to be "assessed" on the value of the debts, means to determine the amount of the corporation loans liable to tax-

ation at their nominal value. *Lehigh Val. R. Co. v. Commonwealth*, 18 Atl. 410, 411, 129 Pa. 429.

"To assess property is simply to place a value upon it. To assess taxes is to fix or settle the amount to be levied or raised upon the property." *Bridewell v. Morton*, 46 Ark. 73, 78; *Moss v. Hinder*, 28 Vt. 279, 281.

As used in a verdict reciting that the jury does assess the damage at so much, "assess" means "to fix the amount of the damages or the value of the thing to be ascertained." *Roddy v. McGetrick*, 49 Ala. 159, 162.

The word "assessed," as used in the constitutional provision that no bonded debt incurred by any company or municipality shall exceed 8 per cent. of the taxable property therein, has and had at the time of the adoption of the Constitution a well-defined meaning when applied to taxable property, and the framers of that provision must be assumed to have used it in the same sense in which it was used in the various acts of the Legislature relating to the subject of taxation. It must be regarded as meaning the value placed upon property for the purpose of taxation by officials appointed for that purpose. The reference is to the past, and not to the future; to an assessment already made and completed and entered upon the records. The word "assessed" in the constitutional provision, being in the same tense, implies the same meaning. *State v. Cornwell*, 18 S. E. 184, 186, 40 S. C. 26; *State v. Tolly*, 16 S. E. 195, 196, 37 S. C. 551.

#### As levy.

In Const. § 181, providing that "the General Assembly may by general laws confer upon the authorities of any county, etc., respectively, the power to assess and collect taxes," the word "assess" means to levy a tax, and does not mean the valuation of property for taxation. *South Covington & C. St. Ry. Co. v. Town of Bellevue*, 49 S. W. 23, 25, 105 Ky. 283, 57 L. R. A. 50.

"Assessing and collecting," as used in a city ordinance providing for the assessing and collecting of taxes, is used in a general sense, so as to include the operation, called "levying" the tax. *City of San Luis Obispo v. Pettit*, 25 Pac. 694, 695, 87 Cal. 499.

"Assessed" is not synonymous with "levied," as used in a lease providing that the lessee should pay all taxes levied during the term of the lease. "To assess a tax is to declare a tax to be payable; to levy it is to raise or collect it. There is a wide difference between taxes assessed and taxes levied, and no tax can be levied until the assessor's return is made and acted upon by the county court, and the book placed in the hands of the collector." *Bouvier* says: "Assessment is the making out of a list of property, and

fixing its valuation or appraisal. It is also applied to making out a list of persons, embracing their occupations, chiefly with the view of taxing such persons and their property." Jacob's Law Dictionary, under the title "levy," says, "The term is used in the law for to collect, or to exact, as to levy money," etc. *Valle v. Fargo*, 1 Mo. App. 344, 347.

The charter of a railroad required that it should pay a state tax, but "that no other tax or impost should be levied or assessed on the company." Held, that the word "assessed," as there used, meant levied or imposed, and that the word could not have the force of describing special levies for public improvement, but merely described the act of levying the tax or impost, and therefore the company was not exempted from assessments for local improvements by such provision. *New Jersey Midland R. Co. v. Jersey City*, 42 N. J. Law (13 Vroom) 97, 99.

#### As not applicable to license taxes.

"Assess" is defined as the setting, fixing, or charging a certain sum upon, by way of tax; as to assess each individual in due proportion (Cent. Dict.); to adjust or affix the proportion of a tax which a person, of several liable to it, has to pay; to distribute taxation in a proportion founded on the proportion of burden and profit; to place a valuation upon property for the purpose of apportioning a tax. Thus the use of the word "assess" in a constitution providing that the Legislative Assembly shall not levy taxes upon the inhabitants or property in any county, etc., for county, town, or municipal purposes, but may vest by law in the corporate authorities power to assess and collect taxes for such purposes, indicates that such provision relates only to taxation proper, and not to license taxes. *State v. Camp Sing*, 44 Pac. 516, 519, 18 Mont. 128, 32 L. R. A. 635, 56 Am. St. Rep. 551.

#### ASSESSABLE.

See "Nonassessable."

In a petition for the revenue of an assessment for taxation of property, containing a statement that the "assessable" valuation of the property was fixed by the commissioners, the use of the word "assessable" is not equivalent to the allegation that the real value of the property is such sum. *In re Bronx Gas & Electric Co.*, 58 N. Y. Supp. 875, 877, 27 Misc. Rep. 371.

#### ASSESSED AGAINST HIM.

The words "assessed against him," as used in an act relating to poll taxes, requiring every person to show, as a condition precedent to his right to vote, that he has paid the poll tax assessed against him for the year next preceding the election at which

he wishes to vote, mean the poll tax due by the voter for the year next preceding the election in which the vote is to be cast, and to which he is made subject under the revenue laws of the state, whether the name of the voter appears on the books of his county trustee or not. *Shannon's Code Tenn.* 1896, § 1225.

#### ASSESSMENT.

##### As calls on corporate stock.

"Assessment," as used in Const. art. 6, § 5, declaring that the superior court shall have original jurisdiction in all cases at law which involved the legality of any tax, impost, "assessment," toll, or municipal fine, does not include installments or calls which are made by private corporations on their stockholders in accordance with an agreement on their part to pay into the corporate treasury the amounts subscribed by them to the capital stock, though such installments are sometimes called assessments, but the term as used in the Constitution has reference to such as are authorized by those provisions of the Constitution which relate to revenue and taxation, and to such as may be made on the authority of a municipal or other public corporation for the purpose of meeting the costs and expenses of some public improvement, and the subjects named in the provision, namely, tax, impost, toll, and municipal fine, imply a charge imposed by public authority for some public purposes, and, under the rules by which the maxim *noscitur a sociis* is applied, it is clear that the assessment referred to is of a kindred nature. *Arroyo Ditch & Water Co. v. Superior Court of Los Angeles County*, 28 Pac. 54, 55, 92 Cal. 47, 27 Am. St. Rep. 91.

"Assessments," as understood in contracts relating to the payment of subscriptions to corporations, means a rating or fixing by the board of directors which every subscriber is to pay of his subscription, when notified of it and when called on. *Spangler v. Indiana & I. C. Ry. Co.*, 21 Ill. (11 Peck) 276, 278.

"Assessments," as used in the corporation statutes of Washington territory in reference to payments on corporation stock, is synonymous with the term "calls" on unpaid subscriptions as used in such statutes. *Stewart v. Walla Walla Printing & Publishing Co.*, 20 Pac. 605, 606, 1 Wash. 521.

##### As charges or premiums in insurance.

"Assessment," as used in reference to payments due a beneficial association, means the payments to be made to the supreme conclave of the association, and not payments to the subordinate conclave, which latter payments are designated "dues." *Warwick v. Supreme Conclave Knights of Damon*, 32 S. E. 951, 955, 107 Ga. 115.

In construing the charter of a mutual fire insurance company which declared that no insurance should be considered as binding until the payment of a premium, and that in default of a payment of "assessments" the insurance should be suspended, and that the insured should have no claim for losses until his assessment was paid, the court said: "That 'assessments' and 'premium' are interchangeable words, and mean the same thing. They are the consideration for the contract. In stock companies an annual premium is required. In mutual companies the premiums consist of the assessments made from time to time to pay losses and expenses." *Hill v. Farmers' Mut. Fire Ins. Co.*, 88 N. W. 392, 394, 129 Mich. 141.

#### **Costs of suit.**

Comp. Laws, § 914, providing that the Supreme Court shall have appellate jurisdiction in all cases in equity, and also in all cases at law in which the title or right of possession to or possession of real estate or mining claims, or the legality of any "assessment tax, impost, toll or municipal fine" is involved cannot be construed to mean the cost of the proceedings had in justices' courts for the purpose of obtaining information respecting the amount and description of a debt alleged to be due from a garnishee defendant to the principal defendant, for a fine is a sum of money paid, or required to be paid, by way of penalty. It is a pecuniary punishment for doing something prohibited, or failing to do something commanded to be done, by law. In all legal proceedings there must be costs, and one party or both must pay them. The general requirement is that they shall fall upon the party in the wrong or in default, the party to pay the costs not as a punishment, but because of the party's fault. They are in no just sense a fine, tax, impost, or assessment, so as to give the Supreme Court appellate jurisdiction. *Wearne v. Haynes*, 13 Nev. 103, 104.

#### **Dues of benevolent association distinguished.**

See "Dues."

#### **As an incidental or temporary expense.**

Where a trustee was directed to collect rents, and, after paying therefrom all taxes, "assessments," and expenses of every nature in respect to the trust, to pay over the remainder to testator's sister for life, and to distribute the trust estate among nieces at her death, such direction as to the payment of assessments related only to incidental and temporary expenses of the estate, and hence a life tenant was not required to bear the entire expense of a street extension assessment levied on improved trust property, but only such proportion as the value of the life estate bore to the value of the property. In this connection the court remarks that, though the word "assessment" is broad

enough to include such assessments as those in question, we are nevertheless of the opinion that, as used in the provision of the will, it referred, not to assessments of a permanent character, such as result from the laying out of a street or the construction of sewers, but that it was merely an additional word employed by the testator to emphasize his intention to include all expenses which may be termed the "current expenses" of the trust estate. The word "assessment" being equivocal, its construction is to be determined by the context. The words with which it is associated are "taxes," "rates," "expenses for insurance and repairs," and "other expenses and outgoings," all of which are words relating to the usual expenses and outlays incident to the care and management of an estate, and which are of a temporary character. *Rhode Island Hospital Trust Co. v. Armington*, 46 Atl. 403, 404, 21 R. I. 33.

#### **ASSESSMENT (In Taxation).**

See "Entire Assessment"; "Frontage Assessment"; "Last Assessment"; "Local Assessments"; "Special Assessment"; "Swamp Land Assessment."

"Assessments," as the term is used in the law relative to taxation, means the adjustment of the shares of the contribution by several toward a common beneficial object according to the benefit received. *Adams, Meldrum & Anderson Co. v. City of Shelbyville*, 57 N. E. 114, 122, 154 Ind. 467, 87 Am. St. Rep. 240; *Palmer v. Stumph*, 29 Ind. 329, 333, 335.

The term "assessments," as used in Chicago City Charter 1831, c. 5, § 2, conferring on the city power to levy and collect taxes on real and personal estates when required, among other purposes, for the erection of a city hall or bridewell, provided the estimated cost may be apportioned and collected by a series of annual assessments, was not there used to signify the taxes, but rather the proceedings for raising them. *Stephani v. Catholic Bishop of Chicago*, 2 Ill. App. (2 Bradw.) 249, 252.

An assessment of taxes "is the act of fixing and determining the proportion of tax chargeable to the distinct items of property." *Webb v. Bidwell*, 15 Minn. 479, 483 (Gil. 394, 397).

As used in Const. art. 7, § 15, providing that the annual "assessments" made on land should be a special lien thereon, the word "assessments" means the sum which has been ascertained as the apportioned part of the tax to be charged against the particular piece of property, embracing more than simply the amount. It includes the procedure on the part of the officials by which the property is listed, valued, and, finally, the pro

rata declared. *State v. Farmer*, 59 S. W. 541, 542, 94 Tex. 232.

"Assessment," as used in Const. art. 8, § 4, declaring that the Legislature shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of taxation, assessment etc., being "in juxtaposition to that of taxation," has "a specific meaning, and includes all the steps necessary to be taken in the legitimate exercise of the power." *Hurford v. City of Omaha*, 4 Neb. 336, 347.

The word "assessment," as used in the statute providing that every action to set aside a certificate or tax deed for any error or defect going to the validity of the assessment, shall be brought within a year after the tax sale, does not mean merely the valuation of the property for taxation, or the assessment of benefits as a basis for the apportioning the cost of the improvements; it includes the whole statutory mode of imposing the tax complained of. *Levy v. Wilcox*, 70 N. W. 1109, 1110, 96 Wis. 127.

The term "assessment," as used in Comp. St. c. 14, art. 1, § 69, subd. 15, authorizing cities or villages to borrow money to a certain amount of the assessed valuation of the taxable property according to the last preceding assessment therefor, does not mean merely the act of the local assessor, but the complete act of all the agencies employed in determining the amount and value of property available for taxation. *Chicago, B. & Q. R. Co. v. Village of Wilber*, 88 N. W. 660, 662, 63 Neb. 624.

The word "assessment," as used in Const. art. 4, § 31, forbidding the enactment of special laws for the assessment or collection of taxes, is not used in the limited sense of valuing property for the purpose of apportioning taxes, but embraces all the proceedings for raising money by the exercise of the power of taxation, from the inception of the proceedings to its conclusion. *Chicago & N. W. Ry. Co. v. Forest County*, 70 N. W. 77, 79, 95 Wis. 80. See, also, *Weeks v. City of Milwaukee*, 10 Wis. 242, 259.

"Assessment," as used in Sp. Acts 1872, incorporating the Orphanage of the Good Shepherd and the Church Home for Females, and exempting these institutions from assessment and taxation, means laying a tax, or determining the share of tax to be paid by each individual, and relates to special taxes or enforced contributions for construction of streets or other local improvements as well as to taxes for the support of the government, for the act of assessment must precede collection in each case. *Kilgus v. Trustees of Orphanage of Good Shepherd*, 22 S. W. 750, 751, 94 Ky. 439.

The action of a state board of equalization in directing the county auditor to add to the various assessments therein such an

amount as will have the effect in the aggregate of making the entire assessment roll of the county correspond in value with the assessment rolls of other counties of the state is not an assessment. *Davis v. Pacific Imp. Co.*, 70 Pac. 15, 18, 137 Cal. 245.

#### As relating to assessor's duties.

"Assessment," as used in Const. Ill. which limits the power of counties to contract indebtedness to 5 per cent. of the last assessment for state and county taxes, means the assessment made by the county assessors, and not that ascertained by the State Board of Equalization. *People v. Hamill* (Ill.) 17 N. E. 799, 801.

As used in Const. art. 4, § 20, prohibiting the Legislature from passing local or special laws upon certain subjects, among which is that for the assessment and collection of taxes for state, county, and township purposes, the term "assessment" has reference to the duties of a subordinate officer known under our laws as an "assessor," whose duty it is to ascertain the value of taxable property and determine the exact amount which each individual is liable for, and prohibits merely a local or special law respecting or regulating the manner or mode of assessing taxes; hence a law, local or special in its nature, directing the levy of the tax, and in no way regulating the manner in which the proportion of each person is to be ascertained—that is, assessed—is not unconstitutional. *Gibson v. Mason*, 5 Nev. 283, 304.

As used in Comp. St. c. 16, § 97, providing that there shall be summoned freeholders for the purpose of assessing damages for the right of way appropriated by railroads, and that either party may have the right to appeal from such assessment, the word "assessment" covers all the official acts of the commissioners or assessors. *Gifford v. Republican Valley & K. R. Co.*, 20 Neb. 538, 541, 31 N. W. 11.

The assessment of land under the Oregon laws is made by entry in the appropriate column in the assessment roll of the name of the owner and a description of the property, with its valuation, which, in case of a lot or block situated in any city, village, or town, a plat of which is recorded, may consist of the number of such lot and block, with the name of the village or town in which the same is situated. *Kelly v. Herrall* (U. S.) 20 Fed. 364, 369.

#### Collection not included.

"Assessment," as used in Laws 1880, c. 309, § 3, providing that every action or proceeding to set aside any sale of land for the nonpayment of taxes, or to cancel any tax certificate, or to restrain the issuing of any tax certificate or tax deed for any error or defect going to the validity of the assessment and affecting the groundwork of

such tax, shall be commenced within one year from the date of such tax sale, means the statutory method of imposing taxes upon property; that is, the assessing and levying the tax, and not its collection or enforcement. *Prentice v. Ashland County*, 14 N. W. 297, 298, 56 Wis. 345; *Urquhart v. Wescott*, 26 N. W. 552, 553, 65 Wis. 135. It has relation only to the statutory method of imposing taxes upon property, and hence a want of proper notice of sale for taxes is not an error or defect going to the validity of the assessment and affecting the groundwork of the tax, within the meaning of the statute. *Urquhart v. Wescott*, 26 N. W. 552, 553, 65 Wis. 135.

#### Entirety implied.

"Assessments," as used in Act April, 1871, providing that whenever any assessment is set aside the township committee may appoint new commissioners to make a new assessment, signifies an entirety, so that no new assessment can be made until the entire original assessment is set aside. *Winkler v. Inhabitants of West Hoboken*, 37 N. J. Law (8 Vroom) 406, 407.

#### As levy.

Distinguished from levy, see "Levy (of Taxes)."

The best lexicographers tell us that the terms "levy" and "assessment" in law mean the same thing. To assess a tax is not the exercise of the taxing power. It is only a ministerial act authorized by the Legislature, to whom the taxing power ordinarily and expressly belongs. *Kinney v. Zimbleman*, 86 Tex. 554, 582.

The term "assessment," as sometimes used, denotes the valuation of the property by the assessors for the purposes of taxation, and it is sometimes used to denote the levying of a tax upon persons or property, and as used in Const. art. 14, § 11, providing that all assessments shall be on property at its cash value, it refers to the valuation, and not to the levy of a tax. *Williams v. City of Detroit*, 2 Mich. 560, 565.

#### As listing and valuation.

An "assessment," strictly speaking, is an official estimate of the sums which are to constitute the basis of apportionment of the taxes between individuals subject to taxation within the district. As the word is more commonly used, an "assessment" consists in two processes, listing the person's property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. *Southern Ry. Co. v. Kay*, 39 S. E. 785, 786, 62 S. C. 28; *State v. Cheraw & D. R. Co.*, 32 S. E. 691, 695, 54 S. C. 564; *Lyman v. Howe*, 42 S. W. 830, 64 Ark. 436; *City of Chicago*

*v. Fishburn*, 59 N. E. 791, 793, 189 Ill. 367; *People v. Weaver*, 100 U. S. 539, 545, 25 L. Ed. 705. Such is its use in Const. art. 1, § 6, providing that property must be taxed in proportion to its value, and article 3, § 29, providing that taxes upon property shall be laid upon its actual value as the same shall be ascertained by an assessment made for the purpose of laying such tax, so that an assessment or valuation is an essential to the tax. *State v. Cheraw & D. R. Co.*, 32 S. E. 691, 695, 54 S. C. 564. As used in the Constitution of South Carolina, providing that all taxes shall be levied on the same assessment which shall be made for state taxes, it means "valuation." *Southern Ry. Co. v. Kay*, 39 S. E. 785, 786, 62 S. C. 28. And is so used in Rev. St. U. S. § 1924, declaring that all taxes in the territory shall be equal and uniform, and that assessments shall be according to the value of the property. *City of Seattle v. Yealer*, 1 Wash. T. 571, 576.

An "assessment" is a valuation made by authorized persons according to their discretion, as opposed to a sum certain or determined by law. *City of Baltimore v. Proprietors of Green Mount Cemetery*, 7 Md. 517, 523; *State v. Smith*, 63 N. E. 214, 215, 158 Ind. 543, 63 L. R. A. 116. It is a valuation of the property of those who are to pay the tax, for the purpose of fixing the proportion which each man shall pay. *State v. Smith*, 63 N. E. 214, 215, 158 Ind. 543, 63 L. R. A. 116; *City of Chicago v. Fishburn*, 59 N. E. 791, 793, 189 Ill. 367. By Const. Ill. "assessment" is a valuation to be determined according to the discretion of persons elected or appointed in such manner as the General Assembly shall direct. *City of Chicago v. Fishburn*, 59 N. E. 791, 793, 189 Ill. 367.

A tax assessment is merely a valuation of the property taxed. *Gray v. Stilea*, 49 Pac. 1083, 1100, 6 Okl. 455.

An assessment is the determination of the value of the thing taxed and the amount of the tax required of each individual, and it may be designated by officers or by the law itself. *United States v. Erie Ry. Co.*, 2 Sup. Ct. 83, 84, 107 U. S. 1, 27 L. Ed. 385.

With reference to municipal improvements, an assessment is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. *San Antonio St. Ry. Co. v. City of San Antonio*, 54 S. W. 907, 909, 22 Tex. Civ. App. 341.

The term "assessment," when employed in connection with general taxation, means more than a mere valuation, and when an assessment is spoken of as the basis for levying and collecting taxes it means an official listing of persons and property, with a statement of the value of the property of each for

the purpose of taxation. *Pomeroy Coal Co. v. Emlen*, 24 Pac. 340, 342, 44 Kan. 117.

As used in Laws 1899, c. 712, §§ 42-45, as amended by Laws 1900, c. 254, providing for the assessment of a special franchise tax by the State Board of Tax Commissioners, and its review by certiorari, the term "assessment" should be construed in its accurate sense as referring to the judicial or quasi judicial determination by which the liability of the property to taxation and its valuation are established. It is not used in the sense of "assess," which also means to impose a tax. *People v. Priest*, 62 N. E. 567, 568, 169 N. Y. 432.

Under the statute giving the board of equalization power to examine the various county assessments and equalize the same, it was contended that the term "assessments" was synonymous with "valuations," and here imports the value already determined; that such valuations already fixed are the aggregate of material with which the board could deal; that they may adjust, distribute, and equalize this aggregate of valuations among the several counties, but that they cannot add to its volume. It was held, however, that such was not the meaning of the term, and where it appears that the assessments of one county were made at the true cash value, and the assessments of all the other counties are less, the board of equalization had power to raise the assessment of the other counties by such percentage as would make them equal to the true cash value of the property. *Wallace v. Bullen*, 52 Pac. 954, 959, 6 Okl. 17.

The term "assessment" is defined to mean an act of assessing, determining or adjusting the amount of taxation charged, damages, etc., to be paid by an individual or company of a community. A finding that certain lots are wholly omitted from the assessment for benefit of a sewer is equivalent to saying that such property was not considered by the commissioners—was not appraised. *J. & A. McKeechnie Brewing Co. v. Trustees of Village of Canandaigua*, 44 N. Y. Supp. 317, 321, 15 App. Div. 139.

"Assessment," as used in Const. art. 11, § 1, providing that the Legislature shall provide for a uniform and equal rate of assessment and taxation, does not mean "assessments" as technically used, but means the listing and valuing of the whole property for general taxation. *Hines v. City of Leavenworth*, 3 Kan. 187, 199.

"Assessment," as used in Acts April 21, 1868, authorizing the drainage of certain swamp land, and authorizing certain commissioners to purchase certain property and to pay for the same out of the moneys raised by assessment, "has a like significance with that word as used in the general tax laws, in defining the duties of the assessor, and is in-

tended to designate the results of the labors of the managers, which is expressed by the statement of the quantity of land of each owner, the class in which it is rated, and the amount of the imposition." *Britton v. Blake*, 35 N. J. Law (6 Vroom) 208, 214.

#### As local improvement assessment.

"Assessments" are special and local impositions on property in the immediate vicinity of an improvement for the public welfare, which are necessary to pay for the improvement, and laid with reference to the special benefit which such property derives from the expenditure. *Reeves v. Treasurer of Wood County*, 8 Ohio St. 333, 338; *Reinken v. Fuehring*, 130 Ind. 382, 384, 30 N. E. 414, 15 L. R. A. 624, 80 Am. St. Rep. 247 (citing *Palmer v. Stumph*, 29 Ind. 329); *Hill v. Higdon*, 5 Ohio St. 243, 247, 67 Am. Dec. 289; *Raymond v. Cleveland*, 42 Ohio St. 522, 527; *Hale v. City of Kenosha*, 29 Wis. 599.

An "assessment" is a charge laid on individual property, because the property on which the burden is imposed receives some benefit different from the general one which the owner enjoys in common with others as a citizen. *Walker v. Jameson*, 37 N. E. 402, 403, 140 Ind. 591, 28 L. R. A. 679, 49 Am. St. Rep. 222.

"An assessment is a tax on property levied according to benefits conferred on the property, and has been recognized as a permissible mode of raising money for the construction of roads and ditches." *Adler v. Whitbeck*, 9 N. E. 672, 677, 44 Ohio St. 539.

Testator bequeathed his residuary real and personal estate, to be held on specified trusts, and the income thereof to be paid in certain shares, "after defraying the expenses incident to estates, the taxes, repairs, assessments, and insurance thereof." Held, that the word "assessments" as there used meant assessments for municipal improvements, and not taxes, and hence such assessments must be paid out of the income. *Stephen's Ex'rs v. Milnor*, 24 N. J. Eq. (9 C. E. Green) 358, 373.

The phrase "taxation and assessment," as used in Laws 1864, c. 1, granting an exemption from taxation and assessment in respect to a certain railroad company and its property, including its capital stock, etc., and declaring that the payment by the company of a certain percentage of its gross earnings should be in full of all taxation and assessment whatever, includes a special assessment for local improvements. *City of St. Paul v. St. Paul & S. C. R. Co.*, 23 Minn. 469, 474; *First Division of St. Paul & P. R. Co. v. City of St. Paul*, 21 Minn. 528, 529.

"Tax" or "assessment," under a charter providing that the property and effects of a corporation should be exempt therefrom, include as well assessments for benefits de-



rived from public improvements, as taxes levied for general revenue. *Hudson County Catholic Protector v. Kearney Tp.*, 28 Atl. 1043, 1044, 56 N. J. Law (27 Vroom) 385.

An exemption to a cemetery association of "all taxes and assessments," was construed to include special assessments for sewer purposes as well as other taxes, although sewer assessments did not exist at the time the grant of the exemption was made. *Proprietors of Swan Point Cemetery v. Tripp*, 14 R. I. 199.

The word "assessment" means laying a tax or determining the share of tax to be paid by each individual. It relates as well to taxes for support of government as to enforced contributions for the construction of streets or other local improvements, for the act of assessment must precede collection in either case. Therefore the exemption granted a charitable corporation from "assessment and taxation" by special acts of 1872 does not of itself indicate a legislative intent to exempt the corporation from the cost of improvement of streets on which their property abuts. Had such been the intention, it would have been plainly indicated by additional or other words than the insufficient term "assessment." *Kilgus v. Trustees of Orphanage of Good Shepherd*, 22 S. W. 750, 751, 94 Ky. 439, 15 Ky. Law Rep. 818.

The word "assessment," as used in Act Cong. Jan. 17, 1870, exempting certain property from any and all taxes or assessments, special, municipal, or county, includes special assessments for local improvements. *District of Columbia v. Sisters of Visitation (D. C.)* 15 App. Cas. 300, 306.

"An assessment is usually induced by the request, made known according to the provisions of the charter of a municipal government, of a majority of the inhabitants of the assessment district, and is levied for the benefit of the property situated within the particular district, the assessment being an equivalent from the owner for the improvement made to the value of the property; and such assessments are not collected like public taxes, but generally a particular mode of recovering the charge is pointed out by the statute." *Wood v. Brady*, 5 Pac. 623, 68 Cal. 78.

"Assessment," as used in Const. art. 11, § 3, providing that the Legislature shall provide for the organization of cities and incorporated villages, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit so as to prevent abuses in assessments and taxation, and in contracting debts of such municipal corporation, means special taxation for municipal improvements, and not taxation in general. The word "assessment," when having reference to the general assessment of taxes, has never in common practice

been used alone as expressing that idea; on the contrary, where that is the idea to be conveyed, it is said "the assessment of taxes," as men say, "the levying of taxes" or "the collection of taxes". When used alone, its established meaning is the specific taxation for municipal improvements. *Weeks v. City of Milwaukee*, 10 Wis. 242, 259.

"Assessments" on real property in New York on local improvements are special contributions paid by an abutting owner in addition to and exclusive of the general taxes which he pays as one of the general public. The assessment is not to be regarded as a burden, but as a compensation paid by the owner of the lot for the inherent value derived by him from the local improvement. *Abendroth v. Manhattan R. Co.*, 7 N. Y. St. Rep. 43, 48.

#### Occupation tax.

An occupation tax is an "assessment" within the provisions of a statute granting the city of Savannah full power and authority to make assessments and lay taxes on the inhabitants on said city and those who transact or offer to transact business therein. *Savannah, T. & I. H. Ry. v. City of Savannah*, 37 S. E. 393, 394, 112 Ga. 164.

#### As public assessments.

The word "assessments" in Laws 1897, c. 137, § 16, as amended by Laws 1877, c. 31, providing that cemetery lands and property of any association formed pursuant to the act, and any property held in trust for the purposes mentioned in section 9 therein, shall be exempt from all public taxes, rates, and assessments, is to be construed to mean public assessments. *Batterman v. City of New York*, 73 N. Y. Supp. 44, 45, 65 App. Div. 576.

#### As specific sum charged or valuation.

The word "assessment," when used in connection with taxation, may have more than one meaning. The ultimate purpose of an assessment in such a connection is to ascertain the amount that each taxpayer is to pay. Sometimes this amount is called an "assessment." More commonly the word "assessment" means the official valuation of a taxpayer's property for the purpose of taxation. *State v. New York, N. H. & H. R. Co.*, 60 Conn. 326, 335, 22 Atl. 765, 768.

"Assessment," as used in Act 1830, is used in the sense of "valuation," and not in the sense of final imposition of a specific sum for taxes or a local improvement. *People v. Village of New Rochelle*, 31 N. Y. Supp. 592, 593, 83 Hun, 185.

Assessment "has been employed in two different senses, sometimes as expressing the assessment or valuation of property—to enter it on the lists for the purpose of taxation—and sometimes as indicating the charge

of special taxes imposed on land as its portion of the expenses of a benefit conferred by a local improvement." *First Division of St. Paul & P. R. Co. v. City of St. Paul*, 21 Minn. 526, 529.

"Assessment," as used in Gen. St. 1889, providing that no suit to set aside a special assessment or to enjoin the making of the same shall be brought after the expiration of 30 days from the time the amount due on each lot for such assessment has been ascertained, means a specific amount charged on the property, and not the mere fact of valuation. *Lynch v. Kansas City*, 24 Pac. 973, 974, 44 Kan. 452; *Hammerslough v. Same*, 26 Pac. 496, 497, 46 Kan. 37.

An accurate meaning of the word "assessment" is doubtless the determination of liability of the property to taxation, and its valuation for that purpose. When the statute provided that "an assessment of a special franchise, by the State Board of Tax Commissioners, may be reviewed," the word "assessment" is plainly used in an accurate sense as referring to the judicial or quasi-judicial determination by which the liability of the property to taxation, and its valuation, are established. *People v. Priest*, 169 N. Y. 432, 435, 62 N. E. 567, 568.

"Assessment," as used in the statutes, is the determining the value of a man's property for the purpose of levying a tax. The whole sum to be raised is ascertained by the assessors from the reports of the city comptroller, and from other sources named in the statutes. The aggregate is then distributed over the assessed property, and, as the statute expresses it, is properly set down or extended in the several assessment rolls which have been theretofore placed in their hands by the tax commissioners. *McMahon v. Beekman* (N. Y.) 65 How. Prac. 427, 433.

#### **As a tax.**

See, also, "Tax—Taxation."

The word "assessments," in Mich. Const. art. 14, § 12, providing that all assessments heretofore authorized shall be on property at its cash value, and section 13, providing that the Legislature shall provide for an equalization by a state board for the year 1851, and every five years thereafter, of the assessments on taxable property, does not mean "taxes" in any sense but the valuation of the property for the purpose of raising taxes. *Woodbridge v. City of Detroit*, 8 Mich. 274, 280.

#### **As valid assessment.**

The term "assessment" clearly implies a valid assessment. The mere vain attempt to impose a legal assessment does not constitute an assessment. *Gable v. City of Altoona*, 49 Atl. 367, 370, 200 Pa. 15.

As used in Pol. Code, § 3649, declaring that any property discovered by an assessor to have escaped "assessment" for the last preceding year, which may be owned or controlled by the same person, may be assessed at double its value, the word "assessment" means a valid assessment. *City of San Luis Obispo v. Pettit*, 25 Pac. 694, 695, 87 Cal. 499.

#### **ASSESSMENT COMPANY.**

In insurance and business circles the words "assessment company" mean that the money to pay a death loss is collected by an assessment made on those members which survive the member, the insurance on whose life is paid. *Mutual Ben. Life Ins. Co. v. Marye*, 8 S. E. 481, 85 Va. 643.

#### **ASSESSMENT CONTRACT.**

An "assessment contract" is defined by Rev. St. 1889, § 5960, as one wherein the payment of the benefit is in any manner or degree dependent upon the collection of an assessment on persons holding similar contracts. *Folkens v. Northwestern Nat. Life Ins. Co.*, 72 S. W. 720, 721, 98 Mo. App. 490.

#### **ASSESSMENT DISTRICT.**

The term "assessment district" is used to designate any subdivision of territory, whether the whole or any part of any municipality, in which by law a separate assessment of taxable property is made by the assessor or assessors elected or appointed therefor. *Rev. St. Wis. 1898*, § 1031.

#### **ASSESSMENT FUND.**

The "assessment fund" of a mutual benefit association is the balance of the assessments, less expenses, and out of this beneficiaries are paid. *Kerr v. Minnesota Mut. Ben. Ass'n*, 39 Minn. 174, 177, 39 N. W. 312, 314, 12 Am. St. Rep. 631.

#### **ASSESSMENT PLAN.**

Laws 1891, c. 418, providing for the granting of a license by the state to mutual beneficiary associations providing life insurance on the "assessment plan," means a company which does not have what is known as a "legal reserve," but merely an emergency fund, and reserves a right in its contract to increase or lower the rates of assessment specified in said contract as the basis of said assessment, according as the needs of the corporation may demand or permit, though it agrees to pay the assured a definite sum, and at the same time fix an absolute rate of assessment upon its members beyond which it cannot go. The mere fact that the company was authorized to receive premiums in advance does not destroy

its character as an insurance association providing insurance on the assessment plan. *State v. Root*, 54 N. W. 33, 37, 83 Wis. 667, 19 L. R. A. 271.

### ASSESSMENT PROCEEDINGS.

See "Proceedings."

### ASSESSMENT ROLL.

An "assessment roll" means the list or roll of taxable property and persons, completed, verified, and deposited by the assessors, and not as it appears after equalization by the board of supervisors. *Oswego County Sav. Bank v. Town of Genoa*, 59 N. Y. Supp. 829, 834, 28 Misc. Rep. 71 (citing *Town of Solon v. Williamsburgh Sav. Bank*, 35 Hun. 1); *Adams v. Brennan*, 18 South. 482, 72 Miss. 894.

"Assessment rolls," as used in County Seat Act (Gen. St. c. 26, p. 297, § 4), declaring that for the purpose of determining the number of the electors in a county the assessment roll of the several township assessors shall be evidence as to the number of electors, means the assessment rolls of personal property, and not the registration lists of adults, authorized by Gen. St. c. 86. In *re Linn County Seat*, 15 Kan. 500, 532.

### ASSESSOR.

An "assessor" is an officer whose duty it is to put an official valuation on property which is called on to contribute to the public revenue. *Kuhlman v. Smeltz*, 33 Atl. 358, 171 Pa. 440.

Assessors are subordinate officers clothed by statute with certain limited powers and duties. Some of their duties are judicial in their nature, and as to those duties they are protected to the same extent that other judicial officers are protected, but they possess such powers only as the statute confers upon them, and when they go beyond those powers their acts are absolutely void. They are required by law to ascertain the taxable property within their towns, and are personally liable to one who is compelled to pay taxes on exempt property assessed by them. *Lapolt v. Maltby*, 31 N. Y. Supp. 686, 687, 10 Misc. Rep. 330.

Assessors are citizens chosen from their respective towns who, in theory of law and in fact, have personal knowledge of the value of the real estate in their towns. *People v. Barker*, 48 N. Y. 70, 76.

The term "assessor," as used in the Constitution, providing for assessors, is not understood as defining an officer whose valuation of property for taxes is necessarily final. From the earliest period in our American jurisprudence, assessors have been employed in almost every state for the purpose of making the primary valuation of property

for taxation, and in none of them was this valuation final, but was subject to correction and alteration by some supervisory board or officer. In employing the term "assessor," the framers of the Constitution must be understood to have used it in this popular sense. *Savings & Loan Soc. v. Austin*, 46 Cal. 415, 476.

In *People v. Barter*, 48 N. Y. 70, it is said that "assessors" are citizens chosen from their relative towns, who, in theory of law and in fact, have personal knowledge of the real estate in their towns. *People v. McNamara*, 45 N. Y. Supp. 456, 458, 18 App. Div. 17.

Assessors are public officers, sworn to a faithful discharge of their duty, which may be compelled by mandamus at the suit of an individual. *Knight v. Thomas*, 45 Atl. 499, 501, 93 Me. 494.

An "assessor" is a quasi judicial officer vested by the statute with a discretion which he exercises in determining the value of tangible property. *West Portland Park Ass'n v. Kelly*, 45 Pac. 901, 908, 29 Or. 412.

"Assessors" are quasi judicial officers when acting within the sphere of their jurisdiction, and their assessments when made become judgments, to be enforced by a warrant in the nature of a special execution. *Wilson v. Wiggins*, 54 Pac. 716, 718, 7 Okl. 517.

The statute of 1868, relating to "assessors" means the board of assessors. *Noyes v. Hale*, 137 Mass. 268, 271.

The words "assessor" or "assessors," when used in the revenue act, shall be construed to include town, district, or deputy assessors. *Hurd's Rev. St. Ill.* 1901, p. 1493, c. 120, § 292, subd. 1.

In statutes relative to elections the term "assessors" shall mean the assessors of taxes of a city or town. *Rev. Laws Mass.* 1902, p. 104, c. 11, § 1.

### ASSETS.

See "Available Assets and Resources"; "Equitable Assets"; "Legal Assets"; "Net Assets"; "New Assets"; "Non-leviable Assets."

"The word (derived from the French 'assez,' enough) is given by both legal and literary lexicographers the double signification of the property of a deceased person appropriable to the payment of his debts, and the entire property of a mercantile or trading corporation; but at this day these are not two different meanings, but rather one and the same idea, applied merely to different things. It is synonymous in both cases with the word 'property.'" *Valden v. Hawkins*, 59 Miss. 406, 419.

In its common acceptance "assets" means property. *Lowber v. Le Roy*, 4 N.

Y. Super. Ct. (2 Sandf.) 202, 217; Republic Life Ins. Co. v. Swigert, 25 N. E. 680, 682, 135 Ill. 150, 12 L. R. A. 328.

"Assets" means everything which can be made available for the payment of debts; the means which a party has as compared with his debts or liabilities. *Stanton v. Lewis*, 26 Conn. 444, 449.

The "assets" of a school district embrace claims not matured as well as claims matured. *Jasper Dist. Tp. v. Sheridan Dist. Tp.*, 47 Iowa, 183, 185.

The word "assets" is of much broader application than is ordinarily given to the word "credits." Burrill says: "The real and personal property of a party deceased, which, either in the hands of his heir or devisee, or of his executor or administrator, is chargeable with the payment of his debts and legacies, and is applicable to that purpose, is, in a large sense, assets. In a larger sense, the property or effects of any individual or corporation, available for the payment of his or its liabilities." *Board of School Directors of Town of Pelican v. Board of School Directors of Town of Rock Falls*, 51 N. W. 871, 873, 81 Wis. 428.

The word "assets" means something belonging to a person, but not of an intangible nature. Where a bequest of "credits" was made by a testator, the word was used in the sense of "assets," and an interest in an insurance business passed thereunder. *Brandon v. Yeakle*, 50 S. W. 1004, 1005, 66 Ark. 377.

The word "assets," as used in Acts 9th Gen. Assem., c. 172, § 4, providing that, when one district township shall be divided into two or more entire townships for civil purposes, there shall be an equitable division made of the then existing assets and liabilities between the old and new districts, is used with reference to the real property—the schoolhouse and land—owned by the districts, together with all other property it is intended shall be taken into account in settling equitably the rights of the separate districts growing out of the division. *Williams Dist. Tp. v. Jackson Dist. Tp.*, 36 Iowa, 216, 219.

#### Of bankrupt or insolvent.

"Assets," as used in the amendatory bankrupt law of 1874, forbidding a discharge to a debtor whose assets shall not equal 30 per cent. of demands proved, means all property, of every name, kind and nature, chargeable with the debts of the bankrupt, that comes into the control of the assignee by reason of its having ever been owned or possessed by the bankrupt. In re *Taggart* (U. S.) 23 Fed. Cas. 619, 620.

The term "assets," as used in N. Y. Laws 1869, c. 902, providing for the winding up of insolvent corporations, and authorizing

the court to appoint a receiver of all the assets of the company, means "all the property, real and personal, of any company coming under its provisions." In re *Attorney General v. Atlantic Mut. L. Ins. Co.*, 3 N. E. 193, 194, 100 N. Y. 279.

The word "assets," in Act April 8, 1892, § 1, giving laborers a preferred claim in the assets of their employers on the insolvency of the latter, "seems to have been used in the ordinary or usual business sense of the word, as intended to include all the property which would come to the receiver's possession, whether subject to liens or not, rather than to the technical or legal sense applied to the word under the sixty-third section of the corporation act when it was held to mean only the company's ultimate rights in the property." *Fitzgerald v. Maxim Powder Mfg. Co.* (N. J.) 33 Atl. 1064, 1067.

The "assets of a bankrupt" includes all the estate real and personal of the bankrupt, and all debts due to him or to any person for his use, and all his rights of action for property or estate, and any cause of action which he has against any person arising from contract, but does not include a cause of action founded in tort. *Wilson v. National Bank of Rollo* (U. S.) 3 Fed. 391, 393.

The word "assets," as used in bankruptcy rule 15, providing that where there are no assets the bankruptcy court need not appoint a trustee where no creditors appear at the first meeting, is used in the sense that there is no property available to the payment of the claims of creditors or expenses of trustees, and not that there is absolutely no property, and therefore it cannot be held that the appointment of a trustee is necessary in order to make a valid order with reference to exempt property. *Smalley v. Laugenour*, 70 Pac. 786, 789, 30 Wash. 307.

#### Of corporation.

The word "assets," when applied to the property of a corporation, embraces its real estate, as well as personal property, stock, and choses in action. *Dauphin County v. Union Canal Co.* (Pa.) 2 Pears. 38, 39.

The double liability of the stockholders of a bank is not an "asset" which it, as an insolvent debtor, can by its deed of assignment pass to its assignee, or in any manner vest the enforcement thereof in him. *Runner v. Dwiggin*, 46 N. E. 580, 581, 147 Ind. 238, 36 L. R. A. 645.

The term "assets," as used in an order of court directing the sale of all "assets," property, and business of an insolvent corporation, means only property which belonged to the corporation as such, and not unnamed and perhaps undiscovered causes of action which the receiver might have maintained, not in the right of the corporation, but solely in the right of creditors. It means such as

sets as belong to the corporation itself and passed to the receiver in its right, and hence a right of action for capital withdrawn and refunded by the corporation to its shareholders without payment of its corporate debts is not an asset to be sold under the order. *Minnesota Thresher Mfg. Co. v. Langdon*, 46 N. W. 310, 313, 44 Minn. 37.

#### Of decedent's estate.

"The broadest definition of 'assets' that I have seen is that given by Justice Story, who says that in an accurate and legal sense, all the personal property of the deceased which is of a salable nature and may be converted into ready money is deemed assets. But the word is not confined to such property for all other property of the deceased which is chargeable with his debts or legacies, and is applicable to the purpose, is in a large sense assets." *Marion v. Marysville St. R. & P. Co.* (U. S.) 49 Fed. 436, 437 (quoting Story, Eq. Jur. 531); *Wilson v. Tootle* (U. S.) 55 Fed. 211, 213.

The "assets" of an estate are such as constituted the power of an executor or administrator, or such as he is intrusted with by law by virtue of his office, to dispose of in the course of his administration. In other words, whatever an executor or administrator takes as such or in respect to his office is to be considered assets. *Commissioners Freedman's Savings & Trust Co. v. Earle*, 4 Sup. Ct. 226, 231, 110 U. S. 710, 28 L. Ed. 301 (quoting from Story, Eq. Jur. § 551).

"Assets" are defined by Bouvier as property in the hands of an heir, or in the hands of executors, administrators, or trustees, which is legally or equitably chargeable with the obligations of such heir, or which the executor, administrator, or trustee is as such required to discharge. *Favorite v. Booher's Adm'r*, 17 Ohio St. 548, 557.

The assets of an estate "are described to be all those goods and chattels, actions and commodities, which were of the deceased in right of action or possession as is known and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in right of his executorship or administratorship, and all such things as do come to the executor or administrator in lieu or by reason of that, and nothing less, shall be said to be assets in the hands of the executor or administrator, to make him chargeable to a creditor or legatee." *Todd v. Neal's Adm'r*, 49 Ala. 266, 275 (quoting Shep. Touch. p. 406); *Smedley v. Philpot*, 3 Mees. & W. 573, 580. It is not necessary in all cases that the money or chattels shall have come to the actual possession of the executor; it is sufficient if it be in his power to receive them, and if he has actually dealt

with them as received. *Smedley v. Philpot*, 3 Mees. & W. 573, 580.

The term "assets," in Pub. St. c. 136, § 11, extending the time for bringing creditors' actions against administrators in case of the receipt of new assets, does not include the proceeds of a mortgage given by the heirs of law, without leave of court, on lands of which their intestate ancestor died seised. *Shute v. Wilkins*, 40 N. E. 848, 163 Mass. 491.

2 Rev. St. p. 147, § 6, declares that "assets" of a decedent are debts secured by mortgages, bonds, notes, or bills, among other things, but this, of course, means debts due the deceased. *Sedgwick v. Ashburner*, 1 Bradf. Sur. 105, 108.

#### Same—Personal property.

The word "assets" signifies personal property applicable to the payment of the debts of a decedent. *Code Civ. Proc. N. Y.* 1899, § 2514, subd. 2.

The term "assets" does not denote any particular species of property, but it is derived from the French word "assez," which means sufficient or enough—that is, that there is enough in the hands of the heir to pay the ancestor's debts; and so whatever descended to the heir from the ancestor by common law was assets, and therefore when, by our law, the personal estate is made to descend to the heir, it must also be regarded as assets. *Hall v. Martin*, 46 N. H. 837, 342.

#### Same—Real estate and chattels real.

The term "assets," as used in the Code, conferring on probate courts authority to grant letters of administration within their respective counties, where the intestate, not being an inhabitant of the state, dies out of the county leaving "assets" therein, includes both real and personal assets, and therefore comprehends land or real estate according to its ordinary signification. *Bishop v. Lalouette's Heirs*, 67 Ala. 197, 200. The word "assets," in Code 1886, § 2013, authorizing the granting of letters of administration on the estates of nonresidents who die leaving assets, includes, as has been declared, lands situated in the county where the administration is granted. *Nicrosi v. Giuly*, 5 South. 156, 157, 85 Ala. 365.

"Assets," when used in the common law, in stating that the heir is bound to the extent of the assets descending is meant the real estate which the testator charged with such debts by a specialty. "The word 'assets' in this connection always meant real estate." *People v. Brook*, 14 N. E. 39, 40, 123 Ill. 246.

Where a testator subjected his whole estate to the payment of his debts, and empowered his executors to sell his land and convey to the purchaser, he thereby converted his whole real estate into equitable assets

subject to the payment of all his debts equally. *Black v. Scot* (U. S.) 3 Fed. Cas. 507, 516.

"Assets" is property belonging to an estate, either of a bankrupt or a decedent, subject to administration by the assignee, trustee, or executor for the benefit of creditors, heirs, or distributees. The word "assets" includes such articles representing real estate of a decedent as are usually denominated "chattels real," as leases, etc. *Shears v. Rogers*, 3 Barn. & Adol. 862, 371.

**Same—Right of action for decedent's death.**

The word "assets," as used in Gen. St. 1878, c. 49, § 2, giving a probate court jurisdiction to direct administration of an estate of a deceased person who was not an inhabitant of the state but left "assets" therein, should be construed to include the right of action given by Gen. St. 1878, c. 77, § 2, to an administrator to recover damages for the death of his intestate, caused by the negligence of the defendant, although, strictly speaking, the cause of action did not belong to the deceased in his lifetime, but only accrued at his death, and also that, when realized on, the proceeds form no part of his general estate, but belong to his next of kin. *Hutchins v. St. Paul, M. & M. Ry. Co.*, 46 N. W. 79, 44 Minn. 5.

**Same—Trust property.**

Property held by a trustee for the testator is legal assets, for, although the benefit of the trust, if resisted, cannot be enforced without equitable aid, yet the analogy of the law will regulate the application of the fund. To constitute equitable assets, the trust imposed by the party or the court must be for the benefit of creditors generally. *Commissioners Freedmen's Savings & Trust Co. v. Earle*, 4 Sup. Ct. 226, 230, 110 U. S. 710, 28 L. Ed. 301.

"Assets" includes only those things in which the decedent had a beneficial interest at his death, and does not include those things which he held in trust, or as a bailee or factor of another; and the rule is that if a testator held money or other property in his hands belonging to others, whether in trust or otherwise, and such money or property was not distinguishable from the mass of the decedent's own property, it falls within the description of "assets." *First Nat. Bank v. Hummel*, 23 Pac. 986, 988, 14 Colo. 259, 20 Am. St. Rep. 257.

**Of insurance company.**

The reserve fund of a mutual insurance company held in trust for division on the dissolution of the company among its then members is not an "asset" of the company, within the general meaning of the term. *Farmers' Loan & Trust Co. v. Aberle*, 46 N. Y. Supp. 10, 11, 19 App. Div. 79 (citing *In re*

*Equitable Reserve Fund Life Ass'n*, 181 N. Y. 354, 30 N. E. 114; *People v. Life Union*, 83 Hun, 598, 31 N. Y. Supp. 1120).

**ASSETS IN HAND.**

"Assets in hand" is such property as at once comes to the executor or other trustee for the purpose of satisfying claims against him as such. *Favorite v. Bocher's Adm'r*, 17 Ohio St. 548, 557.

**ASSIGN.**

See "Duly Assigned."

See, also, "Assign Over."

"Assign," as defined by Webster, means to allot, to make or set over, to transfer, to sell or convey; and Bolles, in his dictionary, says that the word "assigning" means allotting, appointing, transferring. *Bump v. Van Orsdale* (N. Y.) 11 Barb. 634, 638.

The meaning of the word "assign" is to mark out, to allot, to apportion, to make over; and there can be no assignment unless it discloses and designates what is marked out, or allotted, or apportioned, or made over. *Franz Falk Brewing Co. v. Mielenz*, 37 N. W. 728, 730, 5 Dak. 136.

To "assign" is to make over a right to another. *Hogg v. Mendenhall*, 19 Minn. 335, 336 (Gil. 289, 290).

The words "assigned and heard by the full court sitting in Boston" are equivalent to "entered and heard by the full court" sitting in Boston. *Commonwealth v. Robertson*, 38 N. E. 25, 26, 162 Mass. 90.

A writing by which certain persons "hereby sell and assign" to certain persons named a fixed amount of money to become due from a third party does not change the character of the instrument from an order to an ordinary assignment. *Nelson v. Nelson Bennett Co.*, 71 Pac. 749, 750, 31 Wash. 116.

**As conveyance or transfer.**

"To assign" means to make a right over to another, as to assign an estate, an annuity, bond, etc., over to another; a transfer by one person to another of any property, real or personal, or of any estate or right therein. *Seventh Nat. Bank v. Shenandoah Iron Co.* (U. S.) 35 Fed. 436, 440; *Richie v. Cralle*, 56 S. W. 963, 964, 108 Ky. 483 (citing *Bouv. Dict.*; *Webst. Dict.*).

"Assign," in a statute relative to negotiable instruments, means transfer. It is the appropriate word for a transfer of personal property, and particularly for a transfer of a right in action. *Haug v. Riley*, 101 Ga. 372, 379, 29 S. E. 44, 47, 40 L. R. A. 244.

"Assigned," as used in *Sess. Laws* 1867, c. 76, p. 110, authorizing an attachment whenever the plaintiff shall make an affidavit that

the defendant has "assigned, secreted or disposed of" his property with intent to delay or defraud his creditors, means the transfer of the legal title to the property, and possibly any conveyance of an interest therein. *Guile v. McNanny*, 14 Minn. 520, 522 (Gil. 391, 393), 100 Am. Dec. 244.

"Assigned" or "duly assigned" has no fixed or precise meaning; a bond may be "duly assigned" for one purpose, and not for another. It may be assigned conditionally, and for the purpose of being canceled on a certain event, or to await some future appointment or direction of the assignor, or in trust for a third person or for the use of the assignor himself. *Allen v. Pancoast*, 20 N. J. Law (Spencer) 68, 74.

"Assign" is defined "to transfer or make over to another." Thus a paper which states, "I hereby assign, release and deliver to J. S. all my right, title and interest in the security or property covered by the following described chattel mortgages," is an assignment of the mortgages, and not a cancellation of them. *Aultman, Miller & Co. v. Sloan*, 73 N. W. 123, 124, 115 Mich. 151.

#### As delivery.

In an agreement whereby a debtor agreed to "assign" all the debts then due and owing to him for the use and benefit of his creditors in full satisfaction of their respective debts, and also all his stock in trade, "assign" means to set over or transfer, and when applied to movables a delivery will satisfy it, and hence, by the delivery and receipt of the debts and stock in trade, there was an assignment of them. "The word 'assign' has various significations, and must be taken according to the subject-matter." *Watkinson v. Inglesby*, 5 Johns. 386, 391.

The term "assign" or "assignment," in respect to the transfer of choses in action, is not peculiar to written transfers. It is the usual and appropriate word to denote any transfer of a chose in action, legal or equitable, in writing, by parol or otherwise, and is so used in the books. The term "assign" in Code, § 3059, providing that the claim of a landlord for rent may be by him assigned, etc., includes assignments by delivery merely, as well as in writing. *Wells v. Cody*, 20 South. 381, 383, 112 Ala. 278.

To "assign" is to make over a right to another. Hence an allegation in a complaint that plaintiff duly assigned a promissory note to defendant imports that plaintiff delivered such note to defendant, actually or constructively, and that such assignment was accepted by defendant. *Hoag v. Mendenhall*, 19 Minn. 335, 336 (Gil. 289, 290).

"Assigned," as used in *Sayles' Civ. St. art. 307*, providing that when a negotiable instrument has been assigned to a person before its maturity for a valuable consideration,

without notice of any discount or defense against it, he shall be compelled to allow only just discounts against himself, means transferred from one to another. The form of the transfer, whether written or verbal, is immaterial. The statute extends its protection to all assigns coming within its terms, though they may not have acquired their instruments in accordance with the technical rules regulating transfers under the law merchant. *Ft. Dearborn Nat. Bank v. Berrott*, 57 S. W. 340, 341, 23 Tex. Civ. App. 662 (quoting *Word v. Elwood*, 90 Tex. 130, 37 S. W. 414).

#### As grant of land.

To "assign" is the power to grant, and "grant," when used in an instrument, is construed as an operative word of conveyance, and the words "I assign the within," when used in a deed, are effectual not only to pass title to the paper on which the deed was written, but also to pass title to the land described in the deed. *Harlowe v. Hudgins*, 19 S. W. 364, 365, 84 Tex. 107, 31 Am. St. Rep. 21.

The words "transfer" and "assign" are not the usual operative words in a conveyance of real estate, but are sufficient to transfer the title. *Sanders v. Ransom*, 20 South. 530, 531, 37 Fla. 457.

"Assigns," as used in an instrument by which the government "assigns" to certain persons a tract of land within described limits, that they might establish thereon a proposed colony, means a setting apart of the land as a tract upon which the persons therein named can perform their proposed colonization, and not a conveyance. It is not a grant of the land on condition that a colony be established, but it is assigned as a place where a colony may be established. The grant was not a conveyance subject to defeasance, but amounted only to a designation and setting apart of the tract as a tract within which the grantees could establish a colony in conformity to the colonization law, and upon such establishment obtain title to a fixed quantum of land within the tract, which never having been done, no title to anything passed by the grant. *Interstate Land Co. v. Maxwell Land Grant Co.* (U. S.) 41 Fed. 275, 279.

#### Guaranty of payment not implied.

The word "assign" implies no guaranty, and, on the assignment of seven bonds secured by a mortgage, the several assignees were alike entitled to come in and share the fund pro rata, according to the bonds held by them respectively. *Appeal of Perry*, 22 Pa. (10 Harris) 43, 45, 60 Am. Dec. 63.

As the term was used in a contract transferring a bond from the defendant to the plaintiff, in which defendant assigned all his interest therein to plaintiff, it did not import

a covenant on defendant's part guarantying that the maker of the bond would pay the same, on which the assignee could maintain an action against the defendant on the maker's default. *Garrettsie v. Van Ness*, 2 N. J. Law (1 Penning.) 20, 24, 2 Am. Dec. 333.

#### As indorsement.

As used in a petition for the foreclosure of a mortgage securing a note, alleging that on a certain date the mortgagee in the mortgage for a valuable consideration "assigned" such note and mortgage to the plaintiff, the word "assigned" should be construed as meaning to transfer or make over, in its broad sense, including all transfers of whatever nature. Under an allegation that an instrument has been assigned to the plaintiff, plaintiff may introduce proof of any fact tending to show an assignment. The mode in most cases is not material, so that there was an intention to pass the entire title to the thing assigned. A transfer of negotiable paper by indorsement is but one of the modes by which it may be assigned or transferred, and hence plaintiff may introduce evidence tending to show a transfer thereof by indorsement. *Mundy v. Whittemore*, 19 N. W. 694, 695, 15 Neb. 647.

To "assign" is to transfer to another. A bill or note may be assigned by delivery without indorsement, in which case the assignor's liability is somewhat different from that of an indorsement. The writing on a note, "I assign over the within note to P.," is an indorsement, and not an assignment. *Davidson v. Powell*, 19 S. E. 601, 114 N. C. 575.

An averment in the complaint in a suit on a promissory note that it was "assigned in writing" is not the equivalent of "assigned by indorsement in writing." A general "indorsement," both from its etymology and in its technical use, means a writing on the back of a note. A mere assignment in writing may be on a separate piece of paper, and in such case the record would not show anything to bind the payee, unless he was made a party to the suit. *Reed v. Garr*, 59 Ind. 299, 300; *Williams v. Osbon*, 75 Ind. 280, 283.

#### Personalty referred to.

As used in a will directing the assignment of property, properly the word "assign" refers to personalty not reduced to money, and not to realty. *Story v. Palmer*, 18 Atl. 363, 305, 46 N. J. Eq. (1 Dick.) 1.

#### Pledge.

A power to "sell and assign" will not authorize an agent to pledge the property of his principal, as in such case the terms themselves exclude the idea of any other disposition than a sale out and out. *Chetwood v. Berrian*, 39 N. J. Eq. (12 Stew.) 203, 207.

The word "assign" as used in a lease prohibiting the lessee from assigning, etc.,  
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means an absolute transfer of all the lessee's interest in the demised estate, and hence does not include a pledge of the lease as collateral security. *Doe ex dem. Pitt v. Hogg*, 1 Car. & P. 160.

#### Sublease.

Conditions in a lease that the lessor shall not "assign over" or otherwise part with this indenture, or the premises thereby leased, or any part thereof, etc., is not broken by the underletting of the whole or a part of the premises for a period less than the whole term. *Jackson v. Harrison* (N. Y.) 17 Johns. 68, 70. See, also, *Doe ex dem. Holland v. Worsley*, 1 Camp. 20, 21.

#### As transfer in writing.

Code, § 952, declares that accounts may be assigned, and permits the assignee to sue in his own name, subject to defenses which the debtor might have against the creditor at any time prior to suit brought. Held, that the word "assigned," as there used, contemplated an assignment in writing; that the true use of the word "assigned," when applied to the transfer of a written instrument, implies a written assignment, unless it is controlled by some adjunct, such as by delivery or the like; and therefore the use of the word "assigned," in connection with accounts, must be construed to have the same meaning, and to require an assignment in writing. *Andrews v. Brown*, 1 Iowa (1 Clarke) 154, 156; *Williams v. Soutter*, 7 Iowa (7 Clarke) 435, 448.

In an action on a note, an averment that it had been duly "assigned" must be construed to mean a transfer in writing, as distinguished from one by delivery; this being the true definition of the word when applicable to contracts, as indicated both by usage and etymology. *Ragland v. Wood*, 71 Ala. 145, 149, 46 Am. Rep. 305.

#### ASSIGN OVER.

In a lease covenanting that the tenant shall not "let or assign over" the said premises, or any part thereof, without license of the lessor in writing, the word "over" is annexed to the word "assign," and the covenant necessarily means that if the lessee part with the premises, even for a part of the term, his lease should be vacated. *Gregson v. Harrison*, 2 Term R. 425, 429.

The word "assign," as used in a lease, means and includes any transfer of the interest of the lessee, and a condition against the assignment is therefore broken by execution of a sublease by the lessee. *Doe ex dem. Holland v. Worsley*, 1 Camp. 20, 21.

#### ASSIGNABILITY.

"Assignability" and "survivability" of things in action are convertible terms. *Tanas*



v. Municipal Gas Co., 84 N. Y. Supp. 1053, 1058, 88 App. Div. 251.

The "assignability" and "survivability" of things in action are convertible terms, and furnish a clear and intelligible rule to determine what injuries to property, rights, or interests will survive to the personal representative of the injured party. The rights of property only which are in their nature assignable and capable of enjoyment by an assignee are those for which a right of action survives to the personal representative,<sup>1</sup> and hence an action by a wife to recover the value of a horse killed by her husband while he was in a state of intoxication caused by liquor sold him by defendants may be revived and continued by the personal representatives of the wife. *Morenus v. Crawford*, 5 N. Y. Supp. 453, 456, 51 Hun, 89.

The attribute of assignability is not confined to rights in action belonging to natural persons, but includes those belonging to artificial persons. *Grocers' Nat. Bank v. Clark* (N. Y.) 48 Barb. 26, 27.

#### ASSIGNABLE.

See "Not Assignable."

"Assignable," as used in Ky. St. § 474, providing that all bonds, appeals, or notes for money or property shall be "assignable" so as to vest the right of action in the assignee, should be construed in the sense of "transferable" or "negotiable." *Richie v. Cralle*, 56 S. W. 903, 904, 108 Ky. 483.

#### ASSIGNABLE BY INDORSEMENT.

The words "assignable by indorsement," as used in Comp. Laws, § 2285, providing for the transfer of a certificate of sale of land for tax in that manner, means that the assignment itself, as well as the name, should be written on the instrument. *Territory v. Perea*, 30 Pac. 928, 929, 6 N. M. 531.

#### ASSIGNED.

A statement by a mercantile commercial agency that a certain firm had "assigned," being false, is libelous per se. *Mitchell v. Bradstreet Co.*, 22 S. W. 358, 359, 116 Mo. 226, 20 L. R. A. 138, 38 Am. St. Rep. 592.

#### ASSIGNEE.

See "Voluntary Assignee."

As defined by Jac. Law Dict., an assignee of a thing is one who is the owner of it, who has the whole estate of the assignor, and possesses the thing in his own right. *Allen v. Pancoast*, 20 N. J. Law (Spencer) 68, 74.

In Comp. St. Neb. c. 73, providing that any mortgagee, his personal representative

or "assignee," who shall refuse to discharge the same on proper request shall be liable in damages, the term "assignee," being unlimited, applies without restriction, without regard to the form of the assignment. *Daniels v. Densmore*, 48 N. W. 906, 32 Neb. 40.

The word "assignee," as used in Rev. St. p. 818, c. 134, § 2, prohibiting the examination of a party to an action as a witness in his own behalf where such party claims as assignee and the original assignor is dead, "is employed in its more usual and appropriate sense of one suing or defending to enforce rights or avoid demands devolving upon him in a representative capacity; of one standing in the place of the original assignor to assert rights which had accrued to, or defeat claims which had arisen against, such assignor before the assignment, by virtue of which the same rights pass to and the same claims accrued against the alleged assignee. I think the term 'assignee' means a person who claims under the assignor, and in subordination to his rights and duties, and that it cannot be applied to one who, as the unqualified owner of property, sues or defends strictly in his own right." *Wisconsin Bank v. Morley*, 19 Wis. 62, 70.

An assignee is one to whom some right in property is transferred. The character of assignee cannot be acquired unless there is something to be assigned and a right springing from a defeated purchase. *Ely v. State Land Office Com'rs*, 13 N. W. 784, 785, 49 Mich. 17.

The word "assignee," as contained in a deed which recited that it was between the grantor of the first part and the "assignee" of the grantor of the second part, and that it was in consideration of the conditions of the assignment made this day for the benefit of the creditors of the grantor, relates to the character in which the grantee took, and means that he took not as purchaser, but in trust for creditors, and the term "assignee" negatives any supposition of an intention to vest an estate in fee in the grantee himself. *McDermith v. Voorhees*, 27 Pac. 250, 251, 16 Colo. 402, 25 Am. St. Rep. 286.

"An 'assignee' is one who has transferred to him in writing the whole interest of the original patent, or the undivided part of such whole interest, in every portion of the United States." *Potter v. Holland* (U. S.) 19 Fed. Cas. 1154, 1157.

#### Assignee by operation of law.

In common acceptance the word "assignee" is limited to an assignee in fact, and does not comprehend an assignee by operation of law, as used in Code Civ. Proc., disqualifying a witness from testifying in his own behalf as against the assignee of a decedent; nor does it comprehend an assignee through the medium of that legal operation which is effected by an order of court. Thus, when

a receiver, in obedience to an order of court, turns over the residuary assets of the receivership to a trustee for the interested parties, such trustee does not become an assignee. *Pulsifer v. Arbuthnot*, 53 Pac. 70, 59 Kan. 380.

An "assignee" is defined by Webster as a person to whom an assignment is made. A person appointed or deputed by another to do some act, perform some business, or enjoy some right, privilege, or property, is an assignee of a bankrupt. An assignee may be by special appointment or deed, or be created by law. Bouvier defines an "assignee" as "one to whom an assignment has been made." Assignees are either assignees in fact or assignees in law. An assignee in law is one in whom the law vests the right, as an executor or administrator. The common acceptance of the word "assignee" is limited to an assignee in fact, and does not comprehend an assignee by mere operation of law. It is so used in Code Civ. Proc. § 322, providing that no person shall testify in his own behalf in respect to any transaction had with a deceased person when the adverse party is executor, etc., or "assignee" of such deceased person, and hence a sheriff who has left a writ of attachment upon chattels, or the attachment creditor, is not an assignee. *Burlington Nat. Bank v. Beard*, 42 Pac. 320, 55 Kan. 773.

#### As creditor.

See "Creditor."

#### Executor, administrator, or legatee.

An "assignee" is one to whom an assignment is made, but an administrator is not included in the term as used in Gantt, Dig. § 911, providing that every plaintiff suing as an assignee may be required to give security for costs. *Tucker v. West*, 81 Ark. 643, 646.

An executor may be deemed an assignee in law to the testator; that is, he takes without appointment of the person, but by operation of law. The testator names the individual as executor, but it is the law which makes him the assignee of the property. A legatee or devisee occupies no such position. What he receives is not by operation of law, as in the case of an executor, but by direct gift from the testator. *Hight v. Sackett*, 34 N. Y. 447, 451.

Although the words "assign and assignee" are frequently used to designate and include executors and administrators, the assignee of an assignee in perpetuum, the heir of an assignee, the assignee of an heir, the assignee of an assignee's executor, and the devisee, yet, in a statute where the words "personal representative" are also used in the same connection, the term "assignee" cannot have such enlarged sense. *Page v. Johnston*, 23 Wis. 295, 296.

"Assignee," as used in Code, § 399, providing that a party may be examined as a witness in his own behalf, or in behalf of another party, in the same manner and subject to the same rules of examination as any other witness, provided, however, that he shall not be examined in his own behalf in respect to any transaction had personally by him with a deceased person against parties who are the executors, administrators, heirs at law, next of kin, or "assignees" of such deceased person, when they have acquired title to the cause of action immediately from said deceased person, or have been sued as such executors, administrators, heirs at law, next of kin, or assignees, cannot be construed to include a legatee of the testator. *Willey v. Whitney* (N. Y.) 25 How. Prac. 75, 77.

#### Grantee or purchaser.

As used in Code, § 399, providing that the testimony of a witness shall be incompetent against a party prosecuting or defending an action as executor, administrator, heir at law, next of kin, or "assignee" of a deceased person, the word "assignee" includes a grantee of the deceased, though the word "grantee" is not used in the statute, since such grantees are within the reason of the act, and the word "assignee" must be held to include them. *Mattoon v. Young*, 45 N. Y. 696, 699.

Code 1886, § 2707, provides that in an action by a mortgagee or his "assignee" against the mortgagor or one holding under him defendant may, if the jury ascertain the amount due on the mortgage debt, pay the debt, and that on payment thereof a writ of possession shall not issue. A purchaser at foreclosure sale of such premises brought ejectment against the mortgagor to recover possession. Held, that the purchaser was not an assignee of the mortgagee, within the meaning of the statute, in a mortgage, as he sued in his own right as owner of the land, and not by virtue of any assignment directly from the mortgagee. *Matkin v. Marx*, 11 South. 633, 634, 96 Ala. 501.

#### As immediate assignee.

The phrase "assignee of the inventor or discoverer," as used in Rev. St. § 4895 [U. S. Comp. St. 1901, p. 3385], providing that patents may be granted and issued or re-issued to the "assignee of the inventor or discoverer," but the assignment must be entered of record in the Patent Office, in one sense means no other than the person or corporation to whom the inventor or discoverer has executed an assignment. An "assignee of an inventor" did not cease to be "assignee of the inventor or discoverer" of a patent because it became an assignor thereof to another, although it did cease to have any legal or equitable interest in the invention after executing the assignment. The language of the section is as literally and

accurately satisfied when the patent is issued to the inventor's assignee as it is when it is issued to the assignee's assignee. The latter is an assignee of the patent, but not strictly the assignee of the inventor. The patent may issue to the person who, by the records of the office, is assignee of the patent, although not technically the assignee of the inventor. *Consolidated Electric Light Co. v. Edison Electric Light Co.* (U. S.) 25 Fed. 719, 721.

"Assignee," as used in Rev. St. § 4895 [U. S. Comp. St. 1901, p. 3385], providing that patents may be granted and issued or reissued to the "assignee" of the inventor or discoverer, but the assignment must first be entered of record in the Patent Office, means the assignee in any degree of the inventor, and however remote, and is not limited to the immediate assignee of such inventor, and hence the reissue was properly made to the fourth assignee in succession of the original patent. *Selden v. Stockwell Self-Lighting Gas Burner Co.* (U. S.) 9 Fed. 390, 396.

#### Indorsee.

The word "assignee" or "assignment" has no certain fixed or technical meaning, as the word "indorsed" has when used in reference to promissory notes or bills of exchange. An assignment may be by deed, by writing, by mere parol and delivery, or by the application of equitable principles to a certain state of facts. *Allen v. Pancoast*, 20 N. J. Law (Spencer) 68, 72.

"Assignee," as used in Code Iowa, § 2081, declaring that nothing in the statute relating to usury shall be construed to prevent the proper assignee in good faith and without notice of any usurious contract from recovering against the usurer, does not mean innocent indorsees of mercantile paper, but means that class of assignees who, in the absence of such a provision, would step into the shoes of their assignors with just the same rights, remedies, and equities to which their assignors were entitled. In strict legal parlance we do not use the term "assignee" when we mean to designate the indorsees of bills and notes. *Palmer v. Call* (U. S.) 7 Fed. 737, 745.

#### As legal representative.

See "Legal Representative."

#### Negotiability implied.

The words "or its assignees," as used in a municipal bond reciting that it is payable to a certain railroad company "or its assignees," is to be construed as equivalent to the words "or order," and to render the bond transferable by indorsement. *Porter v. City of Janesville* (U. S.) 37 Fed. 617, 619.

#### Parties beneficially interested.

In Rev. St. § 629 [U. S. Comp. St. 1901, p. 503], providing that no Circuit Court shall

have cognizance of any suit to recover on a note or chose in action in favor of an assignee unless the suit might have been brought in such court if no assignment had been made, the term "assignee" covers not merely persons to whom is technically transferred the contract in controversy, but any one who by virtue of any transfer to him can claim its beneficial interest. *Plant Inv. Co. v. Jacksonville, T. & K. W. R. Co.*, 14 Sup. Ct. 483, 485, 152 U. S. 71, 38 L. Ed 358; *Virginia Carolina Chemical Co. v. Sundry Ins. Co.* (U. S.) 108 Fed. 451, 458. By the term "assignee" is meant one who sues under and by devolution of interest from another. So that a person who purchased insured premises, and to whom the policy of insurance was assigned, does not stand in the relation of an assignee, since such assignment constitutes in effect a new contract between the insurance company and the purchaser. *Virginia Carolina Chemical Co. v. Sundry Ins. Co.* (U. S.) 108 Fed. 451, 458.

#### As real party in interest.

See "Real Party in Interest."

#### Receiver.

As receiver, see "Receiver."

The word "assignee" includes a receiver appointed under the insolvency act of 1881. § 2. *Bliss v. Doty*, 36 Minn. 168, 169, 30 N. W. 465, 466.

A receiver represents no particular interest or class of interests. He holds for the benefit of all who may ultimately show an interest in the property. He stands no more for the creditor than the owner. They are not assignees, and the principles of common law applicable to assignees do not define or determine the character of a receiver's possession, or its effect upon the rights of those interested in the property in their possession. *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.* (U. S.) 58 Fed. 278, 278.

#### Surviving partner.

The term "assignees," as used in Code Proc. § 299, prohibiting evidence of transactions with a deceased person against parties who are executors, administrators, heirs at law, next of kin, or "assignees" of the deceased, cannot be construed to include the surviving partner of a firm of which the deceased was a member, for at his death the partnership was dissolved, and the effects remained in the hands of the survivor, subject to the partnership debts and accounts. It became his duty to wind up and settle the concern of the firm, to pay the partnership debts and obligations, and to distribute the surplus according to the respective shares of those entitled to it. For this purpose, after the dissolution of a partnership by the death of one of its members, the legal interest subsists, although for all other

purposes the partnership is actually terminated, and the survivor holds the assets still as partnership property and by virtue of his original power as partner, and he is in no sense the assignee of the deceased, so that the reception of evidence by the plaintiff as to transactions had personally by him with the deceased was not prohibited. *Tremper v. Conklin* (N. Y.) 44 Barb. 456, 457.

#### ASSIGNEE FOR BENEFIT OF CREDITORS.

An "assignee for the benefit of creditors" succeeds only to the rights of his assignor, and takes the property subject to all existing liens and equities. The assignee is the mere representative of the debtor, enjoying his rights only, and bound where he would be bound. *Barron v. Whiteside*, 43 Atl. 825, 826, 89 Md. 448.

An "assignee for the benefit of creditors" is a party who claims under the assignor. He is not a bona fide purchaser for value. He stands in the shoes of an assignor, and can assert no claim to the property which the assignor could not. *Textor v. Orr*, 38 Atl. 939, 940, 86 Md. 392 (citing *Luckemeyer v. Seltz*, 61 Md. 313, 315; *Tyler v. Abergh*, 65 Md. 18, 3 Atl. 904).

An "assignee in a voluntary assignment for creditors" is not merely the representative for creditors, as a receiver appointed by the courts, who is the embodiment of the creditors merely, but stands in the place of his assignor, with all the property which his assignor can pass to him, with the duty to divide it between creditors who may elect to come in. *Wimpfheimer v. Perrine* (N. J.) 50 Atl. 356, 357.

An "assignee for the benefit of creditors" stands in the shoes of the assignor, and has the powers only of the assignor as to the collection of outstanding funds. Thus, where securities have been deposited with superintendent of insurance by an insurance company, to be held in trust for the policy holders, the assignee of such company cannot recover such securities without first showing that the company is no longer liable to any of its policy holders. *State v. Matthews*, 60 N. E. 605, 606, 64 Ohio St. 419.

An "assignee for the benefit of creditors" is to be considered primarily as a trustee for the creditors. *Slater v. Oriental Mills*, 27 Atl. 443, 444, 18 R. I. 352.

An "assignee for the benefit of creditors" is a trustee, and subject to the good faith and responsibilities as such. In *re Brown's Estate*, 44 Atl. 443, 445, 193 Pa. 281.

#### As acting in fiduciary capacity.

See "Fiduciary Capacity or Character."

#### As bona fide purchaser.

See "Bona Fide Purchaser."

#### Devisees or heirs.

"Assignees," as used in Act Cong. March 2, 1799, § 65, providing that in all cases of insolvency, or where any estate in the hands of executors, administrators, or "assignees" shall be insufficient to pay all the debts due from the deceased, the debts due the United States on any bond or bonds for the payment of duties shall be first satisfied; and any executor, administrator, or assignee, or other person who shall pay any debt due from the person or estate for whom or for which they are acting, previous to the debt or debts due to the United States, shall be personally liable therefor, "means only such persons as become vested with or possessed of the property of the living debtor in one or other of the cases of insolvency pointed out in the statute, and is not to be so extended as to embrace heirs or devisees, or any other description of persons; for assignees are not only distinguishable, but are clearly distinguished in the law itself, from those who succeed to the title and possession of property upon and in consequence of the demise of the debtor." *United States v. Crookshank* (N. Y.) 1 Edw. Ch. 233, 237.

#### As a legal representative.

See "Legal Representative."

#### As an officer.

See "Officer."

#### As purchaser.

See "Purchaser."

#### Receiver.

That receivers appointed by the direct order of the court, and executors and administrators receiving their appointment from the court, are officers of the court whose appointments they bear, so that property in their hands by virtue of such appointment is in custodia legis and not subject to attachment, has passed beyond the point of doubt, and is well settled by the decisions of all the courts to which counsel have called attention. But an assignee in Iowa does not receive his appointment from the court, and while, under the statutes of that state, he is subject to the orders of the state, and may even be removed by that court for causes provided in the statutes, yet his appointment is wholly the voluntary act of the assignor, and the property received by him under the assignment is not entitled "in custodia legis," so as to exclude a federal court from acting with reference thereto or as to the validity of the assignment. *Rothschild v. Hasbrouck* (U. S.) 65 Fed. 283, 285.

#### As trustee.

See "Trustee."

As trustee of an express trust, see "Express Trust."

# ASSIGNEE IN BANKRUPTCY.

As an officer, see "Officer."

As legal representative, see "Legal Representative."

As representative, see "Representative."

# ASSIGNEE IN FACT.

An "assignee in fact" is one to whom an assignment has been made in fact by the party having the right to assign. *Starkweather v. Cleveland Ins. Co.* (U. S.) 22 Fed. Cas. 1091, 1092; *Tucker v. West*, 31 Ark. 643, 648.

# ASSIGNEE IN LAW.

An "assignee in law" is one in whom the law vests the right, as an executor or administrator. *Bouvier*; *Tucker v. West*, 31 Ark. 643, 648.

An "assignee in law" is one in whom the law vests the right and control in the property. To this class an assignee in bankruptcy belongs; he is like an administrator or executor, upon whom, when appointed by the proper authority, the law confers the right and power to control the property thus committed to his charge, paramount to all others. *Starkweather v. Cleveland Ins. Co.* (U. S.) 22 Fed. Cas. 1091, 1092.

# ASSIGNMENT.

See "Equitable Assignment"; "New Assignment."

Assignment or otherwise, see "Otherwise."

An "assignment" is a transfer of property. *Hoag v. Mendenhall*, 19 Minn. 335, 336 (Gil. 289, 290) (citing *Bouvier*, Law Dict.; *Worcester*, Dict.).

The idea of an assignment is essentially that of a transfer by one existing party to another existing party of some species of property or valuable interest. *Andrews v. National Bank of North America* (N. Y.) 7 Hun, 20, 22 (citing *Hight v. Sackett*, 34 N. Y. 447).

The word "assignment" means the act by which one person transfers to another, or causes to vest in another, his property, or an interest therein. *Harlowe v. Hudgins*, 19 S. W. 364, 365, 84 Tex. 107, 31 Am. St. Rep. 21.

An "assignment" is the transferring or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. *Brown v. Crookston Agricultural Ass'n*, 34 Minn. 545, 546, 26 N. W. 907, 908.

An "assignment" does not differ in its essential elements from any other contract. There must be persons competent to con-

tract, a valuable consideration, legal subject-matter, and mutual assent of the contracting parties. No contract is raised by a mere overture or offer to enter into an agreement not definitely and expressly assented to by both parties. Thus, where a debtor offered to assign a claim to a creditor, but the creditor did not assent to the same, there was no assignment. *Commercial Bank v. Rufe* (U. S.) 92 Fed. 789, 795.

In order to constitute "an assignment," it is essential that the dominion and control of the assignor over the assigned fund should be terminated. *Dirimple v. State Bank*, 65 N. W. 501, 91 Wis. 601, 606. Especially is this a requisite where the assignment is wholly without consideration, and merely a donation. Hence a letter from an insured to the insurer requesting that such insurance be made payable in case of his death to his son was not an assignment by the insured of such insurance, since he still retained dominion over it, and could cancel, and, with the consent of the insurer, modify, the same. *Alvord v. Luckenbach*, 82 N. W. 535, 536, 106 Wis. 537.

## Assignment by delivery or in writing.

An "assignment" in law, as defined by Webster, is a transfer of title or interest by writing, and such is its use in Code, § 2244, providing that all choses in action arising upon contract may be assigned, etc. *Turk v. Cook*, 63 Ga. 681, 682.

"Assignment," as used in Rev. St. 1881, § 3637, providing that any person becoming a shareholder in a corporation by assignment of stock shall succeed to all the rights and liability of his assignor, means a transfer by writing, as distinguished from one by delivery. *Burnsville Turnpike Co. v. State*, 20 N. E. 421, 422, 119 Ind. 382, 3 L. R. A. 265.

Under the statutes of Arkansas, providing that bonds may be transferred by "assignment" so as to vest the legal title and the right of action in the assignee, the transfer of a bond by delivery merely is no assignment thereof. *Hardie v. Mills*, 20 Ark. 153, 154.

No particular form of words is required to constitute a valid "assignment" of a chose in action. Any act showing an intent to transfer the parties' interest is sufficient for that purpose. *Maclin v. Kinealy*, 41 S. W. 893, 895, 141 Mo. 113.

The term "assignment" does not necessarily imply or require writing, and, when alleged of any subject, it should always be construed in connection with the law of transfer applicable to that particular subject-matter. *Hutchings v. Low*, 13 N. J. Law (J. S. Green) 246, 247.

An "assignment" is defined as the setting over or transferring the interest a man has in anything to another. This definition includes the case of the transfer of a note pay-

able to bearer by delivery merely. *Edison v. Frazier*, 9 Ark. (4 Eng.) 219, 220.

"An 'assignment' is the setting over or transferring the interest a man hath in anything to another, and the word is often used by writers on mercantile law to express such a transfer;" hence a transfer of negotiable paper by indorsement or delivery is an assignment thereof. *Jagoe v. Alleyn* (N. Y.) 16 Barb. 580, 582.

The term "assign" or "assignment," in respect to the transfer of choses in action, is not peculiar to written transfers. It is the usual and appropriate word to denote any transfer of a chose in action, legal or equitable, in writing, by parol or otherwise, and is so used in the books. The term "assign," in Code, § 3059, providing that the claim of a landlord for rent may be by him assigned, etc., includes assignments by delivery merely, as well as in writing. *Wells v. Cody*, 20 South. 381, 383, 112 Ala. 278.

No formal "assignment" of an account is necessary, any act showing an intent to transfer the party's interest being sufficient. *Smith v. Sterritt*, 24 Mo. 260, 262.

No particular form of words or written instrument is required by the law to constitute an "assignment" of an insurance policy. Any order, writing, or act which makes an appropriation of the fund amounts to an equitable assignment, and an oral or written declaration may be as effectual as the most formal instrument. *Opitz v. Karel*, 95 N. W. 948, 950, 118 Wis. 527, 62 L. R. A. 982 (citing *Crooks v. First Nat. Bank*, 83 Wis. 81, 52 N. W. 1181, 35 Am. St. Rep. 17).

Any transfer of property, whether by gift or otherwise, is in a general sense an "assignment." 1 Bouv. 155. True, there must be an actual delivery of the thing assigned, or its equivalent, such as a written evidence of the transfer, intending to vest thereby the subject of the transfer in present in the assignee, but it is not essential that the delivery shall be directly to the assignee. If the delivery is made to a third person with intent on the part of the assignor to surrender dominion over the thing assigned, and the assignee assents to the transaction, that is sufficient. *Stoll v. Mutual Benefit Life Ins. Co.*, 92 N. W. 277, 278, 115 Wis. 558.

#### As assignment for benefit of creditors.

The word "assignment," as used in Civ. Code, § 106, providing that, when cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, does not mean an ordinary transfer of the claim or cause of action by the party in whose favor it ex-

ists, but rather in the sense in which it is employed in proceedings in bankruptcy and insolvency. *Hade v. McVay*, 31 Ohio St. 231, 238; *Salladin v. Mitchell*, 61 N. W. 127, 128, 42 Neb. 859.

The word "assignment," in Insolvency Act 1881, § 4, includes the proceeding by which the property of the insolvent is passed over to the receiver. *Bliss v. Doty*, 36 Minn. 168, 169, 30 N. W. 465, 466.

Within the meaning of Laws 1897, c. 418, § 15, declaring that no assignment of a building contract or money due thereunder shall be valid until the contract of assignment, or copy thereof, is filed by the county clerk of the county where the property is situated, the word "assignment" is to be construed as only meaning an ordinary assignment, and not an assignment for the benefit of creditors. An ordinary assignment and one for the benefit of creditors have nothing in common, save a partial similarity of name. Each belongs to an entirely different group of contracts, and disregarding words, and considering merely the idea, two entirely unrelated concepts result. To constitute an assignment for the benefit of creditors, there must be voluntary transfer by a debtor of all his property to an assignee for the payment of his debts, and in this state the assignee is simply a trustee, and not the absolute owner. The material and essential characteristics of a general assignment is the presence of a trust. The assignee is merely trustee, and not absolute owner. He buys nothing and pays nothing, but takes the title for the performance of trustees. *John P. Kane Co. v. Kinney*, 71 N. Y. Supp. 8, 9.

#### As assignment of whole interest.

"An assignment is understood by the common law as a parting with the whole property." *Potter v. Holland* (U. S.) 19 Fed. Cas. 1154, 1156 (quoting 2 Bl. Comm. 326).

An "assignment" is a transfer or setting over of property, or of some right or interest therein, from one person to another, and, unless in some way qualified, it is properly the transfer of one whole interest in an estate or chattel or other thing. Where a policy of insurance forbids an assignment under penalty of forfeiture, it must be an absolute assignment or transfer, and a delivery as collateral security would not be such an assignment. *Griffey v. New York Cent. Ins. Co.*, 3 N. E. 309, 311, 100 N. Y. 417, 53 Am. Rep. 202.

An "assignment of an estate" for life or for years is a transfer of the whole interest of the assignor to some one, other than the immediate reversioner or remainderman, holding an estate which is larger than that of the assignor. *Scott's Ex'x v. Scott* (Va.) 18 Grat. 150, 159, 160.

**As change of title.**

Assignment "means a class of acts by which the right or title to something is transferred to another before the object of the transfer has become property in possession, and a right under a contract, express or implied, which has not been reduced to possession, is therefore assignable, as a chose in action; but if the right has been reduced to possession, there is nothing left to transfer, and an assignment passes no property or rights thereof. So a passbook representing deposits made in a bank is assignable, and an assignment of the book transfers an equitable title to any deposits represented by the books." *Cross v. Sacramento Sav. Bank*, 6 Pac. 94, 96, 66 Cal. 462.

"Assignment is a setting away or transferring the interest a man hath in any action to another." *Hutchings v. Low*, 13 N. J. Law (1 J. S. Green) 246, 248 (quoting Jacob's Law Dict.).

The "assignment" of the interest in a lease is a sale of such interest, the parties then becoming joint owners of the lease and jointly liable thereon. *Jackson v. O'Hara*, 38 Atl. 624, 625, 183 Pa. 233.

The term "assignments and transfers," as used 5 Stat. U. S. 456, § 12, providing that all "assignments and transfers" of the right secured by such statute prior to the issuing of the patent for public lands under pre-emption laws shall be null and void, cannot be construed as meaning a conveyance with covenants for title and with warranty purporting to pass the fee simple of lands and tenements. The term "assignments and transfers" is used, when applied technically, to describe a transfer of an estate for years, or an equitable interest, or a chattel. *Franklin v. Kelley*, 2 Neb. 79, 88.

**As a conveyance.**

See "Conveyance."

**Guaranty of payment implied.**

"An 'assignment' is the appointing and setting over a right to another, and imports nothing more than that the assignor transferred to the assignee his interest in the bond assigned, with authority, before the statute making bonds assignable for the assignee, to sue in the name of the assignor, and after the statute in his own name, and no implied contract grows out of the transaction that the assignor will pay if the obligor is unable to." *Garrettsie v. Van Ness*, 2 N. J. Law (1 Penning.) 20, 30, 2 Am. Dec. 333.

An "assignment relates only to nonnegotiable securities." The assignor in effect agrees that the assignee shall recover the full amount of the bonds from the debtor, and if, after the exercise of due diligence, he is unable to do so, he, the assignor, will

make good the amount received by him upon the assignment. In all cases the actual consideration may be shown, and this constitutes the measure of recovery by the assignee against the assignor. *Welsh v. Ebersole*, 75 Va. 651, 657.

An assignment neither includes nor implies becoming in any way a party to the payment, or responsible for the insolvency or default of the maker. *Paine v. Smith*, 24 N. W. 305, 307, 33 Minn. 495.

**Change of beneficiaries of policy.**

In a provision on the back of a certificate in a benefit society that in case of the "assignment" of the within certificate the beneficiary must consent thereto, and said assignment must be approved by the secretary, otherwise the assignment shall be void, the word "assignment" does not embrace a change of beneficiaries made by the assured, but means a formal transfer of the certificate from the insured to another person. *Carpenter v. Knapp*, 70 N. W. 764, 768, 101 Iowa, 712, 34 L. R. A. 128.

**Consignment of goods for sale.**

The terms, "assignment, transfer or conveyance, directly, indirectly, absolutely or conditionally," in Gen. St. c. 118, § 89, forbidding any assignment, transfer, or conveyance, directly, indirectly, absolutely, or conditionally, by an insolvent debtor with a view to prefer a creditor, includes a consignment of goods to be sold for or on account of the consignor, and therefore such a consignment is prohibited by the statute if the consignee is authorized by it to apply the avails of the sales to the payment of a pre-existing debt which the consignor owes him. *Burpee v. Sparhawk*, 97 Mass. 342, 344.

**Check.**

See "Check."

**Devise.**

Under a will by which testator provided that if a sale, "assignment," or pledge be made by any of his children of their interest in the property devised, it shall work a forfeiture thereof, the devise by one of such children of her share in such property is not an assignment of her share, within the meaning of this clause. The idea of an "assignment" is essentially that of transfer by one existing party to another existing party. *Miller v. Worrall*, 44 Atl. 890, 891, 59 N. J. Eq. 134.

**Enforcement of lien distinguished.**

The "assignment of a lien" is by no means the enforcement of a lien. The enforcement of a lien would follow the assignment of it, and would be a distinct and inde-

pendent proceeding. *Dorsey v. Omo*, 48 Atl. 741, 743, 93 Md. 74.

**Equitable assignment distinguished.**

The distinction between legal assignments that may be enforced in an action at law and an equitable assignment that can only be enforced in an equitable action seems to be that an assignment to be valid as a legal assignment must be of a debt or fund in existence at the time, and of the whole thereof, or of a part of a debt or fund then in existence, and an assignment or order transferring the fund accepted by the debtor or person holding the fund; but in an equitable assignment of a specific debt or fund, or part thereof, it is not an essential element that the debt should have been earned or the fund be in esse at the time of the assignment, or that the assignment or order transferring the specific debt or fund, or part thereof, should be accepted by the debtor or holder of a specific fund. *Sykes v. First Nat. Bank*, 49 N. W. 1068, 1062, 2 S. D. 242.

To make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. A mere possibility is not assignable, but courts of equity support assignments not only of choses in action, but of contingent interests and expectations, and also of things which have no present, actual, potential existence, but rest in mere possibility only. *Mitchell v. Winslow* (U. S.) 17 Fed. Cas. 527, 531.

**As indorsement.**

"Assignment" and "indorsement" are synonymous, and mean a transfer. *State v. McLeran* (Vt.) 1 Aikens, 311, 313.

The words "assignment" and "indorsement" are frequently used interchangeably. *Buckner v. Real Estate Bank*, 5 Ark. (5 Pike) 536, 41 Am. Dec. 105.

"Assignment," as applied to commercial paper, in its original sense means a transfer or conveyance of the right and title of the seller, and not an indorsement. Yet the term is frequently used to denote an indorsement. Undoubtedly the owner of a note may transfer his title thereto without becoming liable as an indorser, but the rule is that if he writes his name on the note, without words limiting his liability, he thereby becomes an indorser. *Andrews v. Whitehead* (Tex.) 60 S. W. 800, 801.

The word "assignment," as used in the statute prohibiting the assignment of a beneficiary certificate in a fraternal association, and requiring that in case of a change of beneficiaries the consent of the association shall be first had and a new certificate be issued, is equivalent to the word "indorsement," and relates only to the indorsement or transfer of such certificate, and not to the

assignment of the claim thereunder which has accrued. *Shuman v. Supreme, Lodge Knights of Honor*, 81 N. W. 717, 718, 110 Iowa, 490.

As to bonds and notes not negotiable, the legal title to them passes by assignment only, and as to them "indorsement" is not equivalent to "assignment." As to them assignment means more than indorsement; it means indorsement by one party with intent to assign, and the acceptance of that assignment by the other party. *Bank of Mariette v. Pindall* (Va.) 2 Rand. 465, 475.

An indorsement on a bill or note is not merely a transfer of title, but a fresh and substantive contract by which the indorser becomes a party to the bill or note, and liable for its payment on certain conditions. An "assignment" means a transfer of title. It neither includes nor implies becoming in any way a party to the payment, or responsible for the insolvency or default of the maker. *Paine v. Smith*, 24 N. W. 305, 307, 33 Minn. 495.

**Lease or sublease distinguished.**

An "assignment" is properly a transfer or making over to another of the right one has in any estate, and it differs from a lease only in that by a lease one grants an interest less than his own, reserving to himself a reversion, while in assignments he parts with the whole property. *State v. Proprietors of Bridges over the Passaic and Hackensack*, 21 N. J. Law (1 Zab.) 384, 389 (citing 2 Bl. Comm. 317, 326).

An "assignment of a lease," as contradistinguished from a "sublease," signifies a party with a whole term, and whenever the whole term is made over by the lessee, though in the deed by which this is done the land and power of re-entry for nonpayment are reserved to the lessee, the indorsement amounts to an assignment, and not a sublease. *Craig v. Summers*, 49 N. W. 742, 743, 47 Minn. 189, 15 L. R. A. 236 (citing 1 Wood. Landl. & Ten. [Am. Ed.] § 258); *Bedford v. Terhune*, 30 N. Y. 453, 458, 86 Am. Dec. 394.

There is a marked difference between an assignment of a lease and a sublease. By an assignment the lessor parts with his whole interest in the estate, whereas by a sublease he grants an interest less than his own, reserving to himself a reversion. A lease of a part only of leased premises is a sublease, and not an assignment of a lease. *Shannon v. Grindstaff*, 40 Pac. 123, 124, 11 Wash. 536.

If a tenant parts with the demised premises for the whole of his term, although his deed purports an underlease, yet it is in legal effect an assignment of the lease. Thus, where a lessee leases the premises to another for a term longer than the limit of his lease, such lease amounts to an assignment of his



lease. *Mulligan v. Hollingsworth* (U. S.) 99 Fed. 216, 222.

An "assignment," as applied to leasehold interests, is properly defined to be a transfer or making over to another of the right one has in the unexpired residue of a term or estate for years. An "assignment," as contradistinguished from an "underlease," signifies a parting with the whole term. Where an alienor, by any instrument whatever, whether reserving conditions or not, parts with his entire interest, he has made a complete assignment; or, if he has transferred his entire interest in a part of the domicile, he has made an assignment pro tanto; if he retains a reversion in himself, he has made a sublease. Thus, where the holder of a leasehold interest in premises, part of which defendant held under a sublease for five years, executed to plaintiff an instrument which purported to be a lease of a portion of the premises held by the defendant for the same five years, such instrument operated as an assignment of the lease held by defendant, and not as a sublease to plaintiff. *Stover v. Chasse*, 26 N. Y. Supp. 740, 741, 6 Misc. Rep. 394.

**Mortgage or pledge.**

Pledge distinguished, see "Pledge."

"Assignment," as used in a fire insurance policy prohibiting the assignment of a policy without the consent in writing of the insurance company, means a transfer of the title to and a control over the property insured, and cannot be construed as including a deposit of the policy of insurance with a creditor of the assured as a security, collateral or original, for a debt. *Ellis v. Kreutzinger*, 27 Mo. 311, 314, 72 Am. Dec. 270.

"Assignments," as used in a statute providing that conveyances and assignments made in contemplation of insolvency shall be void, does not include a mortgage. *Bates v. Coe*, 10 Conn. 280, 294.

As the word "assignment" in Rev. St. § 6343, providing that all assignments in trust to a trustee or trustees, made in contemplation of insolvency, with intent to prefer one or more creditors, shall inure to the benefit of all, etc., embraces every form of conveyance that will operate to transfer title to property, it includes a deed of all the debtor's property, and the contemporaneously executed written agreement authorizing the grantee to sell and convey the same, and to apply the proceeds thereof in a manner which will prefer certain creditors. *Maas v. Miller*, 51 N. E. 158, 162, 58 Ohio St. 483.

**Payment of pre-existing debt.**

The words "conveyance," "transfer," "assignment" or "incumbrance," as used in Bankr. Act July 1. 1898, c. 541, § 67, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], providing

that all "conveyances, transfers, assignments or incumbrances of his property or any part thereof made or given by a person adjudged a bankrupt within four months prior to the filing of a petition with intent to hinder, delay, or defraud creditors shall be void," applies to a transfer or incumbrance of property, real or personal, rather than to the payment of money upon a pre-existing debt. *Blakey v. Boonville Nat. Bank* (U. S.) 95 Fed. 267, 268.

**Seal unnecessary.**

An "assignment" does not, like the term "deed" or "specialty," signify an instrument under seal. A mere written assignment, founded upon a valuable consideration, is just as available for the purpose of passing to the assignee the equitable title to land as an instrument under seal. *Barrett v. Hinckley*, 14 N. E. 863, 864, 124 Ill. 32, 7 Am. St. Rep. 331.

**Subrogation distinguished.**

See "Subrogation."

**Transfer of land.**

In the law of contracts the word "assignment" seems to be broad enough to include the transfer of an interest in lands and tenements. *Tiede v. Schneidt*, 81 N. W. 828, 827, 105 Wis. 470.

**Transfer to partner.**

The word "assignment," as used in a fire insurance policy insuring partnership property, and providing that there shall be no assignment of the interest of the insured without the consent of the company in writing, means an assignment to a stranger, and not an assignment by one of the partners to the other, for, when underwriting for a firm, the insurers will be presumed to know and be satisfied with each and every of its members. They are also presumed to know that on the death of either of two partners, the survivor for all purposes becomes the sole legal, and on a favorable state of the account the sole equitable, owner of the partnership assets. They know, too, that on a voluntary dissolution of the firm, if one partner has drawn out more than his share, the other will thereby have been made the sole owner of the assets remaining. They therefore agree in effect that a transfer of the interest from one partner to another is within the original understanding, and that it shall form no objection, in case of loss, to the right of recovery. It is an assent necessarily implied from the nature of the contract, and given in advance. *Wilson v. Genesee Mut. Ins. Co.* (N. Y.) 16 Barb. 511, 512.

**Of lease.**

Act Feb. 15, 1844, authorizing receivers to sell the real estate and franchises of the

corporation, and providing that nothing contained in the act should be construed to invalidate "any existing lease made by said company or assignment thereof," means only "the transfer of the interest of the tenant, and not an assignment of a claim for rent by the landlord." *Potts v. Trenton Water Power Co.*, 9 N. J. Eq. (1 Stockt.) 592, 618.

**Of patent.**

The "assignment of a patent" is not a public document, but is merely a private writing. *City of New York v. American Cable R. Co.* (U. S.) 60 Fed. 1016, 9 C. C. A. 336.

**Of rents and profits.**

In *Ex parte Willis*, 1 Ves. Jr. 162, Lord Thurlow said "that an assignment of rents and profits is an odd way of conveying, but it amounts to an equitable lien, and would entitle the assignee to come into equity and insist upon a mortgage." *Allen v. Gates*, 50 Atl. 1092, 1094, 73 Vt. 222.

**ASSIGNMENT FOR BENEFIT OF CREDITORS.**

See "Common-Law Assignment"; "General Assignment"; "Partial Assignment"; "Voluntary Assignment."

An assignment "is the transfer of property to a trustee, to be converted into money, and the proceeds thus realized to be appropriated to the payment of debts." *Van Patten v. Burr*, 3 N. W. 524, 528, 52 Iowa, 518.

An "assignment for the benefit of creditors" is an absolute, unconditional, and irrevocable conveyance of the legal title to the real estate of the insolvent to the assignee in trust for the benefit of the creditors. *Prouty v. Clark*, 34 N. W. 614, 615, 73 Iowa, 55.

An "assignment" is a transfer by a debtor, without compulsion of law, of some or all of his property to an assignee or assignees, in trust, to apply the same or the proceeds thereof to the payment of some or all of his debts, and to return the surplus, if any, to the debtor. *Westchester Fire Ins. Co. v. Blackford*, 51 S. W. 978, 980, 2 Ind. T. 370 (citing *Turner v. Watkins*, 31 Ark. 437).

"Assignment for the benefit of creditors," according to the common acceptance of the term, is a transfer, without compulsion of law, by a debtor of his property to an assignee, in trust, to apply the same or the proceeds thereof to the payment of his debts, and to return the surplus, if any, to the debtor. As to the form and contents of it, it has always been understood in this state to be a written deed of conveyance executed by the assignor as party of the first part to the assignee as the party of the second part, reciting the grantor's indebtedness

and inability to pay, and conveying his property, real and personal, by apt words of sale and transfer, to the assignee, in trust, to take possession of and sell the same and to collect the outstanding debts, and out of the proceeds to pay the creditors. *Farwell v. Nilsson*, 24 N. E. 74, 75, 133 Ill. 45 (citing *Farwell v. Cohen*, 21 Chl. Leg. N. 359, 28 N. E. 35, 38, 138 Ill. 216, 19 L. R. A. 281).

"Assignment," as used in the act of 1836 relating to assignments for benefit of creditors, includes any transfer of a man's property in trust for the payment of his debts, without regard to the particular form of the conveyance. *Appeal of Johnson*, 103 Pa. 373, 377.

If a conveyance or mortgage is given to secure others than the particular creditor to whom the property was conveyed or mortgaged, and was made in contemplation of insolvency, it becomes in law an "assignment," and inures to the benefit of all of the creditors of the grantor. *First Nat. Bank v. F. C. Trebein Co.*, 52 N. E. 834, 838, 59 Ohio St. 316 (citing *Pendery v. Allen*, 50 Ohio St. 121, 33 N. E. 716, 19 L. R. A. 367; *Gashe v. Young*, 51 Ohio St. 376, 38 N. E. 20).

Any transfer by a trader or merchant of all his stock and business, when it covers substantially all his property, may be an "assignment," within the meaning of a policy of insurance against loss on sales sustained by the insolvency of debtors who have assigned for the benefit of creditors, in spite of its form or the name given to it. Thus, where a debtor conveyed all his property to pay or secure his debts, and at once ceased to do business, and the property was delivered, it constituted an "assignment" within the meaning of the policy. *People v. Mercantile Credit Guarantee Co.*, 60 N. E. 24, 26, 166 N. Y. 416 (citing *Brown v. Guthrie*, 110 N. Y. 435, 441, 18 N. E. 254; *Britton v. Lorenz*, 45 N. Y. 51; *Dana v. Lull*, 17 Vt. 390; *Kendall v. Bishop*, 76 Mich. 634, 43 N. W. 645; *White v. Cotzhausen*, 129 U. S. 329, 9 Sup. Ct. 309, 32 L. Ed. 677).

"Assignments," as used in Act 1884, amending Gen. St., regulating assignments by insolvent debtors by providing that in all assignments made in pursuance of this act wages and salaries owing to employes shall be preferred, is to be construed as being used in the proper sense of the transfer and trust which the written instrument makes effectual, and not as simply meaning the written instrument, or the instrument necessary to effect such assignment. *Richardson v. Thurber*, 11 N. E. 138, 134, 104 N. Y. 606.

Assignments for the benefit of creditors are substantially like wills, unilateral arrangements in all their essential particulars, the assignor himself declaring the extent and conditions of the grant so far as the law allows, an assignee having no part in the mat-

ter, except the simple acceptance of the trust as created. Appeal of Fallon, 42 Pa. (6 Wright) 235, 256.

The word "assignment," as used in Act March 5, 1859, relating to an assignment for the benefit of creditors, is used in its ordinary sense as meaning the transfer of property by the owner, and the statute, therefore, does not prevent a debtor from making a contract with his creditors by which his property is conveyed to trustees to be disposed of for his own benefit as well as that of his creditors. *Robbins v. Magee*, 76 Ind. 381, 385.

**Attachment distinguished.**

Assignment in insolvency is a sequestration of all the debtor's property to pay all his creditors pro rata, as distinguished from attachment, which is a sequestration to pay a single debt. *Maltbie v. Hotchkiss*, 83 Conn. 80, 85, 9 Am. Rep. 364.

**Bill of sale distinguished.**

See "Bill of Sale."

**Conditional transfer.**

A voluntary assignment is an instrument in writing, executed by a failing debtor, by which he assigns to a third person as assignee the whole or the bulk of his property, to be by him distributed among the assignor's creditors in satisfaction of their demands. In order to constitute an assignment for the benefit of creditors, the property must be conveyed to an assignee authorized to sell it, absolutely, and not on a contingency, to distribute the proceeds among creditors. The conveyance or assignment must pass both the legal and the equitable title, with no right of redemption in the debtor. A conveyance direct to several creditors whose debts it secures, as well as trustees named, providing that the trustee is not to sell it absolutely, but only on a contingency, is not an assignment for the benefit of creditors, but is in effect a mere mortgage. *Blackman v. Metropolitan Dairy Co.*, 77 Ill. App. 609, 610.

**As a conveyance.**

See "Conveyance."

**Deed of trust or mortgage distinguished.**

The distinction between a "mortgage" and an "assignment" exists principally in the interest which the mortgagor retains in the property, namely, his equity of redemption. An assignment is intended as a payment, and a mortgage as security; but the equity of redemption in the mortgage, and the absence of it in the assignment, is their distinguished feature of difference. *Stites v. Champlon*, 24 Atl. 403, 406, 49 N. J. Eq. (4 Dick.) 446; *Farmers' & Traders' Bank v.*

*Martin*, 33 S. W. 565, 566, 96 Tenn. (12 Pickle) 1; *Warner v. Littlefield*, 50 N. W. 721, 724, 89 Mich. 329.

As distinguished from "deeds of trust," an "assignment" is more than a security for the payment of debts. It is an absolute appropriation of property to their payment. The distinction is that an assignment is a conveyance to the trustee for the purpose of raising funds to pay a debt, while a deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. *Union Nat. Bank v. Bank of Kansas City*, 10 Sup. Ct. 1013, 1016, 136 U. S. 223, 34 L. Ed. 341; *Sandusky v. Faris*, 38 S. E. 563, 573, 49 W. Va. 150; *Crow v. Beardsley*, 68 Mo. 435, 437.

In discussing the difference between a "mortgage" and a "deed of trust," the court said: "A mortgage being merely intended as security for a debt, gives, under our system at least, merely a lien upon the property, with or without power of sale, leaving an equity of redemption in the mortgagor, and the surplus, if any, after the payment of the debt, within the reach of his creditors by due process of law. An assignment, on the other hand, conveys to the assignee the entire estate of the assignor in the property, to be disposed of by the trustee in such manner as the assignor may have lawfully directed. The mortgagor may vacate the mortgage at any time by the payment of a debt, but by an assignment the property passes beyond the control of the assignor in any event. It is true that, should a surplus remain after paying the debt, a trust would result in favor of the assignor, and the assignee would hold for his benefit." *Schneider v. Bagley*, 24 S. W. 1116, 1117, 6 Tex. Civ. App. 226; *Adams v. Bateman* (Tex.) 29 S. W. 1124, 1126; *Lochte v. Blum*, 30 S. W. 925, 927, 10 Tex. Civ. App. 385. Thus a conveyance by an insolvent partner to a trustee of all his property to convert into cash and to pay certain preferred debts, and then to distribute the remainder pro rata among other creditors, and with no claim or defeasance therein, is an assignment, and not a mortgage. *Schneider v. Bagley*, 24 S. W. 1116, 1117, 6 Tex. Civ. App. 226. An instrument conveying all the property of an insolvent to another, and giving him power to sell the property and pay the debts, and return the balance to the grantor, is a statutory assignment, and not a mortgage. *Lochte v. Blum*, 30 S. W. 925, 927, 10 Tex. Civ. App. 385. An instrument conveying all of insolvent's property for the purpose of securing all his debts, and providing that after the debts are paid the property remaining in the hands of the grantee shall be returned to the grantor, is a mortgage, and not an assignment for the benefit of creditors. *Adams v. Bateman* (Tex.) 29 S. W. 1124, 1126.

An assignment for the benefit of creditors is more than a security for the payment of debts; it is an absolute appropriation of property for their payment. It does not create a lien in favor of the creditors upon the property, which in equity is still regarded as the assignor's, but it passes both the legal and equitable title absolutely beyond the control of the assignor, and the trust which results to the assignor in the unemployed balance does not indicate such an equity. An assignment for the benefit of creditors implies an actual transfer of the property to an assignee or trustees, so that the assignor is divested of all control over it. *Sandusky v. Faria*, 88 S. E. 563, 573, 49 W. Va. 150; *Sandmeyer v. Dakota Fire & Marine Ins. Co.*, 50 N. W. 353, 355, 2 S. D. 346; *Martin v. Hausman* (U. S.) 14 Fed. 160, 165; *Stites v. Champion*, 24 Atl. 403, 406, 49 N. J. Eq. 446. Hence a deed of trust of a debtor's property to a trustee, to have and hold the same to secure the payment of an indebtedness to one of his creditors, the trustee to proceed at once to realize from such property at either public or private sale for cash, keeping an accurate account of all goods so sold and the amount realized therefrom, as well as all expenses, and apply the proceeds of such sales to pay, first, the cost and expenses, and the balance pro rata upon the indebtedness as it matured until the whole should be paid, and when fully paid the deed of trust to be released, is an assignment for the benefit of all his creditors, whether named in the instrument or not, and the property cannot be applied exclusively to the debt of the beneficiary in the so-called "trust deed." *Martin v. Hausman* (U. S.) 14 Fed. 160, 165.

In *Hembree v. Blackburn*, 16 Or. 153, 19 Pac. 73, the court, in holding that a mortgage upon all of the property of a firm was not an assignment, said: "The distinction, however, is clearly defined. A mortgage, or deed of trust in the nature of a mortgage, is a security for a deed. An assignment is more than that. It is an absolute appropriation of property to the payment of debts. A mortgage creates a lien upon property in favor of the creditor, leaving the equity of redemption still the property of the debtor, and liable to sale or incumbrance by him, so that a mortgage containing a defeasance clause and a reservation to the insolvent over the mortgaged property under default in paying the debt is not an assignment for the benefit of creditors." *Beall v. Cowan* (U. S.) 75 Fed. 139, 144, 21 C. C. A. 267.

An assignment is a transfer by a debtor, without compulsion of law, of some or all of his property to an assignee or assignees in trust, to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor. "A mortgage is a security against the default of a debtor in the payment of his debts. We do not hold that the

giving of one or more mortgages, the confession of judgments, or other means adopted to give security or preference, constitute necessarily, or even ordinarily, an assignment. But what we do hold is that where one or more instruments are executed by a debtor, in whatsoever form or by whatsoever name, with the intention of having them operate as an assignment, and with the intention of granting the property conveyed absolutely to the trustee to raise a fund to pay debts, the transaction constitutes an assignment." *Mr. Justice Walker, in Turner v. Watkins*, 31 Ark. 429, 437 (cited in *Westchester Fire Ins. Co. v. Blackford*, 51 S. W. 978, 980, 2 Ind. T. 370).

The general distinction between a "mortgage" and an "assignment" is well understood. The one is intended to secure, the other to satisfy, a debt. A mortgage contemplates a personal effort to pay the debt, or at least reserves the right, by doing so, to restore the mortgagor's title. An assignment, on the other hand, implies a surrender of his property to his creditors, without the hope of redeeming it. The form of the two instruments is quite similar. If the instrument on its face is ambiguous, it may be read in the light of surrounding circumstances, to see whether it is really a mortgage or an assignment. Where a deed of trust was made payable on demand, and the grantor was unable to continue business, and the trustee was authorized to take immediate possession, such facts do not of themselves convert a mortgage into an assignment. The controlling guide is the intention of the parties at the time the instrument was executed. *Marquese v. Felsenthal*, 24 S. W. 493, 494, 56 Ark. 293.

The essential elements of an assignment are that there shall be an actual transfer of the property of the debtor to another in trust for the payment of creditors, with either an express or an implied provision that the surplus, if any, shall be returned to the assignor. A mortgage is the transfer of the property of a debtor as security for the payment of one or more obligations, with a condition, expressed or implied, that on payment of the debt the title reverts to the mortgagor. A sale is an absolute transfer of the property to the vendee. Much of the language used in an instrument belonging to one of these classes will be found in the others, and the court must determine in each instance the real intent of the party, in order to determine which is intended. *Smith-McCord Dry Goods Co. v. Carson*, 52 Pac. 880, 882, 59 Kan. 205.

An instrument purported to be entered into between a certain person of the first part, and a certain person of the second part, and the several persons, creditors of the party of the first part, who have executed, or shall hereafter execute or accede to, these presents.

It then recited that the party of the first part was indebted to certain persons, which indebtedness he was unable to pay, and was desirous of conveying his property for the benefit of his creditors, and then proceeded to convey to a party of the second part all of his property of every description, except exempt property, to have and to hold the same, in trust and confidence, to sell and dispose of the property and collect said choses in action, using reasonable discretion, and from the proceeds to pay expenses, to distribute and pay the remainder thereof to and among the parties of the third part ratably in proportion to their respective debts, and pay over the surplus, after paying all parties of the third part in full, to the party of the first part, his executors, administrators, and assigns. It was held that this instrument was a mortgage or deed of trust, as distinguished from a statutory assignment. *Prouty v. Musquiz* (Tex.) 59 S. W. 568, 569.

An "assignment" is a making over or transfer of property, and hence, where a debtor made a deed conveying his property in trust to a third person for the benefit of his creditors, such transaction was an assignment of his property, and the third person to whom it was transferred is the assignee thereof, though the instrument was called a "trust deed," and conveyed the property as trust property, in trust. *Schee v. La Grange*, 42 N. W. 616, 618, 78 Iowa, 101.

A conveyance which passes the legal title to a trustee, to be immediately sold, and directs that the proceeds shall be applied to the payment of a debt, is generally held by other courts to be an assignment. An instrument which is intended merely to secure a debt is, on the other hand, usually held to be a mortgage, and this distinction has become the recognized rule. Hence an instrument conveying all of an insolvent's property to secure all his debts, and providing that after the debts are paid the remaining property shall be returned to the grantor, is a mortgage, and not an assignment for creditors. *Adams v. Bateman*, 30 S. W. 855, 88 Tex. 130.

An assignment for the benefit of creditors is a transfer of a debtor's property for the purpose of having the same applied as far as the same will go in satisfaction of the debts of the assignor. It need not necessarily be an assignment in name for the benefit of creditors, nor need it be by any one instrument. Thus, a mortgage, or several mortgages taken together, with or without an assignment proper, given as a part of one transaction, may constitute an assignment for the benefit of creditors, if it was thereby intended by the debtor to transfer all of his property for the payment of his debts. *Burrows v. Lehnendorff*, 8 Iowa (8 Clarke) 96.

"Assignment," as the term is used to denote a conveyance for the benefit of the grantor's creditors, is any conveyance by

which a grantor parts with the title to his property in order that the same might be administered by the grantee for the payment of the grantor's debts; and hence a chattel mortgage with power of sale, together with a stipulation that the mortgagee shall pay certain debts of the mortgagor, constituted an assignment. *Kliser v. Dannenberg*, 15 S. E. 17, 20, 88 Ga. 541.

#### **Dissolution of corporation distinguished.**

A petition for a voluntary dissolution of a corporation is not an assignment for the benefit of creditors. One important difference between the two proceedings is that a general assignment usually implies insolvency; a voluntary dissolution does not. The latter course is frequently resorted to where a solvent corporation desires to go out of business. In re *Empire Metallic Redstead Co.* (U. S.) 95 Fed. 957, 965.

#### **As judicial proceeding.**

See "Judicial Proceeding."

#### **Levy of execution equivalent.**

An assignment for the benefit of creditors of an insolvent debtor is the equivalent for the protection of their rights against prior mortgages to the levy, of execution on the property at the suit of each of the creditors, and operates as the seizure of the property by legal process in behalf of each and all of the creditors from the date of the assignment. *Besuden v. Besuden*, 49 N. E. 1024, 1025, 57 Ohio St. 508.

#### **Relation of debtor and creditor implied.**

An "assignment" implies the relation of debtor and creditor between the assignor and those to be benefited by the assignment, and that the consideration is an existing debt or liability, and contemplates that the debtor thereby divests himself of his property for the benefit of one or more of his creditors; and hence a sale or mortgage for a present consideration, and not on account of a pre-existing debt or obligation, is not an assignment, technically speaking, nor within the meaning of Rev. St. § 3466 [U. S. Comp. St. 1901, p. 2314], providing that whenever any person indebted to the United States is insolvent the debt to the United States shall be first satisfied, and that the priority shall extend to cases in which a debtor who has not sufficient property to pay his debts makes a voluntary assignment of it. *United States v. Griswold* (U. S.) 8 Fed. 496, 501.

#### **Sale distinguished.**

See "Sale."

#### **Solvency of grantor, effect of.**

When any person makes a transfer of property, money, rights, or credits to a trust-

tee in trust for the benefit of creditors, such transfer constitutes an assignment under Rev. St. c. 4, tit. 2, pt. 3. Even though the maker of such transfer should be fully solvent, still the transfer will be held to be an assignment, if it is made to a trustee in trust for the benefit of creditors. Any instrument which by a transfer of property creates a trust in a trustee for the benefit of creditors is an assignment, and its form in other respects is not material. A deed conveying real property to a trustee in trust for the benefit of creditors constitutes an assignment, and such deed, or a copy thereof, should be filed in the probate court at the time of making such deed. *Wambaugh v. Northwestern Mut. Life Ins. Co.*, 52 N. E. 839, 841, 59 Ohio St. 228.

**As a transfer in general.**

See "Transfer."

**Transfer to creditor.**

An assignment made directly to the creditors, either as collateral security or in satisfaction of the assignor's debt, is not an assignment in trust within the meaning of Act March 24, 1818, relating to voluntary assignments to any person in trust for the use of his creditors. *Chaffees v. Risk*, 24 Pa. (12 Harris) 432, 433.

**As a transfer of entire estate of debtor.**

An instrument which shows that it was not the intention of the maker to convey all of his property subject to execution, nor for the benefit of all his creditors, is not an assignment for the benefit of creditors within the assignment law of the state. *Martin-Brown Co. v. Siebe*, 26 S. W. 327, 329, 6 Tex. Civ. App. 232.

An assignment, whether statutory or common-law, conveys to the assignee the entire estate of the assignor. It vests the title in the assignee, which cannot be divested by mere payment of the debts. If the debts be satisfied, the assignee would hold the balance of the applied estate in trust for the assignor. If the instrument on its face, when construed according to the settled rules of construction in this state, does not pass the title of the assignor to the assignee, it cannot be held to be an assignment, but must be held to be a mortgage. *Tittle v. Vanleer*, 29 S. W. 1065, 1066, 89 Tex. 174, 37 L. R. A. 837 (citing *Watterman v. Silberberg*, 67 Tex. 100, 101, 2 S. W. 578).

An assignment for the benefit of creditors, since the act of 1843, may be defined to be a transfer by a debtor of the whole or part of his effects to some person in trust to pay all his creditors in like proportions, and return the surplus, if any, to the debtor. *Wiener v. Davis*, 18 Pa. (6 Harris) 331, 333.

**Transfer of specific fund.**

The assignment to a trustee or agent of a specific fund to pay a particular debt is not such an assignment for the benefit of creditors as the statute requires shall be acknowledged and lodged for record. *Bottoms v. McFerran* (Ky.) 43 S. W. 236, 237.

The assignment of a specified fund to one creditor to secure his debt due is not a general assignment for the benefit of creditors. *Deane v. John A. Tolman Co.*, 83 Ill. App. 486.

**Trust implied.**

To constitute an assignment in trust for the benefit of creditors within the meaning of Act March 24, 1818, there must be a transfer of the property assigned to another—more than mere transmission of its custody or management. The form is not material, but there must be a trust created for the creditor which is enforceable. *Beans v. Bullitt*, 57 Pa. (7 P. F. Smith) 221, 229.

Code, § 977, provides that no "general assignment" of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors of the assignor, shall be valid unless it be made for the benefit of all his creditors, etc. Held, that the word "assignment" as here used has acquired a peculiar and appropriate meaning, which means a transfer to another of the property of an insolvent, to be administered for the benefit of his creditors. It is a technical word, and implies a trust, and contemplates the intervention of a trustee. *Cowles v. Ricketts*, 1 Iowa (1 Clarke) 582, 585.

"Voluntary assignments for the benefit of creditors or otherwise are transfers without compulsion of law by debtors of some or all of their property to an assignee or assignees in trust to apply the same, or the proceeds thereof, to the payment of some or all of their debts, and to return the surplus, if any, to the debtor. There must be a trust, a trustee, creditors, and cestui que trust, who can compel an enforcement of the trust in order to constitute an assignment for the benefit of creditors. It implies a trust, and contemplates the intervention of a trustee. Assignments directly to creditors, and not upon trusts, are not voluntary assignments for the benefit of creditors." *Maxwell v. Simonton*, 51 N. W. 869, 871, 81 Wis. 635.

A voluntary assignment for the benefit of creditors implies a trust, and contemplates the intervention of a trustee. Assignments directly to creditors, and not upon trust, are not voluntary assignments for the benefit of the creditors. Unless a trust is thereby created by the assignor in favor of creditors, such conveyances are not within the class of instruments known as "assignments for creditors," and hence a mortgage of a debtor's

property to separate parties for the security of good-faith indebtedness, in which there was no express or implied agreement or arrangement for trustee, and no trust created in favor of creditors, and did not convey all the debtor's property, is not an assignment for the benefit of the creditors. *Sheldon v. Mann*, 48 N. W. 573, 577, 85 Mich. 265.

### ASSIGNMENT OF DOWER.

The assignment of dower is not a conveyance, but the dowress, by intendment of law, is in by her husband. The only object to be accomplished by the assignment is to give the widow a right of entry and to define the boundaries of her possessions, the allotment conferring upon her no new right to the land, and, after the dower is assigned, her seizure relates back to the date of the death of her husband, and the antecedent seizure of the heir, which took effect on the death of the husband, is considered as never having had an existence, and she is, in contemplation of law, the immediate successor in title to the husband. *Bettis v. McNider*, 34 South. 813, 814, 137 Ala. 588.

### ASSIGNMENT OF ERROR.

See "Specific Assignment of Error."

An assignment of errors is a specification of the errors on which the appellant relies for a reversal of the case with such fullness as may be necessary to give aid to the court in the examination of the transcript. *Squires v. Foorman*, 10 Cal. 298, 299.

An assignment of error is a pleading upon which an issue is made in an appellate court or in an appellate proceeding upon which an issue is made by demurrer, joinder, or plea. *Wells v. Martin*, 1 Ohio St. 386, 388.

An assignment of error actually means the marking or pointing out of the error. *Franz Falk Brewing Co. v. Mielenz*, 37 N. W. 728, 5 Dak. 136, 138; *State v. Chapman*, 47 N. W. 411, 1 S. D. 414, 10 L. R. A. 432. Assignments of error should be so framed as to enable the court to readily discern without aid of argument what particular errors are relied on. *Hedlun v. Holy Terror Min. Co.* (S. D.) 92 N. W. 31, 36.

The purpose of an assignment of errors is to apprise the opposite counsel and the court of the particular legal points relied upon for a reversal of the judgment of the trial court. Hence an attempt to make the assignment of errors more particular in the brief is not proper. *Lloyd v. Chapman* (U. S.) 93 Fed. 599, 600, 35 C. C. A. 474 (citing *Doe v. Waterloo Min. Co.* [U. S.] 17 C. C. A. 190, 196, 70 Fed. 455, 456).

The office of an assignment of error is to notify the opposite party of the particular action of the court below complained of, and,

if the assignment does not specify the alleged error, it will be insufficient; and therefore an assignment as follows, "as shown in the bill of exceptions," is void for uncertainty, and will not be noticed by the Supreme Court. *Smith v. Williams*, 36 Miss. 545, 547.

The assignment of errors is a pleading filed by the party complaining of the errors of the judge, and each assignment should be single, and not multifarious, for that reason. A general objection to evidence stating no reason is insufficient. A general objection to a charge is of no value. The bill must show that the precise point of which a review is sought was made by the counsel, presented to the mind of the court, and decided before bail was sealed. If it do that, it is sufficient. *Associates of Jersey Co. v. Davison*, 29 N. J. Law (5 Dutch.) 415, 418.

The object of an assignment of errors is to point to the specific error claimed to have been committed by the court below for which the judgment should be reversed, so as to obviate the necessity of the discussion by the opposite party, and the examination by the court, of all the questions which may have been raised on the trial of the case in the lower court. *Clements v. Hearne*, 45 Tex. 415, 416.

An assignment of error is in the nature of a declaration or complaint, and to permit a party to assign one class of errors and to argue another would be to countenance connivance and unfair practice. *Hollingsworth v. State*, 8 Ind. 257, 258.

An assignment of error constitutes the appellant's complaint or cause of action in the Supreme Court. In the absence of such an assignment, it is not informed in any legal manner of what supposed errors the appellant complains, or upon what grounds the judgment below is sought to be reversed. *Pruitt v. Edinburg, F. R. & N. Turnpike Co.* 71 Ind. 244; *Deputy v. Hill*, 85 Ind. 75, 76; *Williams v. Riley*, 88 Ind. 290, 293.

An assignment of errors on appeal is appellant's pleading tendering an issue of law. It might be said to be the very foundation upon which he rests his right to require the court to examine and review the errors imputed to the trial court. *Rubey v. Hough* (Ind.) 67 N. E. 257.

An assignment of error in the Appellate Court performs the same office as a declaration in the lower court. *Lang v. Max*, 50 Ill. App. 465, 466.

An assignment of error in the Supreme Court performs the same office as a declaration in a court of original jurisdiction. It would be just as regular and proper for the circuit court to render a judgment in a cause where there is no declaration as for this court to affirm or reverse a judgment where there is no assignment of errors. *Ditch v. Sennott*, 5 N. E. 395, 396, 116 Ill. 288.

An assignment of errors is in the nature of a declaration. Error in law and error in fact cannot be regularly assigned together in an assignment of errors. If it be attempted, the assignment will be bad for duplicity, and subject to a special demurrer. Several errors of the same class may be assigned, but error in law and error in fact cannot be assigned in the same cause, for they are distinct matters and require different trials. *Acker v. Ledyard* (N. Y.) 1 Denio, 677.

In practice an assignment of error is the statement of the case of the plaintiff setting forth the error complained of. It corresponds with the declaration in an ordinary action. All the errors of which the plaintiff complains should be set forth and assigned in distinct terms, so that the defendant may plead to them. An assignment of error is in the nature of a declaration, and is either of errors in fact or in law. A brief cannot be treated as an assignment of error, for a brief is an abridged statement of the party's case—a summary of the points or questions in issue. In general legal usage, a brief is in no sense a pleading. It contains a statement of the facts shown by the record, and the points, authorities, and arguments relied upon to sustain the contention presented for consideration. *Lamy v. Lamy*, 12 Pac. 650, 4 N. M. (Johns.) 43.

# ASSIGNOR

"In its popular sense an assignor" is one who transfers a right of action not transferable at common law." *Clement v. Adams* (N. Y.) 12 How. Prac. 163, 164.

Whoever may transfer the whole of a particular estate is an assignor, whether the estate be personal or real property, or the assignment be by deed or parol. *Glasford v. Baker*, 1 Wash. T. 224, 227 (citing *Whart. Law Dict.* 69; *Bouv. Law Dict.* pp. 133, 134).

In law, he who pays or lends a bank note or transfers anything in action, negotiable at common law, is an assignor. It is in this sense that the word "assignor" is used in Code, § 399, relating to the examination of parties to actions or special proceedings, and providing that the assignor of a thing in action shall not be examined in respect to any transaction, etc. *Potter v. Bushnell* (N. Y.) 10 How. Prac. 94, 96.

## Indorser of note.

An indorser of a note is not an assignor of a thing in action, within the meaning of Code, § 399, relating to the examination of parties to actions, and providing that the assignor of a thing in action shall not be examined, etc. *Hicks v. Wirth* (N. Y.) 10 How. Prac. 555, 558; *Porter v. Potter*, 18 N. Y. 52, 53; *Jagoe v. Alleyn* (N. Y.) 16 Barb. 580, 582.

Under a statute declaring that, when an assignor of a thing in action or contract is examined as a witness on the behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, it is held that a person transferring by delivery a promissory note payable to bearer is an "assignor," within the meaning of the statute. It is true, says the court, the usual term applied to the parties transferring negotiable paper is not "assignor," nor is the usual term applied to the act of transfer assignment, but the words "indorser," "bearer," "transfer," and "negotiate," are the proper mercantile terms. But assignor of a thing in action or contract comprehends a much larger class of contracts than mercantile paper, and must also include them. So the word "assignment" means the conveyance of the interest a man has in an estate or chose in action, and is more comprehensive than the term "indorse and negotiate," or the like mercantile words, applied to negotiable paper. *Bump v. Van Orsdale* (N. Y.) 11 Barb. 634, 638.

As the term is used in Rev. St. c. 137, § 51, prohibiting the "assignor" of a thing in action from testifying in an action brought thereon, it applies only to the assignors of such things in action as were made assignable at law by the Code, and were not so previously, and which the assignee, contrary to former rules, was authorized to prosecute in his own name, and hence does not include one who transfers a promissory note or bill by indorsement or delivery. *McConnell v. McCracken*, 14 Wis. 83, 85, 86; *McHose v. Cain*, 22 Wis. 486, 487.

Where an indebtedness evidenced by a note is barred by a discharge in bankruptcy, but the debtor renews the claim by a new promise to pay it, and the holder afterwards indorses and delivers the note to another, the transfer of the right to bring action on the note, accompanying its indorsement and delivery, constitutes the person so transferring the note an assignor, so that when the debtor is sued on the note by the subsequent holder, and the prior holder is introduced to prove the new promise to pay, the defendant, under section 397 of the Code, becomes a competent witness as to the same matter. *Clark v. Atkinson*, 2 E. D. Smith, 112, 116.

# ASSIGNS.

See "Heirs and Assigns."

"Assigns" is a word comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law. *Bally v. De Crespigny*, 10 Best & S. 1, 12; *Brown v. Crookston Agricultural Ass'n*, 26 N. W. 907, 908, 34 Minn. 545.



The word "assigns," as used in How. St. Mich. § 7545, providing that in a suit in which the heirs, assigns, or personal representatives of a decedent are parties, the opposite party, if examined as a witness in his own behalf, shall not be permitted to testify, etc., means "a person to whom any property or right is transferred by a deceased person in his lifetime." *Ripley v. Seligman*, 50 N. W. 143, 145, 88 Mich. 177.

The term "assigns" means those who are assigned, deputed, or appointed, by the act of the party or the operation of law, to do any act or enjoy a benefit on their own account or risk. *Smith v. Baxter*, 49 Atl. 1130, 62 N. J. Eq. 209.

"Assigns" means those to whom rights have been transmitted by particular title, such as sale, donations, legacy, transfer, or cession. Civ. Code La. 1900, art. 3553, subd. 5.

The word "assigns," when used in an agreement to pay to H. or his assigns a certain sum of money, in consideration that he shall give a lease of certain rooms for the use of a post office at a lower rate of rent than an adequate compensation for such premises, means any person or persons to whom the property might be transferred before the execution of the lease, and cannot refer to persons who might succeed to the title afterwards, because no lease from them would be necessary. *Sanborn v. First Nat. Bank*, 47 Pac. 660, 681, 9 Colo. App. 245.

The word "assigns" in a deed by a land agent to the heirs and assigns of a certain person, executed in pursuance of a legislative resolve, that a certain amount of land be granted to each revolutionary soldier, indicates that the purpose of the deed is to affirm a prior title, to whomsoever the owner of that title might have assigned it. *Banton v. Crosby*, 50 Atl. 86, 87, 95 Me. 429.

"Assigns," as used in a mortgage authorizing the mortgagee, his heirs, executors, administrators, or assigns, to sell the premises therein conveyed in case of default, does not authorize the trustee to assign the estate to a stranger, nor, if assigned, does it authorize the stranger to execute the power of sale. *Bitter v. Calhoun* (Tex.) 8 S. W. 523, 525.

"Assigns," as used in Act 1870, providing that the act should be held to constitute an irrevocable contract between the railroad company, whose property it exempted from taxation, and its successors and assigns, was probably used to designate such persons or corporations as might acquire land certificates before location, or the lands afterwards. *International & G. N. Ry. Co. v. Smith County*, 65 Tex. 21, 25.

The term "assigns," as used in a will providing that, when the homestead should

be no longer used or occupied by either or any of testator's daughters, the same was devised to such child or children at that time living, and their heirs and assigns forever, was used merely to indicate the absolute character of the estate—a fee which the remaindermen were to take. It has no significance beyond that, and was entirely unnecessary. *Endicott v. Endicott*, 3 Atl. 157, 160, 41 N. J. Eq. (14 Stew.) 93.

"Assigns," as used in a deed conveying land to a railroad corporation, its successors and assigns, for the purpose of running, erecting, and establishing a railroad, cannot be construed as extending to any assigns except one who should be the assignee of its franchise to establish and run a railroad. *East Alabama Ry. Co. v. Doe*, 5 Sup. Ct. 869, 874, 114 U. S. 340, 29 L. Ed. 136.

"Assigns," as used in Laws 1874, c. 154, § 4, as amended by Laws 1876, c. 263, authorizing the erection and maintenance of dams across a certain river, and giving the person constructing the dam, his heirs and assigns, a lien for the toll on logs sluiced through such dams, to be enforced in the same manner as a laborer's lien on logs, should be construed as meaning assigns of the franchise to erect and maintain the dam, and not of the lien for tolls. It does not give the owner of such franchise the right to assign his right to a lien on the logs for tolls to which he was entitled for sluicing them through the dam. *Tewksbury v. Bronson*, 4 N. W. 749, 750, 48 Wis. 581.

#### As affecting alienability.

The word "assigns" need not be used in a lease if made to the lessee, his executors or administrators, since the lessee's assigns, or persons holding through or under him, are included in himself; his right to assign being an incident to his estate in the land under the lease. *Church v. Brown*, 15 Ves. 258, 263.

The word "assigns" in the limitation of a fee is not requisite to give the estate devised the quality of alienability, and, where an estate is given by technical words, this alienability cannot be restricted, since such a restriction would be inconsistent with the nature of the estate. *Grant v. Carpenter*, 8 R. I. 36, 38.

The first clause of a will devised to a daughter certain lands for life, and, after her death, "to her heirs or their assigns." The second and third clauses devised to other daughters other lands on like conditions, except that the devise was not to the heirs of each "or their assigns," but to the heirs of each "and assigns." The residuary clause devised a life estate to the wife, and from and after her death devised the same to the three daughters and to their heirs "and assigns." Held, that the word "assigns," as used in the second and third clauses, meant

that there was a grant of power to dispose of the remainder, notwithstanding the words of apparent limitation. *Goetz v. Ballou*, 19 N. Y. Supp. 433, 434, 64 Hun, 490.

Where a deed conveyed property to certain named grantees during their natural life, and after their death to their heirs and assigns, the use of the word "assigns" evidenced an intention on the part of the grantors to give the grantee power to sell and dispose of the property, and was held to be inconsistent with an intention on the part of the grantors that the grantee should take only a life estate. *Johnson v. Morton*, 87 S. W. 790, 791, 28 Tex. Civ. App. 296.

As used in a will devising the testator's realty to each of his three sons, their heirs and assigns, forever, the word "assigns" cannot be construed as enlarging or in any manner affecting the interest devised. Every interest recognized by law may be the object of an assignment. It belongs essentially to every species of interest or property, and the introduction of the term, therefore, in a will, was superfluous and inoperative. *Wortendyk v. Wortendyk*, 7 N. J. Law (2 Halst.) 363, 378.

#### **Assignability or negotiability implied.**

The words "assigns," in an insurance policy providing that the company will pay the amount of the insurance to the executor or administrator of the assured, and also to his assigns, was presumably used in its ordinary acceptation, meaning assignees, and such word, together with a paragraph which provides that the company will not notice any assignment of this policy until the original or duplicate thereof shall be filed in the home office, clearly indicates the sense of the parties that the insured has an assignable interest in the policy which he might transfer in his lifetime to a third party, and that such contract did not create an absolute trust fund not capable of diversion in the lifetime of the assured. *Ladd v. Union Mut. Life Ins. Co.* (U. S.) 116 Fed. 878, 884.

The use of the word "assigns" in a bill of lading is an authority to dispose of it; thus indicating that the bill of lading is a negotiable instrument. *Pollard v. Reardon* (U. S.) 65 Fed. 848, 850, 13 C. C. A. 171.

#### **Assignee by operation of law.**

"Assigns," or, as the word is more commonly spelled, "assignees," are of two classes, depending upon the manner of their creation: First, the voluntary assignees, who are created by the act of the parties; and, second, assignees created by operation of law. Whether, in a given case, an assignee belongs to the first or second class, depends upon the purpose for which he was created, the object to be obtained by his creation, and the language of the statute or other instru-

ment from which he derives his power. A voluntary assignee is ordinarily invested with all the rights which his assignor possessed with respect to the property, while the rights of an assignee by operation of law are such only as are necessarily incident to the complete possession and enjoyment of the things assigned. The voluntary assignee takes the property with all the rights thereto possessed by his assignor, and, if he has paid a valuable consideration, may claim all the rights of a bona fide purchaser with respect thereto. Upon the other hand, an assignee by operation of law—as, for instance, a purchaser at a judicial sale—takes only such title as the execution debtor possessed at the time of the sale, and a purchaser of original rights to entryman on public lands at an execution sale against his or his grantee is not an assignee, within the meaning of the act of June 16, 1880, c. 244, § 2, 21 Stat. 287 [U. S. Comp. St. 1901, p. 1416], providing that when, for any cause, an entry on public lands has been erroneously allowed and cannot be confirmed, repayment should be made of the consideration to the entryman or to his heirs or assigns. *Hoffeld v. United States*, 22 Sup. Ct. 927, 928, 186 U. S. 273, 46 L. Ed. 1160.

"Assigns," in its legal significance, includes an assign by an operation of law as well as assign by contract. The term is used in this broad sense in Code 1892, § 4461, providing that forcible entry and detainer may be maintained by the legal representatives or assigns of any person against whom the possession of land is withheld by a tenant after the expiration of his right. *Glenn v. Caldwell*, 20 South. 152, 153, 74 Miss. 49.

#### **As assignee in writing.**

"Assigns," as used in Rev. Code, § 930, providing that an action against a county treasurer for a claim against the county can only be maintained by the party to whom it is payable, his legal representatives or assigns, means a transfer in writing, and not by delivery only. When commercial paper payable to bearer is transferred by delivery, both the right of property and the right to issue pass thereby to the transferee; and this is frequently called an "assignment" of such chose in action. But this has gone by under the usage of commerce, and is scarcely a correct use of the term. Assignment proper is a transfer by writing, as distinguished from one by delivery. *Enloe v. Reike*, 56 Ala. 500, 504.

#### **As assignee of whole interest.**

"Assigns" as used in the forcible detainer act of 1865, § 4, providing that such action shall lie wherever any person shall hold over against the lessor, his heirs or assigns, includes assignees of that portion of the reversion which follows immediately on the termination of the term of the tenant

wrongfully holding over. Bouvier defines the word "assigns" as those to whom rights have been transmitted by particular title, such as sales, gift, legacy, transfer, or cession. Of the word "assignment" he says: "In common parlance this word signifies the transfer of all kinds of property, real, personal, and mixed, and, whether the same be in possession or in action, is a general assignment. In a more technical sense it is usually applied to the transfer of a term of years; but it is more particularly used to signify a transfer of some particular estate or interest in lands, and will embrace a lease for years. It is not necessary that the grantee be the holder of the entire reversion. *Ball v. Chadwick*, 46 Ill. 28, 31.

"Assigns," as used in a grant to the licensee of a patent and his assigns, must be construed as the right to assign the license as an entirety, and not in parts. *Brush Electric Co. v. California Electric Light Co. (U. S.)* 52 Fed. 945, 964, 3 C. C. A. 368.

#### Contractor.

The word "assigns," as used in Act Nov. 24, 1790, § 22, providing that the bridges to be built by virtue of this act shall continue the property of the persons therein named—that is, the commissioners, their executors, administrators, or assigns—for the term of 99 years from the passing of this act, and no longer, does not mean the persons who should contract to build the bridges, for the persons intended by the proviso are to hold the property in the bridges for the whole term of 99 years under all circumstances, and without regard to the question how many years' toll might be agreed upon as sufficient to compensate for the building of the bridges; it being also provided in the act that the bridges should be erected in consideration of the toll for a certain number of years that could be earned to the builders. *Proprietors of Bridges over Passaic and Hackensack Rivers v. State*, 22 N. J. Law (2 Zab.) 593, 594.

#### Estate in fee implied.

The word "assigns," as used in a will bequeathing land to a certain person and his assigns, is not a sufficient word of purchase to pass a fee-simple estate in and of itself. It has been held that the expression "to one and his assigns forever" will pass a fee, but this is probably more from the force of the word "forever" than from the use of the word "assigns." "Assigns" will never be construed as sufficient to enlarge or in any manner affect a certain interest given by will. *Weart v. Crusier*, 13 Atl. 36, 38, 49 N. J. Law (20 Vroom) 475.

#### Executor or administrator.

The word "assigns," as used in a bond which recited that D. was indebted to defendant, that F. was indebted to D., that D.

had conveyed certain lands to defendant, and that defendant had agreed, on payment of the indebtedness of D. to him and of F. to D., to convey the lands to E. F. or her assigns, might be construed to include an administrator. *Douglas v. Hennessy*, 3 Atl. 213, 215, 15 R. I. 272.

Although the words "assign" and "assignee" frequently designate and include executors and administrators, the assignee of an assignee in perpetuum, the heir of an assignee, the assignee of an heir, the assignee of an assignee's executor, and a devisee, yet, in a statute where the words "personal representative" are also used in the same connection, the term "assignee" cannot have such enlarged sense. *Page v. Johnston*, 23 Wis. 295, 296.

#### Grantee or purchaser.

As used in a bond for a deed providing that if said grantor, his heirs or assigns, make a good and sufficient deed, then this obligation to be null and void, the word "assigns" must be construed to mean grantee. *Shelly v. Mikkelson*, 63 N. W. 210, 214, 5 N. D. 22.

The word "assigns," in a contract made between one who has conveyed land to another supposing it to contain a less number of acres than it did contain, executed, after the discovery of the mistake, in which the purchaser agreed to reconvey a portion of the land, the contract being expressly made binding on the assigns of both of said parties, cannot be limited in its signification to assignees of the contract, but includes grantees of the land. *Torrence v. Shedd*, 41 N. E. 95, 100, 156 Ill. 194.

The word "assigns," as used in a bond which recited that D. was indebted to defendant, that F. was indebted to D., that D. had conveyed certain lands to defendant, and that defendant had agreed, on payment of the indebtedness of D. to him and of F. to D., to convey the lands to E. F. or her assigns, meant, not assignees of the land, but assignees of the bond itself. *Douglas v. Hennessy*, 3 Atl. 213, 215, 15 R. I. 272.

The word "assigns," within Pol. Code, § 3477, requiring the county treasurer to pay amounts due on reclamation of swamp land to the original purchaser or his assigns, is used to designate an assignee of the indebtedness, and not to a succession in interest of the original purchaser by virtue of the purchase of the land merely. *Miller v. Batz (Cal.)* 61 Pac. 935, 936.

"The term 'assigns' is as comprehensive as that of purchaser, as one taking by purchase. It means those to whom rights have been transferred by particular title, such as sale, gift, legacy, transfer, or cession." *Watson v. Donnelly (N. Y.)* 23 Barb. 653, 658 (citing *Booth's Case*, 5 Co. Rep. 77b).

The term "assigns," as used in Gen. St. 1894, § 6041, providing that the mortgagor, his heirs, executors, and administrators, or assigns, may redeem within 12 months after a mortgage foreclosure sale, should be construed to include a purchaser at an abortive mortgage foreclosure sale, who has gone into the possession of the mortgaged premises by consent, express or implied, by the mortgagor or his successor in interest, in the belief that the foreclosure was regular and valid, and has remained in such possession until the redemption period has expired. *Law v. Citizens' Bank*, 89 N. W. 320, 85 Minn. 411, 90 Am. St. Rep. 568.

The word "assigns," as used in the statute providing that where a suit is defended by the assigns of a deceased person the opposite party shall not be permitted to testify as to matters which must have been equally within the knowledge of the deceased person, is used in its legal sense, and signifies a person to whom any property or right is transferred by a deceased in his lifetime, and is broad enough to cover successive transfers. *Ripley v. Seligman*, 50 N. W. 145, 88 Mich. 177. It thus includes a grantee in a deed from a deceased grantor. *Bailey v. Holden*, 71 N. W. 841, 113 Mich. 402.

We know of no instance, either in our statutes or in the decisions of our courts, where the word "assigns" has been applied to a purchaser at execution sale. *Kvans v. Krontinger* (Idaho) 72 Pac. 882, 884.

#### Heirs and devisees.

As used in the act of 1798 authorizing an alien grantee to hold lands granted to him in pursuance of the act, to his heirs and assigns forever, the term "assigns" includes devisees and the heirs of assignees and assignees of heirs. *Duke of Cumberland v. Graves*, 7 N. Y. (3 Seld.) 305, 312.

"Assigns," as used in a deed of trust to secure a debt conveying land to the trustees named therein and the survivor of them, and to the heirs, executors, administrators, and assigns of said survivor in trust, and giving them power to sell the property, does not mean persons who may be made assigns by the spontaneous act of the surviving trustee to take effect during his life, but it means persons who may be made such by devise and bequests; and hence the surviving trustee could not, while living, without an express authority for that purpose, delegate this power to another. *Whittelsey v. Hughes*, 39 Mo. 13, 20.

#### Junior mortgagees.

The word "assigns" has been deemed to comprehend all those who take either immediately or remotely from or under the assignment, whether by conveyance, devise, descent, or act of law. *Bally v. De Crespigny*, L. R. 4 Q. B. 180, 186. Under Gen.

St. 1878, c. 81, § 18, providing that all surplus of a foreclosure sale shall be paid "to the mortgagor, his legal representative or assigns," the word "assigns" is broad enough to include a second mortgagee. *Brown v. Crookston Agricultural Ass'n*, 84 Minn. 545, 548, 547, 26 N. W. 907, 908.

Within the provisions of Rev. Codes, § 5424, providing that, on the sale of premises on a mortgage foreclosure, the payment of the surplus, after satisfying the mortgage, shall be paid to the mortgagor, his legal representatives or assigns," the word "assigns" is of sufficiently broad meaning to include a second mortgagee, so that the surplus does not necessarily have to be paid to the mortgagor in place of the junior mortgagee. *Nichols v. Tingstad*, 86 N. W. 694, 696, 10 N. D. 172. So, also, under a like statute. *Brown v. Crookston Agricultural Ass'n*, 26 N. W. 907, 908, 84 Minn. 545.

"Assigns," as used in Gen. St. 1878, c. 81, § 13, providing that the mortgagor, his heirs, executors, administrators, or assigns, may redeem from a mortgage sale within 12 months thereafter, means grantees of a mortgagor, and those acquiring his title otherwise than by descent, which would not include a junior mortgagee. *Cullerier v. Brunelle*, 33 N. W. 123, 37 Minn. 71.

#### Licensees.

"Assigns" is ordinarily construed as only indicating the nature of the estate, and its ordinary effect is only to the extent of declaring that whatever is obtained is of an assignable nature. Strictly an authority to assign or an assignment relates to what already exists, and has no pertinency to a creation of a right out of another right. As used in Act March 3, 1891, c. 565, § 1, 26 Stat. 1106 [U. S. Comp. St. 1901, p. 3406], providing that the author or proprietor of any painting, and the assigns of any such person, shall have the liberty of publishing the same on compliance with the copyright provisions, one to whom a German artist gives the exclusive right of reproduction and publication is an assign. *Werckmeister v. Pierce & Bushnell Mfg Co.* (U. S.) 63 Fed. 445, 450.

#### Remaindermen.

"Assigns," as used in a lease reserving rents to the lessor, his heirs and assigns, which is executed by one seised in fee, who has settled the lands on himself for life with remainders to other persons, but reserved a leasing power therein, includes such remaindermen. *Greenaway v. Hart*, 14 C. B. 340.

#### Subsequent assignee or grantee.

Laws 1859, c. 22, § 35, gives a right of action to the grantee named in any deed of conveyance made by the clerk of the board of supervisors of any county, etc., his heirs,

executors, or assigns, to bar the interest of the original owners, and those claiming under them, any lands sold for taxes. Held, that an "assign," as there used, was a subsequent holder in privity with the prior holder or owner of the land, and thus a grantee of the grantee in a tax deed was his "assign," within the meaning of the section, and was therefore entitled to sue. *Flinney v. Ford*, 22 Wls. 173, 174.

Under the word "assigns" at common law, in all cases where the legal title or estate belongs to the assignee, is included the assignee of an assignee in perpetuum. *Bennington Iron Co. v. Rutherford*, 18 N. J. Law (3 Har.) 153, 164.

## ASSIGNATION HOUSE.

An "assignment house" is a house resorted to for the purposes of prostitution, and is synonymous with "bawdy house" or "brothel." *McAllister v. Clark*, 33 Conn. 91, 92.

## ASSIST.

Consent distinguished, see "Consent."

"Assist the court," as used in St. 1889, p. 18, providing that the Supreme Court shall appoint five persons of legal learning "to assist" in the performance of the court's duties and in the disposition of the numerous causes now pending, means merely to facilitate the court, to lessen its labors, and cannot be construed as giving the commissioners the right to appropriate the functions of the court or to decide causes, or that they shall take part in the decisions of causes as members of the court, and the assistance referred to does not mean supersession. *People v. Hayne*, 23 Pac. 1, 3, 83 Cal. 111, 7 L. R. A. 348, 17 Am. St. Rep. 211.

"Assisting" a debtor to remove may be restricted in a narrow sense to the person of the debtor, and it may be asked how one can assist in moving a debtor out of the country in which he resides if he is already out of it. This would be so if the statute meant to carry the body of the debtor in a carriage, etc., but it has never been doubted that the statute extends to his property. If the debtor rides his own horse or walks, the person who carries his property for him thus assists in removing the debtor; or if the party wait until the debtor crosses over the line, and then carries his property over to him, it will be assisting the debtor. It would be a fraud on the law to allow it to be evaded by furnishing a debtor, who happens to be over the line, with money to enable him to run away, and then send his property to him. *Moore v. Rogers*, 48 N. C. 90, 94.

A person is assisting an absconding debtor where he goes with him to the depot and brings back his horse. To "aid" or "assist"

is the doing of such an act whereby the party is enabled, or it is made easier for him, to do the principal act, or effect some primary purpose. *Moss v. Peoples*, 51 N. C. 140, 142.

A person is guilty of assisting a debtor in getting out of the county, though he carries the debtor only to the county line. *Godsey v. Bason*, 30 N. C. 260, 264.

### In criminal law.

"There are no words in the law that have acquired a more definite and specific meaning than 'procure, advise, and assist,' as contradistinguished from the actual commission of the crime. The latter is the principal offense, but the former only accessory. If a person does no more than procure, advise, or assist, he is only an accessory; but if he is present, consenting, aiding, procuring, advising, and assisting, he is a principal, and must be indicted as such." *United States v. Wilson* (U. S.) 28 Fed. Cas. 699, 710.

By technical legal construction, a person may "assist" or "aid" in the commission of a crime and still be possessed of no criminal intent, and therefore in no sense an accessory to the crime; but, to the ordinary mind, one who aids or assists in the commission of the crime of forgery is guilty, and this is true because to such a mind criminality is included as an element in the act of the party aiding or assisting. To the ordinary understanding it would seem that a person could not commit the crime of forgery without knowing that it was a crime, neither could he "aid" or "assist" in its commission without being aware of the criminality of his acts, and the use of such terms in an instruction would not tend to mislead the jury. *People v. Dole* (Cal.) 51 Pac. 945, 946.

"Assists," as used in Civ. Code La. art. 2324, providing that one who causes another to do an unlawful act, or "assists or encourages" in the commission, is responsible in solido with that person for the damages caused by such act, includes officials or authorities who passively permit a wrongful act, though a strict meaning of the words "causes," "assists," or "encourages" might not under other circumstances include such failure to prevent. *Comitez v. Parkerson* (U. S.) 50 Fed. 170, 171.

The words "encourage," "aid or abet," "counsel," "advise," or "assist," are words in appropriate use to describe the offense of a person who, not actually doing the felonious act, by his will contributes to or procures it to be done, and thereby becomes a principal or accessory. *True v. Commonwealth*, 14 S. W. 684, 685, 90 Ky. 651; *Omer v. Same*, 25 S. W. 594, 596, 95 Ky. 353.

The words "assists such person to escape," in Code 1876, § 4130, providing a punishment for any one who furnishes any disguise, etc., to aid any person to escape, or

in any way "assists such person to escape," whether such escape be attempted or effected or not, though it means in its ordinary purport that the prisoner does effect his escape, and that he has assistance in accomplishing it, when construed with the latter clause, "whether such escape be attempted or effected or not," applies to cases where the prisoner either does not escape or does not attempt to escape. *Hurat v. State*, 79 Ala. 55, 57.

#### ASSISTANCE.

See "Clerical Assistance"; "Writ of Assistance."

Under a statute giving the wife authority to administer her paraphernalia without the assistance of her husband, the term "without assistance" means without his control, without the necessity of being thereunto authorized by him, as is the case with many of her acts. It is not incompatible with her personal administration that she should avail herself of the assistance of her husband if he is willing to render it, provided he acts under her authority and as her proclaimed agent. *Miller v. Handy*, 33 La. Ann. 160, 163.

The phrase, "charitable assistance and benefit," as used in a will bequeathing a permanent fund to be used for the charitable assistance and benefit of indigent, unmarried, Protestant females over the age of 18 years, has the same meaning as the words "charitable assistance and charitable benefit." The words "assistance" and "benefit" as used are synonymous. They are applied to an indigent class of unmarried females, and it is impossible to see how they could be assisted by a bequest without being benefited, or benefited without being assisted. *Appeal of Tappan*, 52 Conn. 412, 416.

#### ASSISTANT.

Under Rev. St. c. 81, § 46, providing that "if any clerk, by himself or his assistant in office, shall issue any writ," etc., an "assistant" is one who is called in by the clerk, without any regular appointment, to aid him, either in conducting the business of the office generally, or to aid him in some particular. *Wright v. Wheeler*, 30 N. C. 184, 187.

"Assistants," as used in a by-law of a corporation providing that the directors "shall elect from their number a president, vice president and such other assistants as are necessary, who may be removed at the pleasure of the directory," means assistants who might be employed to assist the president and vice president in carrying on the business, and does not apply to the president." *Archer v. Whiting*, 7 South. 53, 55, 88 Ala. 249.

In 3 & 4 Wm. IV, c. 101, § 118, empowering the corporation of Gravesend to appoint

clerks, treasurers, collectors, and such other officers and assistants as they may think necessary for the purposes of the act, but that it shall not be lawful for the corporation to appoint the person who may be appointed clerk in the execution of the act as treasurer for the purposes of the act, the words "officers" and "assistants" were synonymous, and applied to officers who were to assist in the execution of the purposes of the act, and did not give authority to appoint the clerk as an assistant treasurer. *Hawkings v. Newman*, 4 Mees. & W. 613, 620.

An "assistant" is defined to be one who stands by and aids or helps another. Thus an inspector of buildings, being an assistant of the commissioner of public buildings, was not an officer. *State ex rel. Bartraw v. Longfellow*, 69 S. W. 596, 598, 95 Mo. App. 660.

#### As a deputy.

St. 1885, c. 352, providing that milk inspectors or their "assistants" may enter all places where milk is stored or kept for sale, and all carriages used for conveyance of milk, and take samples for analysis, does not authorize the inspector to appoint an agent who shall have the right, in the absence of the inspector, and without his immediate direction and control, to take by force, and against the will of the owner, samples of milk from carriages used for its conveyance. The general rule is that the performance of public duties cannot be delegated by a public officer, and, unless there is a clear expression in the statute to the contrary, it will be presumed that the Legislature intended that public duties which require the exercise of discretion should be performed by public officers. *Commonwealth v. Smith*, 6 N. E. 89, 91, 141 Mass. 135.

"Assistant," as used in Act March 14, 1864 (13 Stat. 26), providing for the appointment of an additional "Assistant" Secretary of the Treasury, means one who stands by and helps or aids another. He is not a deputy, and cannot therefore act in the name of and for the person he assists, and under his direction, unless otherwise expressly provided by law. *United States v. Adams* (U. S.) 24 Fed. 348, 351.

An "assistant" does not mean a "deputy." Clerks and other public officers have assistants who are not deputies. Though a deputy is an assistant, the word "assistant" is more comprehensive than the word "deputy," including those who aid, whether sworn or not sworn, while "deputy" embraces only the sworn class. *Ellison v. Stevenson*, 22 Ky. (6 T. B. Mon.) 271, 276, 279.

#### ASSISTANT CLERK.

As clerk, see "Clerk."

## ASSISTANT PRINCIPAL.

The term "assistant principal" in school work implies a position subordinate to that of the principalship of the school. *Morrow v. Board of Education of City of Chamberlain*, 64 N. W. 1126, 1128, 7 S. D. 553.

## ASSIZE.

See "Writ of Assize."

An "assize" is a real action which proves the title of the demandant, merely by showing his or his ancestor's possession. *Sherman v. Dilley*, 3 Nev. 21, 26 (citing 5 Chit. Bl. 184).

## ASSIZE OF NUISANCE.

An "assize of nuisance" was an old common-law remedy by action, in which the sheriff was commanded to summon a jury to view the premises, and if they found for the plaintiff he had judgment to have the nuisance abated, and for damages. The assize of nuisance lay only against the wrongdoer himself, but not against the alienee of the tenement wherein the nuisance was situated. *Powell v. Bentley & Gerwig Furniture Co.*, 34 W. Va. 804, 808, 12 S. E. 1085, 1086, 12 L. R. A. 53.

## ASSOCIATE.

Abide synonymous, see "Abide."

## ASSOCIATES.

Associates are persons united and acting together by mutual consent or compact in the promotion of some common object. *Lechmere Bank v. Boynton*, 65 Mass. (11 Cush.) 369, 382.

As used in *Laws 1849*, c. 44, incorporating certain persons named and their associates under the name of the "Minnesota Historical Society," "associates" meant such persons, other than those specifically named, as might thereafter become members of the association. *State v. Sibley*, 25 Minn. 387, 399.

### As assigns.

A deed granting land to "L. and his associates" is not void for uncertainty as to the grantee. The conveyance being to L., and the word "associates" bearing a strong analogy and common parlance to the word "assigns," the grant would be construed to vest the legal title in L., with authority to him to regrant or convey any part thereof to such persons as would associate with him in the undertaking to settle the land. *Duncan v. Beard*, 2 Nott & McC. 400, 404.

## ASSOCIATION.

See "Beneficial Associations"; "Benevolent Association"; "Building and Loan Association"; "Co-operative Association"; "Fraternal Association."

The word "association" "is said to signify confederacy or union for particular purposes, good or ill. Johnson's Dict. In that sense it is a generic term, and may indifferently comprehend a voluntary confederacy, which is a partnership dissoluble by the persons who formed it, or a corporate confederacy, deriving its existence from a confederacy, and dissoluble only by the law." *Thomas v. Dakin* (N. Y.) 22 Wend. 9, 104.

The word "association" has various significations, one of which is the interests of persons in a company. *People v. Commissioners of Taxes* (N. Y.) 1 Thomp. & C. 630, 631.

Association is "confederacy or union for particular purpose, good or ill. This term is used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies, for the prosecution of some common enterprise. It also enters into the names bestowed by the legislatures upon many corporations. In this connection it is used without any very uniform discrimination as to its precise meaning, but seems to be on the whole preferred for bodies which are not vested with full and perfect corporate rights and powers." *Allen v. Stevens*, 54 N. Y. Supp. 8, 23, 33 App. Div. 485.

"Association," as used in *St. 1893*, c. 443, providing that no person, association, or union that has adopted a trade-mark may file therewith a certificate specifying the name or names of the person, association, or union so filing, includes an association without as well as with officers. *Commonwealth v. Rozen*, 57 N. E. 223, 224, 176 Mass. 129.

"The term 'association' usually means an unincorporated organization composed of a body of men, partaking in its general form and mode of procedure of the characteristics of a corporation. Such an association cannot be the donee of a bequest, even for a charitable purpose." *Pratt v. Roman Catholic Orphan Asylum*, 46 N. Y. Supp. 1035, 20 App. Div. 352. "The term 'association,' in *Laws 1896*, c. 908, § 4, subd. 7, exempting charitable corporations or associations from taxation, does not include a bequest to persons taking property by a will, as trustees for the purpose of founding a home for the aged." *Knight v. Stevens*, 72 N. Y. Supp. 815, 818, 66 App. Div. 267.

The word "association," in a constitutional provision authorizing municipalities to subscribe to the stock of any company, "as-

sociation," or corporation, may well apply to an unincorporated company. *Rubey v. Shain*, 54 Mo. 207, 209.

Under Laws 1849, c. 437, the term "association" includes every individual doing business alone for some purpose, under the banking law. *Bank of Havana v. Wickham* (N. Y.) 7 Abb. Prac. 134, 138.

The word "association," when used in reference to a corporation, shall be deemed to embrace the words "successors and assigns of such company or association," in like manner as if these last-named words, or words of similar import, were expressed. *U. S. Comp. St.* 1901, p. 4.

#### Club.

Though a club is an association, it is not an "association" within St. 12 & 13 Vict. c. 108, the latter aiming at associations established for profit. In re *St. James Club*, 13 Eng. Law & Eq. 589.

#### As company.

"Association," as used in an indictment charging that a certain fire insurance company exercised the privilege of a fire insurance company or association without obtaining a license, is synonymous with the word "company" as there used. *Lee Mut. Fire Ins. Co. v. State*, 60 Miss. 395, 396.

#### Corporation.

Act March 28, 1867, provides that no suit shall be maintained against any stockholder or director in any corporation or association to charge him with any claim for moneys for which the corporation or association could be sued, except within six years after the loaning to or deposit of the money with the corporation or association. Held, that "association" must be held to be used as a synonym for "corporation," and that the association whose stockholders are protected are such as can be sued without joinder of other parties, and that the subjects of the suits barred are claims for which the association is primarily and the stockholders secondarily liable, but an unincorporated association has no capacity to be sued as an entity distinct from its members. *Campbell v. Floyd*, 25 Atl. 1033, 1036, 153 Pa. 84.

In Laws 1885, c. 184, § 11, authorizing the reincorporation of "any existing corporation, association, or society," the words "association" and "society" are not employed as synonyms with or to characterize the word "corporation," but refer to bodies other than legally created corporations. *State v. Steele*, 34 N. W. 903, 904, 37 Minn. 428.

Associations formed under the banking act are moneyed corporations, within the meaning of the statute subjecting such corporations to taxation on their capital. *Niagara County Sup'rs v. People* (N. Y.) 7 Hill, 504.

Act Feb. 27, 1855, § 1, providing that all persons and associations doing business as merchants, bankers, etc., shall be assessed and taxed on all sums invested in said business as though they were residents of the state, is to be construed as including corporations. *People v. Commissioners of Taxes of City of New York*, 23 N. Y. 242, 243.

The term "associations," in Act 1855, subjecting to taxation all nonresident persons and associations doing business in the state, is comprehensive enough to embrace foreign corporations, such as insurance companies. *British Commercial Life Ins. Co. v. Commissioners of Taxes and Assessments*, \*40 N. Y. (1 Keyes) 303, 305.

"Association of persons," as used in Rev. St. § 2347 [*U. S. Comp. St.* 1901, p. 1440], providing that "any association of persons" shall have the right to enter by legal subdivisions any quantity of vacant coal lands not otherwise appropriated, and not exceeding 320 acres to each association, includes incorporated as well as unincorporated associations, since it is unreasonable to suppose that Congress intended to limit the right of entering coal lands to 320 acres in the case of unincorporated associations, and to allow incorporated associations to acquire such lands without restriction. *United States v. Trinidad Coal & Coking Co.*, 11 Sup. Ct. 57, 61, 137 U. S. 160, 34 L. Ed. 640.

#### Joint-stock company.

Act July 9, 1851, authorizing any company or association composed of not less than seven persons to sue or to be sued in the name of its president or treasurer, relates only to those associations or companies which are authorized by acts of the Legislature for the various purposes of banking, insurance, railroads, etc., and have no application to private voluntary associations or copartnerships which are not organized in pursuance of any statute. *Austin v. Searing*, 16 N. Y. 112, 117, 69 Am. Dec. 665.

The business of insurance carried on in the manner of the ancient Lloyds may be included within the scope of the term "association," where each underwriter is individually liable for a fixed amount, but not for the whole or any part of another underwriter's liability, yet all act together to effect the contract of insurance. *Hoadley v. Purifoy*, 18 South. 220, 223, 107 Ala. 276, 30 L. R. A. 351.

The word "associations" is used as synonymous with "companies" in the statute providing that the Attorney General shall institute suits against companies or associations violating certain provisions of the law. Speaking of joint-stock companies, Mr. McCullough, in his *Commercial Dictionary*, says that the word "company" is usually applied to large associations like the East India Company, the Bank of England, etc., who conduct their operations by means of agents



acting under the orders of a board of directors. In speaking of the English & East India Company, Mr. McCullough describes it as "a famous association originally established for prosecuting the trade between England and the East Indies." *Mills v. State*, 23 Tex. 295, 303.

#### As a partnership.

An "association," as defined by Webster, is an organization of persons, without a charter, for business, humanity, charity, culture, or other purposes; unincorporated society or body. It is neither a partnership nor a quasi partnership. Thus, an unincorporated association having charitable features is not a partnership within the rule that a partner cannot be guilty of embezzlement in appropriating the funds of the firm. *Laycock v. State*, 36 N. E. 137, 140, 136 Ind. 217.

#### Society synonymous.

"Association and society are convertible terms, and therefore Laws 1895, c. 398, § 153, providing that any incorporated medical society instituting proceedings against physicians for practicing medicine without lawful registration shall receive the fines imposed and collected in such prosecution, applies to any incorporated medical society, whether it be designated a 'society' or an 'association.'" *New York County Medical Ass'n v. City of New York*, 65 N. Y. Supp. 531, 32 Misc. Rep. 116.

#### State.

The word "association" means a body of persons invested with some, yet not full, corporate rights and powers, but will not include the state. *State v. Taylor*, 64 N. W. 548, 550, 7 S. D. 533.

#### Trade union.

"Associations," as used in Act May 8, 1891, entitled "An act to protect associations, unions of workmen and persons in their labels, trade-marks and forms of advertising," should not be construed as limited in its meaning to associations of workmen. The term "unions" having come to have a well-known meaning, it is to be presumed that "associations" was used in a broader sense. *Cohn v. People*, 37 N. E. 60, 62, 149 Ill. 486, 23 L. R. A. 821, 41 Am. St. Rep. 304.

St. 1895, c. 462, § 3, entitled "An act to protect manufacturers from the use of counterfeit labels and stamps," authorizing suits to prevent fraudulent use and counterfeiting of labels by any person, "association, or union," includes a voluntary trade union. *Tracy v. Banker*, 49 N. E. 308, 170 Mass. 286, 39 L. R. A. 508.

#### ASSOCIATION OF LEARNING.

Act May 14, 1874, exempting from taxation all universities, colleges, seminaries,

academies, "associations and institutions of learning," should be construed to include a convent used exclusively for the residence of the teachers in a school free to all classes and creeds, erected and maintained by a Catholic church, in which convent teachers are allowed to reside as part consideration for their services. A school for children preliminary to the academy or college is an "institution of learning." Its purposes and methods place it within the general term. *White v. Smith*, 42 Atl. 125, 128, 189 Pa. 222, 43 L. R. A. 498. It will also be held to include a library company. *Philadelphia Library Co. v. Donohugh* (Pa.) 12 Phila. 284, 285.

#### ASSORTED.

A clause in a charter party which stipulated that the ship should carry 700 tons measurement of "assorted cargo" imports the idea of a miscellaneous character, or freight distributed into various sorts, kinds, or classes; in short, whatever the defendant should reasonably select as the kind or sort of goods with reference to his own interests. *Roberts v. Opdyke*, 40 N. Y. 259, 262.

#### ASSUME.

The definition of the word "assume," in matters of law, is "to take upon one's self." *Springer v. De Wolf*, 62 N. E. 542, 543, 194 Ill. 218, 56 L. R. A. 465, 88 Am. St. Rep. 155.

A bill of exceptions reciting that the court, "assuming the plaintiff was a credible witness," found on the evidence for defendants and directed judgment to be entered for them, "is not, we think, to be taken to mean that every scintilla in his testimony is true." *Simmons v. Brooks*, 34 N. E. 175, 177, 159 Mass. 219.

The word "assumed," as used in an instruction to the effect that circumstantial evidence is a species of presumptive evidence, and consists in this: that, where there is no satisfactory evidence of the direct fact, certain facts which are "assumed" to have stood around or been attendant on the direct fact are proved, from the existence of which the direct fact may be inferred—is employed in the sense of "claimed," and the plain meaning of the passage is that the assumed or claimed facts therein mentioned must be proved before the main fact can be inferred. *Jenkins v. State*, 62 Wis. 49, 64, 21 N. W. 232.

"Assume," as used in Pub. St. c. 76, § 6, forbidding any person to assume or continue to use in his business the name of a person formerly connected with him in partnership, or the name of any other person without written consent, means "use for the first time," in the same way that is contemplated in the other branch, "continue to use in his

business," and does not prohibit a person from describing himself as successor to another. *Martin v. Bowker*, 40 N. E. 766, 163 Mass. 461.

**As agree to pay.**

The word "assume," in a deed which recites that the premises are subject to a certain mortgage which the grantee assumes, means the same as the word "assumes to pay," and amounts to a personal covenant by the grantee to pay the mortgage. *Eggleston v. Morrison*, 84 Ill. App. 625, 631; *Sparkman v. Gove*, 44 N. J. Law (15 Vroom) 252, 254; *Vreeland v. Van Blarcom*, 35 N. J. Eq. (8 Stew.) 530, 532; *Green v. Stone*, 34 Atl. 1009, 1100, 54 N. J. Eq. 387, 55 Am. St. Rep. 577; *Miles v. Miles*, 6 Or. 266, 269, 25 Am. Rep. 522; *Drury v. Tremont Imp. Co.*, 95 Mass. (13 Allen) 168, 171; *Reed v. Paul*, 131 Mass. 129, 132; *Lappen v. Gill*, 129 Mass. 349, 350; *Locke v. Homer*, 131 Mass. 93, 109, 41 Am. Rep. 199; *Wayman v. Jones*, 58 Mo. App. 313, 317; *Schley v. Fryer*, 2 N. E. 280, 100 N. Y. 71; *Jehle v. Brooks*, 70 N. W. 440, 441, 112 Mich. 131.

"Assumes," as used in a contract which provides that one of the parties "assumes a lease," means that the party so assuming a lease "takes to himself the obligations, contracts, and agreements and benefits to which the other contracting party was entitled under the terms of the lease." *Cincinnati, S. & C. R. Co. v. Indiana, B. & W. Ry. Co.*, 7 N. E. 139, 152, 44 Ohio St. 287.

It is no longer an open question that where the purchaser accepts and holds a conveyance of real estate, wherein it is recited that such person assumes and agrees to pay an incumbrance thereon, he thereby subjects himself to liability to the holder thereof, which may be enforced by a personal action. *Saunders v. McClintock*, 46 Mo. App. 216, 223.

A stipulation, in a deed conveying real estate, that the grantee assumes a mortgage thereon, and agrees to hold the grantor harmless from such mortgage, shows an agreement not merely to indemnify the grantor, but to pay the mortgage debt. *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199.

"Assume" means to undertake, engage, or promise, so that a complaint alleging that defendant purchased certain property subsequent to the execution of a mortgage set forth in the complaint, and assumed payment of the note and mortgage, states a cause of action. *Petteys v. Comer*, 54 Pac. 813, 814, 34 Or. 86.

Where a person by an agreement assumes a debt of the seller, he undertakes to substitute himself in the place and instead of such person; hence the obligation to pay resting upon him becomes the obligation of

the purchaser. *Stout v. Folger*, 34 Iowa, 71, 75, 11 Am. Rep. 138.

There is only one proposition contained in the words "assumed" and "agreed" to pay. The assumption to pay the debt is the same thing as agreeing or undertaking to pay it, and the use of both words "assume" and "agree" is no more the statement of two distinct propositions than if it had been stated that they "agreed and agreed" to pay the debt. *Jones v. Eddy*, 27 Pac. 190, 191, 90 Cal. 147.

"The difference between the purchaser assuming the payment of a mortgage and simply buying subject to the mortgage is simply that in the one case he makes himself personally liable for the payment of the debt, and in the other case he does not assume such liability. In both cases he takes the land charged to the payment of the debt, and is not allowed to set up any defense to its validity." *Hancock v. Fleming*, 3 N. E. 254, 255, 103 Ind. 533.

A deed poll reciting that the premises were subject to a mortgage for a certain amount which the grantee was to assume, it being a part of the consideration, should be construed as an undertaking to pay the mortgage debt out of the fund furnished for the grantor for that purpose. "The legal obligation undertaken was that if the note secured by the mortgage was not then due, to pay it at maturity and save any forfeiture of the land mortgaged; if the note was then due, the contract was to pay it forthwith, or within reasonable time, so as to avoid any entry by the mortgagee for breach of condition." *Braman v. Dowse*, 66 Mass. (12 Cush.) 227, 228.

**ASSUMED RISK.**

See "Assumption of Risk."

**ASSUMPSIT.**

See "Implied Assumpsit."

"The action of assumpsit may be defined to be, at common law, an action for the recovery of damages for the nonperformance of a parol or simple contract, or, in other words, a contract not under seal nor of record—circumstances which distinguish this remedy from others; for the action of a debt is in legal consideration for the recovery eo nomine and in numero, and is most frequently brought on a deed; and the action of covenant, though in form for the recovery of damages, can only be supported upon a contract under seal. Assumpsit, however, is not sustainable unless there has been an expressed contract, or unless the law will imply a contract. *State v. Harmon*, 15 W. Va. 115, 124. See, also, *Force v. Haines*, 17 N. J. Law (2 Har.) 385, 386.

"Assumpsit is a form of action which lies for the recovery of damages for the non-performance of a parol or simple contract, and will not lie where there has been an express contract under seal or of record, but the party must proceed in debt or covenant where the contract is under seal, and in debt if it be of contract, even though the debtor, after such contract was made, expressly promised to perform it." *Andrews v. Montgomery* (N. Y.) 19 Johns. 162, 164, 10 Am. Dec. 213; *North v. Nichols*, 37 Conn. 375, 377; *Hill's Adm'r v. Nichols*, 50 Ala. 336, 338; *Westmoreland v. Davis*, 1 Ala. 299, 300; *Morgan v. Patrick*, 7 Ala. 185, 187; *Wass v. Bucknam*, 40 Me. 289, 290.

Chitty says assumpsit will lie for the breach of all parol or simple contracts, whether verbal or written, express or implied, or for the payment of money, or for the performance or omission of any other act. Assumpsit will lie against an attorney for a breach of duty. *Ellis v. Henry's Adm'r*, 28 Ky. (5 J. J. Marsh.) 247, 248.

An action of assumpsit is founded on an undertaking of defendant, not under seal, and the averment always is that he undertook and promised to pay the money sued for or to do the act mentioned. *Hurlock v. Murphy* (Del.) 2 Houst. 550, 555.

The action of "assumpsit," so called, is an action on the case, and is properly entitled a plea of trespass on the case in a declaration, the counts of which are in assumpsit. *Carter v. White*, 32 Ill. 509, 510.

The term "assumpsit" presupposes a contract. Whatever excludes all idea of a contract excludes at the same time the remedy of assumpsit, which can spring from contract only, which affirms it and seeks its enforcement. Hence it is held that, to maintain an action of assumpsit for the occupation of land, the relation of landlord and tenant must be established, and that the action will not lie where the possession has been acquired and maintained under a different or adverse title, or where it was tortious and makes the holder a trespasser. *Lloyd v. Hough*, 42 U. S. (1 How.) 153, 159, 11 L. Ed. 83.

"Assumpsit is an action for sums due on implied contracts, though no price for articles sold or labor performed may have been agreed upon." *Mershon v. Bank of Commonwealth*, 29 Ky. (6 J. J. Marsh.) 438, 440.

Assumpsit is that form of action which is brought whenever the foundation of the action is a contract, and the action is assumpsit, no matter in what way the declaration is framed. *Legge v. Tucker*, 1 Hurl. & N. 500, 501.

Assumpsit is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he

is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes a promise to fulfill that obligation, but the law never implies a promise to pay unless some duty creates an obligation, and, more especially, it never implies a promise to do an act contrary to law. *Bailey v. New York Cent. & H. R. R. Co.*, 89 U. S. (22 Wall.) 604, 638, 639, 22 L. Ed. 840.

Assumpsit is an action at law for the recovery of damages for a breach or a non-performance of a contract, express or implied. It may be maintained not only where a contract has existed in fact, but where the wrong done was originally a tort, which the plaintiff is entitled to waive, and sue on a quasi contract by an action of assumpsit. *Hill v. Davis*, 3 N. H. 384; *Chauncy v. Yeaton*, 1 N. H. 151.

The action of assumpsit lies to recover damages for consequential wrongs or torts, which, though they are *ex delicto*, are quasi *ex contractu*, and they arise from malfeasance, or doing what the defendant ought not to do, nonfeasance, or not doing what he ought to do, and misfeasance, or doing what he ought to do improperly. *Wood v. Downing's Adm'r*, 62 S. W. 487, 489, 110 Ky. 656.

The action of debt is founded on contract, while the action of assumpsit is founded on a promise, and in this exists the principal distinction between the two actions. *Metcalf v. Robinson* (U. S.) 17 Fed. Cas. 177, 178.

## ASSUMPSIT FOR MONEY HAD AND RECEIVED.

The action of assumpsit for money had and received in its spirit and purpose has been likened to a bill in equity, and is an exceedingly liberal action, and will always lie where a defendant has in his hands money which *ex æquo et bono* he ought to refund to the plaintiff. *Rushton v. Davis*, 28 South. 476, 479, 127 Ala. 279 (citing *King v. Martin*, 67 Ala. 177).

Assumpsit for money had and received is an equitable action to recover back money which the defendant in justice ought not to retain. And it may be said that it lies in most, if not all, cases where the defendant has moneys of the plaintiff which *ex æquo et bono* he ought to refund. *Prichard v. Budd* (U. S.) 76 Fed. 710, 714, 22 C. C. A. 504 (citing *Nash v. Towne*, 72 U. S. [5 Wall.] 689, 18 L. Ed. 527).

## ASSUMPTION.

See, also, "Assume."

"Assumption," as used in an instruction that "if the whole evidence in the case is just as consistent with the assumption of defend-

ant's innocence as with the assumption of his guilt," etc., "your duty is to acquit him," was used as synonymous with "hypothesis," and means "what is not known to be true or not proved," so that the instruction is not erroneous. *State v. Haras*, 65 Pac. 774, 775, 25 Wash. 416.

#### Of debt or mortgage.

The word "assumption," in speaking of the assumption by one of the obligations and liabilities of another, as defined in the Century Dictionary, means the agreement of the transferee of property to pay obligations of the transferor which are chargeable on it. *Springer v. De Wolf*, 62 N. E. 542, 543, 194 Ill. 218, 56 L. R. A. 465, 88 Am. St. Rep. 155.

A verbal promise to pay an existing mortgage debt as part of the purchase money of mortgaged premises is an "assumption of the mortgage debt," and may be enforced by the grantor or the holder of the mortgage. *Lang v. Dietz*, 60 N. E. 841, 842, 191 Ill. 161.

"Assumption," as used in conveyance reciting that in consideration of assumption of certain debts, etc., includes the promise of payment of such debts, since "assumed" means to take upon one's self, to undertake, or to adopt; or, in other words, to take upon one's self, or to adopt, the obligation or the liability of another, is to put one's self in place of that other as to such obligation or liability—to become bound as such other is bound. It is a broader word than "agrees to pay," and includes the latter. *Lenz v. Chicago & N. W. R. Co.*, 86 N. W. 607, 608, 111 Wis. 198.

#### Of marital rights.

Civ. Code, § 55, provides that consent alone will not constitute marriage, but it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations. Held, that "assumption" means the "act of assuming or taking to or upon one's self. It is sometimes used to express the pretension of having or possessing, the taking on in appearance, and not in reality. But when used in the last sense it does not necessarily mean a pretense presented to the eyes of the community, though it may include such general pretense. To adopt the illustrations of counsel, one may assume, by words, manner, or bearing, in the presence of one person alone, a virtue though he have it not. To deceive a single soul, the devil hath power to assume a pleasing shape." *Sharon v. Sharon*, 16 Pac. 345, 359, 75 Cal. 1.

#### ASSUMPTION OF RISK.

"Assumption of risk" is a term in a contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of in-

jury obviously incident to the discharge of the servant's duty shall be at the servant's risk. *Bauer v. American Car & Foundry Co.* (Mich.) 94 N. W. 9, 10 (citing *Narramore v. Cleveland, C., C. & St. L. Ry. Co.* [U. S.] 96 Fed. 301, 37 C. C. A. 501, 48 L. R. A. 68); *Atchison, T. & S. F. Ry. Co. v. Bancord*, 71 Pac. 253, 255, 66 Kan. 81; *Green v. Western American Co.*, 70 Pac. 310, 317, 30 Wash. 87.

The saying that assumption of risk is a form of the contract of employment is not strictly true. It is more accurate to say that the services of one are engaged by the other, and from the relationship the law implies certain duties and obligations. *Martin v. Chicago, R. I. & P. Ry. Co.*, 91 N. W. 1034, 1035, 118 Iowa, 148, 59 L. R. A. 698, 96 Am. St. Rep. 371.

Assumption of risk rests in the law of contract, and involves an implied agreement by an employé to assume the risks ordinarily incident to his employment, or a waiver, after a full knowledge of an extraordinary risk, of his right to hold the employer for a breach of duty in this regard. *Bodie v. Charleston & W. C. Ry. Co.*, 39 S. E. 715, 718, 61 S. C. 468.

Where an employé entered into the service of a railroad company using defective machinery, knowing of such defects, or where he continued in the employment after such knowledge without notifying his superiors and protesting against its continuance, such employé would have been held to have waived such objection, and to have assumed the risk rising from the use of such defective machinery, but under Priv. Laws 1897, c. 65, §§ 1, 2, providing that any employé of a railroad company who shall suffer injury in the course of his employment by any defect in the machinery, etc., shall maintain an action against the company, there is no such thing as assumption of risk. *Coley v. North Carolina R. Co.*, 39 S. E. 43, 45, 128 N. C. 534, 57 L. R. A. 817.

The term "assumed risk" includes generally any form of assumed risks; that is to say, risks ordinarily incident to the work, as well as risks not so incident, but arising from the circumstance that the danger was a known one. *International & G. N. R. Co. v. Moynahan* (Tex.) 76 S. W. 803, 804.

The assumption of a risk appears to involve the fact of comprehension that a peril is to be encountered and a willingness to encounter it; that is to say, a positive exercise of volition in the form of an assent to the risk. *Adolff v. Columbia Pretzel & Baking Co.*, 73 S. W. 321, 324, 100 Mo. App. 199.

The doctrine of assumed risks may be thus epitomized, viz.: "Where one voluntarily enters into a contract of hiring with a railroad company, he assumes all the risks and hazards ordinarily and usually incident to such employment, and will be presumed

to have contracted with reference to such risks and hazards. But while an employé assumes all the risks incident to the service he enters, he does not assume a risk created by the negligent act of the master, and only such risks as he knows to exist, or may know by ordinary care." *St. Louis, I. M. & S. Ry. Co. v. Tuohey*, 54 S. W. 577, 579, 67 Ark. 209, 77 Am. St. Rep. 109.

The doctrine of assumption of risk is that if a particular machine has become injured or dangerous, and an employé seeing the danger does not report its condition, but goes on with his work in disregard of it, he assumes the risk. There is a distinction between knowledge of danger, which is a knowledge of the absence of safety appliances which should be in use, and an assumption of risk by working without protest at a machine which has become defective and dangerous. *Lloyd v. Hanes*, 35 S. E. 611, 612, 126 N. C. 359.

The word "risk," as used in the term "assumption of risk," includes more than a knowledge of conditions. It also includes a knowledge or opportunity for knowledge of the peril to the employé arising from the condition. *Atchison, T. & S. F. Ry. Co. v. Bancord*, 71 Pac. 253, 255, 66 Kan. 81.

A servant's implied assumption of risk does not extend to more hazardous work outside of his contract of hiring, and where he is required to do the more hazardous work, and is injured while using defective tools furnished by the master, he will be entitled to recover. *Indiana Natural & Illuminating Gas Co. v. Marshall*, 52 N. E. 232, 233, 22 Ind. App. 121.

The doctrine of assumption of risk and *volenti non fit injuria* does not apply to a case of a breach of the specific statutory duty imposed upon the employer, and the fact that a servant continues in his employ with knowledge of the breach of the duty imposed by statute will not prevent his recovery. *Boyd v. Brazil Block Coal Co. (Ind.)* 50 N. E. 368, 371.

Assumed risk is a contract, and may be implied as well as expressed. When a servant enters upon or continues in a service with full knowledge that it is dangerous, and is fully aware of the extent of the danger to which he is exposed, there is an implied contract of assumed risk, by which the servant waives his right to recover for injuries received by him in such service. *Faulkner v. Mammoth Min. Co.*, 66 Pac. 799, 801, 23 Utah, 437.

#### **Contributory negligence distinguished.**

Contributory negligence is a breach of the legal duty imposed by law upon the servant, however unwilling or protesting he may be; and it differs in this respect from assumption of risk, which is not a duty, but

purely voluntary on the part of the servant. *Dempsey v. Sawyer*, 49 Atl. 1035, 1036, 95 Me. 295.

The doctrine of "assumption of risk" by a servant, is that it is a term of the contract of employment, expressed or implied. Assumption of risk in such cases is the acquiescence of an ordinarily prudent man in a known danger; the risk which he assumes by contract. It is distinguished from contributory negligence, which is that action or nonaction in regard to personal safety by one who, treating the known as a condition, acts with respect to it without due care of its consequences. Thus in *Hesse v. Columbus S. & H. R. Co.*, 58 Ohio St. 167, 169, 50 N. E. 354, 355, it is said that "acquiescence with knowledge" is not synonymous with "contributory negligence." One having full knowledge of defects in machinery with which he is employed may yet use the utmost care to avert the danger which they threaten. Assumption of risk and contributory negligence approximate where danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom, but where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation. One who assumes the risk cannot be said to be guilty of contributory negligence, if, having in view the risk of danger assumed, he uses care, reasonably commensurate with the risk, to avoid injurious consequences. One who does not use such care, and who by reason thereof suffers such injury, is guilty of contributory negligence. *Narramore v. Cleveland, C., C. & St. L. Ry. Co. (U. S.)* 96 Fed. 298, 304, 37 C. C. A. 499, 48 L. R. A. 68.

Contributory negligence and assumption of risk are entirely different, although the two questions may arise under the facts of the same case. Every person suing for a personal injury must show that he was in the exercise of ordinary care and caution for his own safety, so that the question of contributory negligence may arise in every case. But an employé may have assumed a risk by virtue of his employment, or by continuing in such employment with knowledge of the defect and danger; and if he is injured thereby, although in the exercise of the highest degree of care and caution, and without any negligence, yet he cannot recover. *Chicago & E. I. R. Co. v. Heerey*, 68 N. E. 74, 77, 203 Ill. 492.

The doctrine of assumption of risk is distinct from the doctrine of contributory negligence, though there may arise a certain condition of facts capable of supporting either inference. When, therefore, a case arises to which it is shown that the employé has assumed the risk in which the injury arose, or, what is the same thing, in effect,

has waived his right to hold the employer responsible for the risk, the employé is defeated because of his agreement, and not because of his negligence. *Barksdale v. Charleston & W. O. R. Co.*, 44 S. E. 743, 745, 88 S. O. 204 (citing *Bodie v. Charleston & W. O. R. Co.*, 61 S. O. 478, 39 S. E. 715).

The doctrine of voluntary assumption of risk, as distinguished from contributory negligence, is generally applied in cases arising between employer and employé, where an employé, without any excuse for so doing, voluntarily undertakes to work with a tool or appliance which is known to be defective, and by so doing assumes the risk of getting hurt, and thereby releases his employer from liability. *Chicago & N. W. Ry. Co. v. Prescott* (U. S.) 59 Fed. 237, 239, 8 C. C. A. 109, 23 L. R. A. 654.

Assumption of risk is a matter of contract. Contributory negligence is a question of conduct. If a servant would be defeated of a right of recovery for an injury, by the rule of assumed risk it would be because he agreed, long before the accident happened, that he would assume the very risk from which his injury arose. If he were to be defeated by the rule of contributory negligence, it would be because his conduct at the time of the accident, and under all the attendant circumstances, fell short of ordinary care. If the one circumstance of the employé's knowledge of the employer's failure to provide the statutory safeguards were held, as a matter of law, always to overcome the other circumstances characterizing the employé's conduct at the time of the accident, assumption of risk would be successfully masquerading in the guise of contributory negligence. If assumption of risk is the issue, knowledge of defective conditions and acquiescence therein are fatal. If contributory negligence is the issue, knowledge of defective conditions and acquiescence therein may be fatal, may be not, depending upon whether a person of ordinary prudence under all the circumstances would have done what the injured person did. If the risk is so great and immediately threatening that a person of ordinary prudence under all the circumstances would not take it, contributory negligence is established. *D. H. Davis Coal Co. v. Pollard*, 62 N. E. 492, 497, 158 Ind. 607, 92 Am. St. Rep. 319.

Contributory negligence implies the existence of negligence of an injured servant, co-operating with that of the master, and thus aiding in producing the injury. It is distinguished from the doctrine of assumed risk, which is that if the servant, with knowledge of the defect in the master's premises and the danger and risk incident thereto, continues in the service of the master without proper notice to the latter, he assumes the risk incident to the service and growing out of the existence of the defect, and thus without regard to the degree of care which

he may exercise in the performance of his labor. *Texas & P. Ry. Co. v. Bryant*, 27 S. W. 825, 826, 8 Tex. Civ. App. 134.

## ASSURANCE.

See "Covenant for Further Assurance"; "Solid Assurance."

"Assurance," as used in a complaint that plaintiff signed certain papers on the assurance that she was signing a chattel mortgage, means representation, declaration, or persuasion, and that such declaration was made by the person presenting the paper, and hence is a sufficient allegation of fraud. *Fieseler v. Stege*, 33 N. Y. Supp. 749, 750, 80 Hun, 595.

In technical phraseology, the evidence of a contract to deliver at a future date the subject of such contract is never denominated "an assurance." Jacob defines an assurance of land to be where they had conveyed by deed. Blackstone says, a translation or transfer of property being admitted by law, it becomes necessary that this transfer should be properly evidenced. The legal evidences of this translation of property are called the "common assurances of the kingdom," whereby every man's estate is assured to him, and all controversies are either prevented or removed. The terms "conveyance" and "assurance" are convertible and synonymous, in the opinion of the soundest and most accurate writers and judges. *State v. Farrand*, 8 N. J. Law (3 Halst.) 833, 335.

## ASSURED.

It is laid down in *Reynolds on Life Insurance* that the "assured" is the person who is to receive the benefit of the insurance. *Hogle v. Guardian Life Ins. Co.*, 29 N. Y. Super. Ct. (6 Rob.) 567, 570.

In *Brockaway v. Connecticut Mut. Life Ins. Co.* (U. S.) 29 Fed. 706, it is held that the term "assured" referred to the one on whose application the policy was issued, who was the beneficiary and paid the premiums. In *Ferdon v. Canfield*, 104 N. Y. 143, 10 N. E. 146, it is said, although the life of Canfield is the life "insured" by the policy, he was not the party "assured" thereto. His life was the subject of insurance, but the contract does not on its face purport to have been made either with him or for his benefit. Thus, where a wife insures her husband's life for her own benefit, and her husband has no interest in the policy, the wife is the person "assured," within statutes providing for service of notice on person for whom life is assured. *Rowe v. Brooklyn Life Ins. Co.*, 38 N. Y. Supp. 621, 623, 16 Misc. Rep. 323.

The word "assured," as used in an insurance policy providing that the policy should be void if the risk was increased by

the act of the assured, means the person who owns the property, and who applied for the insurance and paid the premium and signed the deposit note, and not one to whom the money was payable in case of loss, though such person had a lease of the premises. *Sanford v. Mechanics' Mut. Fire Ins. Co.*, 66 Mass. (12 Cush.) 541, 548.

As used in a fire insurance policy providing that in case of loss the assured should give immediate notice, stating the number of the policy and the name of the agent, the word "assured" does not mean the person to whom the policy was issued only, but a mortgagee to whom the policy was made payable in case of loss, as his interest should appear, was one of the parties assured within the meaning of the policy, and a notice given by him would inure to the benefit of all other interested parties. *Watertown Fire Ins. Co. v. Grover & Baker Sewing Mach. Co.*, 1 N. W. 961, 962, 41 Mich. 131, 32 Am. Rep. 146.

#### Insured distinguished.

As used in a life insurance policy providing that it was accepted by the assured upon the express conditions that in case said person whose life is hereby insured shall pass beyond the settled limits of the United States the policy shall be void, or in case the said assured shall not pay the annual premiums the policy shall cease, the term "assured" must be held as applicable to him for whose benefit the policy was effected. The terms "assured" and "insured" are generally applicable either to the party for whose benefit the insurance is effected or to the party whose life is insured, and the construction of such terms must depend on their collocation and context in the policy, and there are instances where the word "assured" applies only to the person for whose benefit the policy was effected, and not to the party whose life was insured, and other cases in which the word "insured" is applied only to the party whose life was insured, and not to the person for whose benefit the policy was effected. *Connecticut Mut. Life Ins. Co. v. Luchs*, 2 Sup. Ct. 949, 951, 108 U. S. 498, 27 L. Ed. 800.

### ASTRACHAN.

Astrachans, being a woven material consisting of a cotton foundation and a rough and more or less curled pile warp composed of goat hair, in some samples of which loops of the pile were cut and in others remained uncut, the goat hair being the material of chief value, it was dutiable as a manufacture, in whole or in part, of goat hair, and not as pile fabrics, as there was no rule of construction requiring the words used in the tariff act to be interpreted according to the technical understanding of manufacturers. *In re Herrman* (U. S.) 52 Fed. 941, 944.

The meaning of the word "astrachan"—that is, whether it applies to fabrics composed in whole or in part of goat hair, and therefore dutiable under Act Oct. 1, 1890, § 392, or whether it is a "pile fabric," and thus dutiable under section 396—has been held to depend upon the evidence. Where the evidence indicated that according to the understanding of weavers the goods under consideration—that is, astrachans—were known as "pile fabrics," but the weight of the evidence was that, according to the understanding of commercial men, they were not so classed, it was held that they would be classed according to the weight of the evidence. This decision was reached under the rule that a descriptive term found in a tariff act may have a commercial meaning which differs from the ordinary meaning, notwithstanding it is used in trade as a specific designation by which any article or product is bought and sold. *In re Herrman* (U. S.) 56 Fed. 477, 481, 5 C. C. A. 582.

### ASTRACHAN TRIMMINGS.

What is known commercially as "Astrachan trimmings" are articles woven on a loom, and consisting of a foundation of cotton and a long curled pile, composed of goat hair, the material being woven in strips, which are afterwards cut apart and the sides stitched under, suitable to be made up into dress trimmings. *Lowenthal v. United States* (U. S.) 65 Fed. 420.

### ASYLUM.

See "Orphan Asylum."

As charity, see "Charity."

"Asylum" signifies a refuge and sanctuary, or charitable institution. *Cromley's Heirs v. Institution of Mercy of New York*, 66 Ky. (3 Bush) 365, 391.

An asylum is a sanctuary, or place of refuge and protection, where criminals and debtors found shelter, and from which they could not be taken without sacrilege; an institution for the protection and relief of unfortunates, as asylums for the poor, for the deaf and dumb, or for the insane. *State v. Bacon*, 6 Neb. 286, 291.

An asylum is an institution for the protection and relief of the unfortunate. *Lawrence v. Leidigh*, 50 Pac. 600, 601, 58 Kan. 594, 62 Am. St. Rep. 631.

In the chapter relating to insane persons other than paupers and indigents, the word "asylum" means any public or private hospital, retreat, institution, house, or place in which any insane person is received or detained as a patient for compensation, but shall not include any state prison, county jail, or poorhouse, nor any public reformatory or

penal institution of the state. Gen. St. Conn. 1902, § 2735.

#### In extradition treaties.

"Asylum," as used in extradition treaties, means a place where the matter of which a person is accused may not be tried. In re Stupp (U. S.) 23 Fed. Cas. 281, 291.

"Asylum," as used in the treaty of March 23, 1865, between the United States and Italy, providing for the extradition of any person charged with murder committed within the jurisdiction of one of the contracting parties and who seeks an asylum in the other, includes not only place, but also shelter, security, and protection, and a fugitive seeks such an asylum at all times when he claims the use of the territories of the United States as an asylum. In re De Giacomo (U. S.) 7 Fed. Cas. 366, 367.

#### School for blind.

An institution for the education of the blind is an educational institution, and not an asylum, the purpose being to give the blind such education and training as shall fit them for the discharge of the duties of life, and not to furnish them a home. Curtis v. Allen, 61 N. W. 568, 570, 43 Neb. 184; State v. Bacon, 6 Neb. 286, 291.

#### School for orphans.

An institution organized for the maintenance and tuition of orphan children, particularly children of soldiers who have lost their lives in the service of the United States, is clearly an asylum, and not a school or institution of learning, within the meaning of the constitutional provision (article 8, § 14) permitting payment of moneys for the education of children kept in asylums. Sargent v. Board of Education of City of Rochester, 79 N. Y. Supp. 127, 128, 76 App. Div. 588.

#### Soldiers' home.

A soldiers' home which is established for the relief of old soldiers is an asylum, within the meaning of Const. Kan. art. 5, § 3, providing that no person shall be deemed to have gained or lost a residence, for the purpose of voting, while kept at any almshouse or other asylum at public expense. Lawrence v. Leidigh, 50 Pac. 600, 601, 58 Kan. 594, 62 Am. St. Rep. 631.

An inmate of the soldiers' home, an institution supported out of annual appropriations by the Legislature, is at an asylum at the public expense, within the Constitution, providing that no person shall by such a residence gain a vote in the place where the asylum is located. Silvey v. Lindsay, 13 N. E. 444, 446, 107 N. Y. 55.

The word "asylum," as used in Const. art. 7, § 5, providing that no elector shall be deemed to have gained or lost a residence

while kept at any almshouse or other asylum at public expense, includes a soldiers' home, and therefore a person who becomes an inmate of a soldiers' home gains no residence in the municipality where the home is located. Wolcott v. Holcomb, 97 Mich. 361, 364, 56 N. W. 837, 23 L. R. A. 215.

A soldiers' home, the inmates of which are maintained at public expense, is an "asylum" within the meaning of Const. Idaho, art. 6, § 5, providing that for the purpose of voting no person shall be deemed to have gained or lost a residence while kept at any almshouse or other asylum at public expense. Powell v. Spackman, 65 Pac. 503, 504, 7 Idaho, 692, 54 L. R. A. 378.

#### AT.

Where, after the word "at" in a promissory note, a blank is left for the place of payment, the word "at" implies that the blank space may be filled, before the note is delivered, with the designated place of payment. Redlich v. Doll, 54 N. Y. 234, 239, 13 Am. Rep. 573; Kitchen v. Place (N. Y.) 41 Barb. 465, 466.

The fact that a note was payable "at a bank" merely designates the place where the holder may find the maker and ascertain whether the maker is ready, able, and willing to pay the same, and does not mean that the note was payable by or through the bank. Grissom v. Commercial Nat. Bank, 10 S. W. 774, 777, 87 Tenn. (3 Pickle) 350, 3 L. R. A. 273, 10 Am. St. Rep. 669.

St. 57 Geo. III, c. 99, § 40, requires that a notice of intended action against a clergyman to recover penalties for nonresidence shall be delivered to the bishop of the diocese by leaving the same "at the registry" of his diocese. Held, that the delivery of a notice in writing of such a suit to the bishop's deputy registrar at the registrar's house, which was carried the next morning to the registry office and there left, was not a leaving at the registry required by the statute, and was invalid. Vaux v. Vollans, 4 Barn. & Adol. 525.

#### As after.

The phrase "at the expiration of" defines a limit of time. It marks the close of a period, not its beginning. A contract authorizing its cancellation at the expiration of three months cannot be construed to authorize a cancellation after such time. Ferree v. Moquin-Offerman-Hessenbuttel Coal Co., 61 N. Y. Supp. 120, 121, 29 Misc. Rep. 624.

"At," as used in a contract of subscription for stock, giving the subscriber the right, "at the expiration of three years" from the time stated, to elect whether he would keep the stock or turn it over to certain named



parties, is equivalent in meaning to "after," and the subscriber was not required to give the notice of his election immediately on the expiration of the three years, but could do so within a reasonable time thereafter. *Rogers v. Burr*, 25 S. E. 339, 341, 97 Ga. 10.

Where a lease provided that the lessee should have the right to remove personal property "at the end of this term," it was evident that the clause was not inserted to limit the lessee's right to remove, but to protect him, and, if any force is to be given to this provision, it means that after the expiration of the term the lessee should be permitted ingress and egress for a reasonable time to remove the property. *Davidson v. Crump Mfg. Co.*, 58 N. W. 475, 476, 99 Mich. 501.

Comp. Laws, c. 49, § 17, providing that "at the end of one year" from the tax sale the collector shall execute to the purchaser a deed of the lands so sold and not redeemed, is to be construed as meaning "after the expiration of the year." *Annan v. Baker*, 49 N. H. 161, 171.

A contract for the sale of realty, agreeing that a certain sum should be paid on the purchase price "at the expiration of three months," means precisely on the day on which the three months expire, and not at any time after such expiration. *Hollmann v. Conlon*, 45 S. W. 275, 278, 143 Mo. 369.

#### In boundaries.

A conveyance of land describing its boundaries as beginning "at" a certain tree does not necessarily fix the point at the center of the tree. That may be, in the absence of other circumstances to qualify the description, the legal effect of it. "But with proof of an actual division and occupation upon a line beginning at the outer surface or near the tree, the deed may be interpreted in conformity with the practical effect given it by the parties. The description, in connection with the visible occupation, was sufficiently accurate for all practical purposes, and the line located at the outer surface of the tree is not inconsistent with the terms of the deed. The corner is substantially 'at' the tree." *Stewart v. Patrick*, 68 N. Y. 450, 454.

It is a well-settled rule that where a boundary of land is described as beginning "at" a road, or "on" a road, or as "bounded by" a road, without qualifying words, the boundary is the center of the road, and not the side thereof; and so, where land is conveyed and described by a lot number as indicated on a map, and the land fronts on a road or highway, the boundary will be the center and not the side of the road. *Lee v. Lee* (N. Y.) 27 Hun, 1, 4.

#### Contingency created.

"At," as used in a will giving a legatee a legacy when he arrives at a certain age,

means that the legacy is contingent. *Colt v. Hubbard*, 33 Conn. 281, 286.

In a bequest to a person at a given age or marriage, the word "at" makes the bequest prima facie contingent. *Post v. Herbert's Ex'rs*, 27 N. J. Eq. (12 C. E. Green) 540, 543.

#### As during.

"At the term," as used in Attachment Act, § 25, requiring that the declaration shall be filed on the return of the attachment, or at the term of court when the same is returnable, means "during the term." *Lawver v. Langhans*, 85 Ill. 138, 141.

In Rev. St. § 7356, providing that the Supreme Court shall have jurisdiction to review errors of law occurring at the trial or appearing in the pleadings or judgment, the word "at" may signify more than "in" the trial or "on" the trial, and means during the progress of the trial from its inception to its end, and therefore includes within its meaning errors of law prejudicial to the defendant occurring while the court is impaneling a jury for the trial. *Hartnett v. State*, 42 Ohio St. 568, 572.

"At the trial," as used in 22 & 23 Car. II, requiring the certificate of the judge to give a plaintiff full costs "at the trial of a cause" when the damages found by the jury are less than 40 shillings, means at any time before verdict and final judgment, and the final judgment is the latest time at which the certificate can be made. *Simonds v. Barton*, 76 Pa. (26 P. F. Smith) 434, 436.

A statutory requirement that a party shall be an inhabitant or resident of the state "at the time" of the desertion in order to entitle him to sue for a divorce on the ground of desertion, refers to the whole period of three years during which the desertion must have continued, not to the mere commencement or act of desertion. *Coddington v. Coddington*, 20 N. J. Eq. (5 C. E. Green) 263, 265; *Sanders v. Sanders*, 29 N. J. Eq. (2 Stew.) 410.

The preposition "at" primarily signifies near to, about, coextensive with, etc. It is very commonly used, however, in the sense of "during," as in Cr. Code, § 120 (2 Gav. & H. St. p. 420), providing that a bill of exceptions in a criminal prosecution must be made out and presented to the judge "at" the time of trial. The section means that such exception must be made out during the time of trial. *Jenks v. State*, 39 Ind. 1, 2.

#### As even at, or as early as.

In Civ. Code, § 1011, regulating the manner of proceeding on failure to perfect appeal, and providing that if the appellant shall fail to deliver the transcript and other papers, if any, to the clerk, and have his appeal docketed, on or before the second day of the term next after such appeal, the appellee

may "at the same term of such court" file a transcript of the proceedings, etc., such phrase should be construed as words of enlargement, permission, and privilege, meaning "even at" or "as early as" the same term of court, and should not be regarded as a restriction to the same term of court and to that term only. *Wilson v. Wilson*, 36 N. W. 661, 664, 23 Neb. 455.

#### As exclusive.

In an agreement for a conveyance of land on payment of the purchase money, a certain amount of which was to be paid annually, "the time commencing 'at' the date of the agreement," "at" meant that the day of the date was to be excluded in the computation. *Farwell v. Rogers*, 58 Mass. (4 Cush.) 460, 464.

In ordinary speech "at" more generally means within than without. Thus "at a town" or "at a county" means at some place within the town or within the county, rather than a place without, or even at the utmost verge of, but not in, the town or county. So, in indictments, the fact is generally stated to have been done "at" the place; and, if it were not done in the place, the venue would be wrong. Thus a charter granting a right to construct a canal beginning "at" the District of Columbia does exclude such district. *Chesapeake & O. Canal Co. v. Key* (U. S.) 5 Fed. Cas. 563, 565.

"At" is used, according to lexicographers, to denote near, approach, nearness, or proximity. Its primary idea may be conceded to be nearness. We may admit that it more generally means "within" than "without," but it is sometimes used to denote exclusion rather than inclusion. It may be used so ambiguously as to require explanation. One, for instance, may be "at" a place and not "in" it, and yet the preposition would serve in either event. The provision for the construction of a road "at the back of the garden," in the absence of anything else, might imply that it was to be constructed within the garden. It may mean within and at the back line, or without and back of, according to circumstances. And where a man insisted that the words "at the back of the garden" should be inserted before he would sign a deed, the clear meaning would be that the road should not run within the garden, but back of the garden and without the garden altogether. *Knoxville, C. G. & L. Ry. Co. v. Beeler*, 18 S. W. 391, 392, 90 Tenn. (6 Pickle) 548.

#### As immediately before.

"At the time of," in 53 Geo. III, c. 159, limiting the liability of a shipowner for damages done by the collision of his ship with another to the value of his ship "at the time of" the collision, meant the value immediately before such accident. *Brown v. Wilkinson*, 15 Mees. & W. 391, 397.

Testator devised lands to his daughter C. during the term of her life, and immediately after her death unto and among every such child and children as the said C. shall have lawfully begotten "at the time of her death," in fee simple, equally to be divided between them. Held, that the phrase "at the time of her death" signified in her lifetime. *Barnes v. Provost* (N. Y.) 4 Johns. 61, 64, 4 Am. Dec. 249.

#### As in or within.

A covenant to deliver tobacco "at" a warehouse does not require the obligor to deliver it "in" the warehouse. *Duckham v. Smith*, 21 Ky. (5 T. B. Mon.) 372, 374.

The word "at," in a declaration alleging that a certain act was committed at a certain shop, is not uncertain on the theory that it may imply either that the act was done in the shop or outside of it, but expresses the idea that the act was done inside the shop. *Kaler v. Tufts*, 81 Me. 63, 65, 16 Atl. 336, 337.

In holding that the words "at the courthouse," in a statute requiring the board of supervisors to meet at the courthouse, required them to meet in the courthouse, and not at the chancery clerk's office, which was held within a quarter of a mile of the courthouse, which was authorized by the statute, because no office was provided in the courthouse, the court says that the preposition "at," when it precedes the name of the place and denotes situation, frequently means the same as "in" or "within." *Harris v. State*, 18 South. 387, 388, 72 Miss. 960, 33 L. R. A. 85.

The word "at," in common parlance, is frequently used as denoting the situation or place where a person or thing is, or something transpired. Thus, in speaking of a place where a person resides, it is commonly said he resides "at" Washington City, "at" New Orleans, or "at" Little Rock, conveying distinctly, in each instance, that the person resides in the place named. Such was the use by the Legislature when it says that court should be holden "at Little Rock." Thus the words "at" and "in" are often used as synonymous, as well in the laws as in the ordinary language in common use in the country. *Graham v. State*, 1 Ark. (1 Pike) 171, 180, 181.

The word "at," when used to denote local position, may mean "in," "on," or "near by," according to the context, denoting usually as the names of towns. If the city is of great size, however, "in" is commonly used, unless the city is conceived of as a mere geographical point, when "at" is used, as, for instance, "our financial interests center 'at' New York." With the names of cities and towns, the use of "at" or "in" depends not so much upon the size of the place, as upon the point of view. When we think

merely of the local or geographical point, we use "at"; when we think of inclusive space, we employ "in." Primarily the word "at" expresses the relation of nearness, the relation of presence, nearness in place. It is less definite than "in" or "on." "At the house" may be "in" or "near" the house. To determine the sense in which the word is used, the subject-matter with reference to which it is used must be taken into consideration. The word, in a subscription to a college conditioned to be located "at" a certain town, was construed to have been used only as denoting a place conceived of as a mere geographical point, and not as fixing a condition that the college should be located within the corporate limits of such town. *Rogers v. Galloway Female College*, 44 S. W. 454, 455, 64 Ark. 627, 39 L. R. A. 636.

A statute providing that, if the premises in an action of ejectment are actually occupied, the declaration shall be served by delivering a copy thereof to the defendant named therein, or by leaving the same with some white person of the family, of the age of 10 years or upwards, "at the dwelling house" of said defendant, if he be absent, does not require that the paper shall be delivered to a person who is in the house at the time of such delivery, but it may be delivered to one who is at or near the dwelling house, but it must be delivered on the step or on a portico or in some outhouse adjoining to or immediately connected with the family mansion, and the delivery at a distance of 125 feet, and in a corner of the yard, is not a compliance with the statute. *Kibbe v. Benson*, 84 U. S. (17 Wall.) 624, 629, 21 L. Ed. 741.

Under a statute requiring the posting of notices "in" certain public places, an affidavit stating that they were posted "at" such places is insufficient. The Legislature had seen fit to use the word "in" for good reasons, and certain it is that the words "in" and "at" are not synonymous, and may have a very different meaning, depending on their connection, and to give them the same meaning by construction might, by forcing them out of their natural meaning, lead at best to uncertainty. *Hilgers v. Quinney*, 51 Wis. 62, 68, 8 N. W. 17.

The term "at and between," in a mortgage of a railroad between certain termini, operates to prevent the mortgage from being construed to include part of the railroad lying outside such termini. *Chapman v. Pittsburgh & S. R. Co.*, 26 W. Va. 299, 309.

#### Same—In criminal law.

In an indictment, charging an assault "at" a certain schoolhouse, "at" will be construed to mean "in." The word "at" has been construed as equivalent to "in," or "within" to "in," or "near" to "into." Mr. Bishop says it is immaterial whether "in"

or "at" be used in the allegation of place in an indictment. *Blackwell v. State*, 17 S. W. 1061, 30 Tex. App. 416 (citing 1 Bish. Cr. Proc. § 378).

"At," as used in an indictment charging that the offense was committed at the parish of C., is synonymous with and equivalent to the word "in," and "at" the parish and "in" the parish conveys the same idea and means the same thing. *State v. Nolan* (La.) 8 Rob. 513, 517.

#### Same—In railroad charters.

The words "from," "to," and "at" are taken inclusively, according to the subject-matter. Thus authority to construct a railroad or turnpike from A. to B., or beginning at A. and running to B., is held to confer authority to commence the road at some point within A., and to end it at some point within B. *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 346, 23 L. Ed. 428.

"At," as used in the articles of association of a railroad company, organized to construct a railroad to commence in the city of Brooklyn, at some convenient point, and to terminate "at" Newtown, Queens county, does not mean "at the limit or boundary of Newtown," thus locating one terminus of the road at the boundary of such town, which is also the boundary of the city of Brooklyn, and would restrict the road wholly to that city. The words "to" and "at," when preceding the name of a place and denoting situation, may mean "in" or "within." *Mason v. Brooklyn City & N. R. Co.* (N. Y.) 35 Barb. 373, 377.

A railroad was authorized to commence at or near the city of Schenectady, and run thence on the north side of the Mohawk river. The city of Schenectady was located on the south bank of Mohawk river, the north bounds of the city being the middle of the channel of the river. Held, that the word "at" or "near," as used in the charter of the company, was used in an inclusive sense, and authorized the railroad company to build a bridge over the Mohawk, and commence their railroad "at or within" the city. *Mohawk Bridge Co. v. Utica & S. R. Co.* (N. Y.) 6 Paige, 554, 561.

As used in the charter of a railroad company by which the terminus was "at or near Atlantic avenue," the terminus was not necessarily to the side of the avenue, but might be adopted at a point within it. *People v. Brooklyn, F. & C. I. Ry. Co.*, 89 N. Y. 75, 87.

#### As near as to place.

"At," as used in a statute providing that to be fellow servants the servants must be working together "at" the same time and place, indicates nearness in time and place. It does not demand an exact coincidence as to either, but only that it shall be sufficiently

so to afford the employes a reasonable opportunity of observing the conduct of each other with a view of guarding themselves against injury therefrom. Thus a switchman injured by a car pushed by a locomotive was a fellow servant with the engineer. *Gulf, C. & S. F. Ry. Co. v. Warner*, 35 S. W. 364, 366, 89 Tex. 475; *Dryburg v. Mercur Gold Min. & Mill. Co.*, 55 P. 367, 371, 18 Utah, 410. Thus it was held that where two crews of men were employed in unloading ties, the day crew performing the actual work of unloading, while the night crew removed and piled the ties, the day crew and night crew were not working together at the same time and place. *Texas & N. O. Ry. Co. v. Echols*, 41 S. W. 488, 491, 17 Tex. Civ. App. 677. But miners separated by a wall of rock 12 feet thick were not working at the same place. *Dryburg v. Mercur Gold Min. & Mill. Co.*, 55 Pac. 367, 371, 18 Utah, 410.

The word "at," in a notice to a city of a personal injury stated to have been received "at" the crossing of two streets is to be construed as meaning "at or near," or other equivalent phrase. Such a description is a sufficient compliance with Acts 1895, c. 172, requiring the notice of the injury to the city to state the place of action. *Wood v. Borough of Stafford Springs*, 51 Atl. 129, 130, 74 Conn. 437.

A statute providing that notice of sale under a trust deed shall be posted "at the courthouse door" does not mean that notices should be posted on or in the door, and the statute was sufficiently complied with where such notices were posted in the corridor of the courthouse, about 40 feet from the front door, at the side of the stairway leading to the courtroom. *Howard v. Fulton*, 14 S. W. 1061, 1062, 79 Tex. 231.

The words "at" and "near," as used in a provision that certain offices should be kept "at or near" a courthouse, are synonymous. *Harris v. State*, 18 South. 387, 388, 72 Miss. 960, 33 L. R. A. 85.

The words "at" and "near," as used in an order directing a militia captain to parade his company "at or near" a certain house, are synonymous. The word "at" is used to denote near approach, nearness, or proximity. *Annan v. Baker*, 49 N. H. 161, 171.

The preposition "at" denotes primarily nearness, presence, or direction towards. *Webst. Dict.* Thus a mortgage on property "known as the town property of said Attalla Iron & Steel Co. at Attalla" is not necessarily limited to property in such town, but may also include property nearby. *O'Conner v. Nadel*, 23 South. 532, 533, 117 Ala. 595.

"In general 'at' denotes nearness or presence, as at the ninth hour, at the house. 'At' the house may be in or near the house." Thus, where an order directed militia to appear at or near a house, and the proof show-

ed that defendant was not near, it was proof that he was not at the house. *Bartlett v. Jenkins*, 22 N. H. (2 Fost.) 53, 63.

The word "at," as used in a declaration describing the place where an event occurred, means a relation of proximity to or nearness to, and failure to prove the exact spot alleged does not therefore constitute a variance. *West Chicago St. R. Co. v. Manning*, 70 Ill. App. 239, 242.

#### Same—In criminal law.

The words "at and near," in a statute prohibiting the disturbance of a religious assembly by acts "at or near" the place of worship, are for the purpose of providing for a punishment of cases of disturbance by the offender who may be near the scene of the disturbance, as well as those committed in the very presence of the assembled worshippers. In what precise locality the offender may be is not an essential element of the offense, and it may be shown by proof, and need not be averred after presentment. *Warren v. State*, 50 Tenn. (3 Helsk.) 269, 271.

"At" is an indefinite word, and may mean "in" or "within," or it may mean "near." Its primary idea is nearness, and it is less definite than "in" or "on." "At" the house may be "in" or "near" the house. It is a relative term, and its signification depends largely upon the subject-matter in relation to which it is used, and the circumstances under which it becomes necessary to apply it to surrounding objects. "At" and "near" may be considered synonymous, and a charge in an indictment that the accused disturbed a congregation of persons lawfully assembled for divine service "at" a named church, is sustained by proof that he disturbed a congregation so assembled for such purpose at a bush arbor "near" such church, both places being within the jurisdiction of the court. *Minter v. State*, 30 S. E. 989, 992, 104 Ga. 743.

"At," as used in an indictment charging an assault to have been committed "at" M., meant "in" or "near"; and treating the allegation as laying the venue, and not as descriptive of the place, proof that assault was committed five miles away did not constitute a variance. *Hurley v. Marsh*, 2 Ill. (1 Scam.) 329, 330.

As used in Rev. Code, § 3622, providing for the punishment of any person betting at a game of cards played "at a storehouse," the word "at" should be construed to mean "near to" and "in front of" the storehouse. *Napier v. State*, 50 Ala. 168, 170. So, also, playing cards within 10 feet of a storehouse within which liquors were sold, constituted a violation of Code, § 3622, forbidding the playing of any game with cards, etc., at any tavern, inn, or storehouse for retailing liquors. *Ray v. State*, 50 Ala. 172, 173.

The words "at or near," in an indictment for card playing at or near a certain public place, renders the indictment bad for uncertainty, as playing near a public place would not necessarily be a violation of the statute, unless it appears so near that it, too, was rendered a public place by reason of its proximity. *Bishop v. Commonwealth* (Va.) 13 Grat. 735, 737.

#### Same—In railroad charters.

That the places from and to which a railroad is to be constructed must be specified, is sufficiently complied with by designating one terminus as "at" or "near" Bergen Cut, though the cut is more than a mile long. *Central R. Co. of New Jersey v. Pennsylvania R. Co.*, 31 N. J. Eq. (4 Stew.) 475, 486.

A contract by a railroad company to establish its depot "at" a specified town, is complied with by locating it at a convenient distance from the business portion of the town. *Frey v. Ft. Worth & R. G. Ry. Co.*, 24 S. W. 950, 951, 6 Tex. Civ. App. 29.

"At" is defined by Webster to express "primarily," "nearness in place or time." "At" the house may be "in" or "near" the house, and authority to connect with the railroad at the most practicable point "at" a certain city is not transgressed when the most practicable point is half a mile from the city limits. *Purifoy v. Richmond & D. R. Co.*, 12 S. E. 741, 742, 108 N. C. 100.

The construction of a railroad from a point a mile and a half from P. was held a sufficient compliance with its act of incorporation requiring it to construct the road from a point "at or near" P. *Appeal of Parke*, 64 Pa. (14 P. F. Smith) 137, 141.

The signification of the word "at" depends largely on the subject-matter in relation to which it is used, and the circumstances under which it becomes necessary to apply it to surrounding objects, and, when used in the new charter of a bridge corporation requiring it to build a bridge "at" the Old Town Falls, will not be held to be synonymous with "at or near," as used in a former charter, but meant a new place, so that rebuilding the bridge 2,000 feet from the falls did not constitute a compliance with the charter. *State v. Old Town Bridge Corp.*, 26 Atl. 947, 950, 85 Me. 17.

When used in reference to place, "at" frequently means "in" or "within," but sometimes denotes nearness or proximity, which is its primary signification, and it is less definite than "in" or "on." Its signification is generally controlled by the context and attending circumstances, and, when used in a contract requiring a railroad company to construct its road so as to intersect another line "at" a certain city, means an intersection near the city, and not necessarily within the

corporate limits. *Ft. Worth & N. O. Ry. Co. v. Williams*, 18 S. W. 206, 208, 82 Tex. 553.

Act March 15, 1864 (P. L. p. 283), authorized a railroad to purchase and hold at the termini of its road, and at any intermediate station on the line thereof, lands not exceeding 15 acres for station purposes. Held, that the expression "at the termini," as so used, meant "near," and therefore the tract it was authorized to purchase need not include the point where the rails end nor join the roadway, but that a reasonable discretion was intrusted to the company to purchase and hold land at or near the terminus, wherever convenience might dictate. *West Jersey R. Co. v. Receiver of Taxes of City of Camden*, 38 N. J. Law (9 Vroom) 299, 302.

#### As near as to time.

"At," as used in Pol. Code, § 2520, providing that the Governor shall appoint three harbor commissioners, and shall "at" the expiration of their respective terms appoint and commission their successors, means, not the exact moment, but near it, and may mean a few moments before or a few moments after. *People v. Blanding*, 63 Cal. 333, 339.

"At the time," as used in the statute of frauds requiring some payment "at the time" of the transaction, did not mean rigorously eo instante. It did not contemplate that the contract and the payment should be at the same time, in the sense that they are considered parts of one and the same continuous transaction. A payment by check which was not cashed until afterwards was within the statute. *Hunter v. Wetsell*, 84 N. Y. 549, 554, 38 Am. Rep. 544.

Rev. St. § 3324, requiring a retail dealer of distilled spirits to deface and obliterate the stamp on the cask "at the time of emptying such cask," and providing a punishment for failure to do so, should not be construed as requiring the effacing and obliterating of the stamp to be done eo instante that the cask is empty, but the act should be done in a convenient time, considering the surrounding circumstances affording evidence of reasonable excuse for delay; and hence, if a cask had been emptied as far as could be done by the faucet, and if it had been removed from the place where it had been used in the course of business, and the stamp had not been effaced and obliterated because the dealer regarded the cask as still containing spirits of value, which she desired to save when she could procure the necessary assistance to pour it out of the bung hole, and a day had not elapsed from its removal until its discovery by revenue officers, there was a reasonable cause for the delay, and the dealer was not guilty of a violation of the statute. *United States v. Buchanan* (U. S.) 9 Fed. 689, 690.

A contract for the shipping of cattle on a railway, providing that no claim would be allowed the shipper unless made in writing "before or at the time" the stock was unloaded, does not mean that such claim must be made at the identical moment of unloading, but so immediately that the object sought by the notice can be attained. "The apparent object of the provision was to enable the company to inspect the stock and ascertain the amount of the alleged damages, and if the claim is made before the stock is mixed with other cattle or slaughtered, or the ascertainment of damages otherwise rendered impracticable, the condition is complied with." *Rice v. Kansas Pac. Ry.*, 63 Mo. 314, 323 (citing *Goggin v. Kansas Pac. Ry. Co.*, 12 Kan. 416).

In a prosecution for bastardy, a judgment allowing expenses incurred "at the birth" of the child cannot be construed as extending beyond lying-in expenses. *Comstock v. Weed*, 2 Conn. 155, 157.

The word "at," in a contract requiring the vendee therein to purchase certain property "at the expiration of three years" from date, meant the day on which the period of three years from date expired. While the word "at" is not invariably used to denote a fixed and definite time or place, and is sometimes so used as to mean "about" or "near to" the time or place stated, as "at the house" may and often does mean about or near the house, yet, in the case of a note or bill payable at a bank at the expiration of 60 days from date, it would hardly be argued, on the authority of Webster or Worcester, that the legal requirements of a contract would be satisfied by a demand of payment anywhere about or near the bank, or near to or within a reasonable time after the expiration of the period of 60 days. In the construction of a will giving a legatee the right of election, to be exercised "at" the death of the testator, it would undoubtedly be held that the right might be exercised within a reasonable time after the event, because the more rigid interpretation of the word would be obviously inconsistent with the intention of the testator, and would necessarily and inevitably defeat the exercise of such right. There is no such reason for applying the same rule of construction to the present case. *Magoffin v. Holt*, 62 Ky. (1 Duv.) 95, 96.

#### As until or up to.

In a will giving a certain sum of money to the children of testator's daughter that she might or should have at the time of her death, "at" should be construed in the sense of the word "until." *Haggerty v. Hockenberry*, 30 Atl. 88, 89, 52 N. J. Eq. (7 Dick.) 354.

In a receipt "received of M. in various payments at this date, on account of," etc., "the sum of," etc., the words "at this date" cannot by themselves be held to mean up to this

date, since each phrase of the receipt had a distinctive import, but referred directly to the date of the receipt, and plainly meant that there was more than one payment included in the receipt on the day on which it was given. *Moore v. Korty*, 11 Ind. 341, 343.

In its customary acceptance the word "at" is generally understood to mean "at the time of," not "before" or "after," but expresses the relation of presence and nearness in either place or time, and, as used in referring to rights and duties "at the date of an assignment," means the rights and duties as they existed when the assignment was made; that is, prior to or up to the date of the assignment becoming operative. *Howe v. Warren*, 40 N. E. 472, 473, 478, 154 Ill. 227.

#### AT AND FROM.

"At and from," as used in a policy of marine insurance on a vessel "at and from" an island, means something more than an insurance at and from a port, and means that the vessel may use the different ports of the island for the purpose of obtaining the return cargo. "The word 'at' comprises the whole island, and under that word the ship is protected in going from port to port around the coast of the island." *Dickey v. Baltimore Ins. Co.*, 11 U. S. (7 Cranch) 327, 328, 3 L. Ed. 360.

"At and from Boston to St. Thomas and a market," as used in a marine policy, meant that so long as the vessel was seeking a market in the West Indies, no matter how frequently she went from port to port, she was within the protection of the policy. *Deblois v. Ocean Ins. Co.*, 33 Mass. (16 Pick.) 303, 309, 28 Am. Dec. 245.

#### As on arrival at port.

A marine policy "at and from" a port must be construed according to circumstances. If a vessel be in a foreign port in the course of a voyage, the risk attaches from her first arrival there. *Seamens v. Loring* (U. S.) 21 Fed. Cas. 920, 924.

According to the general import of the words "at and from," a policy of insurance "at and from" any port or ports in Newfoundland would ordinarily attach on the ship's first mooring in the harbor or coast; but it appearing that, according to the usage of the Newfoundland trade, when ships arrive they are either employed for some time in fishing, or they make an intermediate voyage in the American seas before beginning to take in their homeward cargo, during which they are protected by separate policy, the risk of the underwriter only commences from the time when the banking or intermediate voyage ends. *Vallance v. Dewar*, 1 Camp. 503, 508.

When a vessel is insured for a voyage "at and from" a certain place, and the ship is not then in port, the policy commences to run

at the time it safely arrives at the specified point, and continues during its stay, while preparing for the voyage insured against. *Snyder v. Atlantic Mut. Ins. Co.*, 95 N. Y. 196, 201, 47 Am. Rep. 29.

A marine policy insuring a vessel "at and from" Bengal to England means the first arrival of the ship at Bengal. *Motteux v. London Assur. Co.*, 1 Atk. 545, 548.

#### As at commencement of ownership.

If assured becomes owner while the vessel is lying in port, the policy "at and from" the port does not attach until after his ownership commences. *Seamens v. Loring* (U. S.) 21 Fed. Cas. 920, 924.

#### As at commencement of preparations for voyage.

"At and from," as used in a marine policy providing that the policy shall cover the vessel "at and from" a certain port, means that the liability of the insurer attaches at the time of the commencement of preparations for the voyage. *Snyder v. Atlantic Mut. Ins. Co.*, 95 N. Y. 196, 201, 47 Am. Rep. 29; *Seamens v. Loring* (U. S.) 21 Fed. Cas. 920, 924; *Kemble v. Bowne* (N. Y.) 1 Caines, 75, 79.

Under a policy of insurance on goods to be carried from Bristol to New York, the policy attached on the goods while preparations were being made for sailing. *Hendricks v. Commercial Ins. Co.* (N. Y.) 8 Johns. 1, 7.

A policy of marine insurance insuring a vessel "at and from" a certain port will be construed to allow the vessel a reasonable time while there engaged in the business of preparing for her voyage. *Thebaud v. Great Western Ins. Co.*, 50 N. E. 284, 286, 155 N. Y. 516.

A policy of marine insurance on goods on board a certain schooner "at and from" S. to F., beginning the adventure from the loading of the goods on board at S., means from the loading on board; the policy cannot attach until they leave the shore to be laden on board. "'At and from,' when applied to a ship, includes the period of her stay in the port from the time of her arrival there, and when applied to goods means from the time the goods are put on the vessel." *Patrick v. Ludlow* (N. Y.) 3 Johns. Cas. 10, 12, 2 Am. Dec. 130.

#### As at date of policy.

"At and from," as used in a marine policy stating that the insurance is on a vessel "at and from" a certain port, means that the policy is operative "from the time it is placed on the vessel in preparation for the voyage contemplated." *Snyder v. Atlantic Mut. Ins. Co.*, 95 N. Y. 196, 201, 47 Am. Rep. 29.

Under a policy on a ship "at and from" Bristol to London, where the vessel was lying

in port, complete and ready for sea, the risk on the policy could only commence from its date; therefore, where the assured did not sail for three months after the execution of the policy, the delay was a material variation. *Palmer v. Marshall*, 8 Bing. 317, 318.

#### As covering deviations or returns.

In a policy on a cargo of a vessel assured for a voyage "at and from Baltimore to Boston," the risk commenced from the time the vessel was loaded, and a deviation thereafter would avoid the policy, whether it occurred before or after the vessel actually left the port of departure; and where the cargo was on board by the 19th of November, and the vessel did not sail until the 22d of December, the delay being unexcused, there was a deviation, and the underwriter was discharged. *Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 343, 373.

The words "at and from Plymouth to the banks and thence back to Plymouth" is a definite and distinct description of a contemplated voyage between two fixed termini, and the vessel cannot make a third port for the purpose of obtaining bait for the fishing voyage in which she is engaged, in the absence of a custom of so doing. *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70, 77, 30 Am. Rep. 654.

"At and from," as used in a marine policy insuring a vessel "at and from" a certain port, means that there is a certain continuous and indivisible risk, and a voluntary and unnecessary departure from port, except on the voyage insured, discharges the underwriter from liability on the policy. *Fernandez v. New York Mut. Ins. Co.*, 48 N. Y. 571, 575.

Insurance of a vessel at and from New York to Havana contemplates the risk of a single voyage limited to the points named. *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571, 575, 8 Am. Rep. 571.

A marine insurance policy insuring a ship, her cargo, and freight, "at and from" a certain port to the port of discharge, rendered the company liable after the return of the vessel to the port from which she started for repairs, and also on the subsequent journey to the port of discharge. *Taylor v. Lowell*, 3 Mass. 331, 344, 3 Am. Dec. 141.

#### As covering initial freight.

Where a policy of marine insurance insured the goods and ship "at and from" all and every port on the coast of Brazil, and after the 17th of September to the Cape of Good Hope, beginning the adventure on the goods from the loading thereof aboard the said ship at all and every port on the coast of Brazil and from the 17th of September, and upon the ship in the same manner, the policy only attached on the homeward-bound cargo laden on board at the coast of Brazil, and did not cover the cargo originally taken

in at the Cape of Good Hope, though such cargo was commissioned on board after the 17th of September, while the ship was on the coast of Brazil, and after she left it on her return to the Cape. *Robertson v. French*, 4 East, 180, 140.

#### **As limited to initial freight.**

As used in a contract of insurance on the freight of a steamer and barge against the total loss of the steamer's or barge's freight "at and from" St. Louis to New Orleans, "at and from" cannot be construed as limiting the insurance to the freight list for goods on board at St. Louis when the voyage was begun, but, in view of the well-known usage of boats in the Mississippi trade to touch at intermediate ports, it covered additions to the cargo received in the usual manner at such ports. *Stillwell v. Holmes Ins. Co.* (U. S.) 23 Fed. Cas. 92.

A marine policy on a vessel on a voyage "at and from" Alexandria to St. Thomas and to other ports on the West Indies, and back to her port of discharge in the United States, "upon all goods or merchandise" laden or to be laden on board, covers the very excessive cargo taken on board in the course of the voyage out and at home. *Columbian Insurance Co. v. Catlett*, 25 U. S. (12 Wheat.) 383, 395, 6 L. Ed. 664.

Where insurance was taken out on freight "at and from St. Louis to New Orleans," the insurance attached not only on the freight at St. Louis, but as to any part of the cargo on the way. *Stillwell v. Commercial Ins. Co.*, 2 Mo. App. 22, 31.

#### **As requiring presence at port.**

A marine policy insuring a ship "at and from" a certain place means, either that the ship is at the port at the time the insurance is effected, or will shortly be there. *Hull v. Cooper*, 14 East, 479, 480.

A policy attached to a vessel insured "at and from" Calais, Me., on the 16th day of July at noon, to "at and from all ports to which she may proceed for six months," though there was no evidence that the vessel was at or prosecuting her voyage from Calais on the day named, it appearing that when the policy was made neither party knew when the vessel sailed from Calais, and that it was their intent to insure on time, without regard to the place where the vessel might be. *Martin v. Fishing Ins. Co.*, 37 Mass. (20 Pick.) 389, 395, 32 Am. Dec. 220.

A marine policy on a vessel "at and from" a certain point attaches, although the vessel at the time has left the port, if neither party in the policy has knowledge of the latter fact, and the intention is to insure on time, without regard to the place where the vessel may be. *Martin v. Fish-*

*ing Ins. Co.*, 37 Mass. (20 Pick.) 389, 395, 32 Am. Dec. 220.

#### **AT OR ABOUT.**

A call in a description for "at or about" the head of a certain stream was sufficiently accurate though it might extend a few rods either way from the place originally intended. *State v. Coleman*, 18 N. J. Law (1 J. S. Green) 98, 103.

#### **AT OR BEFORE.**

A promise to pay a person "at or before" a day named is a promise to pay on the day named, the promisor having the option to pay before that time. *Wilson v. Bicknell*, 49 N. E. 113, 170 Mass. 259.

Within a certain period "on or before" a day named and "at or before" a certain day are equivalent terms, and the rules of construction apply to each alike. *Leader v. Plante*, 50 Atl. 54, 95 Me. 339, 85 Am. St. Rep. 415.

#### **AT OR NEAR.**

See, also, "Near."

An allegation in a petition that plaintiff's intestate was killed "at or near" a private crossing should be construed to mean that she was killed at a place on the track other than the crossing. *Davis' Adm'r v. Chesapeake & O. R. Co.*, 75 S. W. 275, 277, 25 Ky. Law Rep. 342.

#### **AT ALL TIMES.**

14 Stat. 529, § 28, providing that the court "may at all times" require a bankrupt to attend and submit to an examination, means at all times until his discharge, but does not confer on the court authority, after his discharge, to require the bankrupt to submit to an examination. *In re Dole* (U. S.) 7 Fed. Cas. 828, 831.

A collector's bond, after reciting that a principal had been appointed collector under Act 43 Geo. III, c. 99, was conditioned for the due collection by such collector of the rates and duties "at all times thereafter." Held, that though the words "at all times thereafter" in the condition of the bond, when taken by themselves, would extend the liability of the surety beyond the officer's term of office, which was but for a year, the office of collector being an annual office, the words must nevertheless be construed with reference to the recital and to the nature of the appointment, under the act, and therefore only rendered the sureties liable for the collector's acts during the term of office. *Pepin v. Cooper*, 2 Barn. & Ald. 431, 439.



A parol license to enter upon land at any and all times, and cut and carry away growing timber, cannot be construed as giving an indefinite time to cut and remove the timber, but means at any and all times within a reasonable time. Thus it was held that if not acted on within three years such license could be revoked. *Hill v. Hill*, 113 Mass. 103, 104, 18 Am. Rep. 455.

Section 3, subd. 5, of the act relating to assignments for the benefit of creditors, provides that the debtor should make an inventory of his property within a certain time after making the assignment, and, in case he shall fail to do so within such time, that the assignee shall then make a schedule, and that if he should fail to do so he shall be removed by the judge, and then further provides that "the books and papers of such delinquent debtor shall 'at all times' be subject to the inspection and examination of any creditor, the county judge is authorized by order to require such debtor or assignor to allow such inspection or examination." Held that, by providing that the books and papers should "at all times be subject to inspection," an intention was expressed that the words "debtor" and "delinquent debtor" should be taken as synonymous with "assignor," and that such inspection might be made by a creditor prior to the refusal of the debtor to make the inventory, as well as after such refusal. In re *H. Herrmann Lumber Co.*, 48 N. Y. Supp. 509, 510, 21 App. Div. 514.

#### As continuously.

A contract between the agent of a towing company and the master of a canal boat by which the master agreed to keep a competent man at the helm of his boat "at all times" while the tow was in motion, and guaranteeing that the boat should be seaworthy and reasonably fit for the trip, required the keeping of a man at the helm continuously during the towage of the vessel, and hence, where there was no one at the helm for some 15 or 20 minutes prior to and at the time of the collision, the contract was broken by the owner of the tow, and no recovery could be had against the tug or its owner. *Ashmore v. Pennsylvania Steam Towing & Transp. Co.*, 28 N. J. Law (4 Dutch.) 180, 197.

#### AT ANCHOR.

See "Lying at Anchor."

#### AT ANY TIME.

Where a warrant of attorney authorizes judgment "at any time thereafter," it may be entered up before the note which it secures becomes due. *Cohen v. Burgess*, 44 Ill. App. 206, 207.

A warrant of attorney, authorizing a confession of judgment "at any time," authorized it to be done at any time after the delivery of the note. *Elkins v. Wolfe*, 44 Ill. App. 376, 380.

"At any time," as used in Rev. St. 1894, § 399 (Rev. St. 1881, § 396), giving a trial court discretion to allow an amendment at any time, should be broadly construed, and so as to permit an amendment to be made upon a proper showing after verdict, but before final judgment. *Raymond v. Wathen*, 41 N. E. 815, 816, 142 Ind. 367.

In Act April 2, 1869, directing that proceedings on which tax sales and conveyances are founded shall not be questioned collaterally, but may be at any time reviewed by certiorari, "at any time" means that the time should be extended to at least the period limited for an action of ejectment, otherwise the statute might in effect shorten the limitation of time for the recovery of possession of lands within the statutory period of 20 years, and certiorari is intended to be in aid of the ejectment, and not to defeat it. *Alden v. City of Newark*, 40 N. J. Law (11 Vroom) 92, 96.

The words "at any time" in a clause in a will devising property to testator's grandson, and directing that, in case the grandson shall "at any time" die without issue, then the property shall go to another, are to be construed to mean at "whatever time" and import a definite failure of issue. Appeal of *Snyder*, 95 Pa. 174, 182; In re *Miller's Estate* (Pa.) 22 Atl. 1044.

The words "at any time shall have the right of pre-emption of the premises," in a covenant in a deed that the grantor shall have at any time the right of pre-emption of the premises at a stated price, cannot be construed to give the grantor the right to repurchase the property at any other time except when the grantee wishes to sell. *Garcia v. Callender*, 5 N. Y. Supp. 934, 935, 53 Hun, 12.

#### As at all times.

"At any time," as used in a village ordinance providing that no rubbish shall be set on fire or burned in any street at any time, forbids fires in the streets at all times. *Village of New Rochelle v. Clark*, 19 N. Y. Supp. 989, 990, 65 Hun, 140.

"Any time," as used in a covenant giving the lessees the privilege of buying certain premises "at any time they may wish to do so," means that they could at any time purchase when the lessor gave them the first privilege, which he was bound to do before selling to others, and that, until such notice was given, the lessees could, at any time during the existence of the lease, purchase the property at the price agreed. *Schroeder v. Gemeiner*, 10 Nev. 355, 361.

**As more than once.**

"At any time," as used in Lunatic Act 8 & 9 Vict. c. 126, § 58, authorizing the justices to inquire into and adjudicate on the settlement of a lunatic "at any time," relates merely to the time at which the inquiry may take place, and therefore, on appeal from an order of maintenance, a prior order of sessions adjudicating on the settlement between the same parties against an ordinary order of removal is conclusive as to the settlement at the time of such prior order. *Overseers of Poor of Parish of Heston v. Overseers of Poor of Parish of St. Bride*, 1 El. & Bl. 583, 587.

**As immediately or within a reasonable time.**

A bond which by its terms is payable "at any time called for" is payable immediately. *Bowman v. McChesney* (Va.) 22 Grat. 609, 612.

"At any time," as used in an offer to buy stock at any time after January 1st, "does not import perpetuity, but only a reasonable time in which to purchase such stock." *Park v. Whitney*, 19 N. E. 161, 148 Mass. 278.

The phrase "at any time," within the meaning of a deed from the city reserving a right to construct a street across the land conveyed at any time, means within a reasonable time. *Raynor v. Syracuse University*, 71 N. Y. Supp. 293, 302, 35 Misc. Rep. 83.

A lease of oil lands for a term of three years, or as much longer as gas or oil should be found in paying quantities, if found before the expiration of the term, giving the lessee the right to remove "at any time" any or all machinery, does not make the lessee's right to remove such machinery unlimited as to time. The right to enter at any time and to remove the machinery at any time was predicated of that part of the term that was uncertain; that is, after three years the lessee had the right at any time to enter and drill additional wells if oil or gas was being produced in paying quantities, and had the right, although three years had passed, to remove machinery and fixtures after or when the well would cease to produce oil or gas in paying quantities. The removal must be made within a reasonable time; or, in other words, the law in such cases allows the tenant a reasonable time for the removal of fixtures. *Shellar v. Shivers*, 33 Atl. 95, 96, 171 Pa. 569.

**As from time to time.**

"At any time," as used in a statute giving a township committee power at any time to set off and divide the township into districts, do not of necessity and in all contexts mean that the division should affect every portion of the township at one and the same time, but the phrase may mean "from

time to time" when required by the context. *Smith v. Howell*, 38 Atl. 180, 181, 60 N. J. Law, 384.

**AT CHAMBERS.**

"At chambers," as used in Const. art. 4, § 18, providing that judges of the several courts shall have such power and jurisdiction "at chambers" as may be directed by law, is to be understood in its ordinary sense. The phrase "at chambers" is a technical one. The term "chambers" is thus defined by Burrill: "The office or private room of a judge, where parties are heard and orders made in matters not requiring to be brought before the full court, and where costs are taxed, and similar business transacted." Bouvier says: "When a judge decides some interlocutory matter, which has arisen in the course of the cause, out of court, he is said to make such decision at his chambers." *Pittsburg, Ft. W. & C. R. Co. v. Hurd*, 17 Ohio St. 144, 146.

Where a certain room was appropriated for use by the court for the transaction of business not requiring the presence of a jury, an averment in an indictment that the motion for a new trial was heard by the court "at his chambers" means that it was heard in such room, and not at the private lodgings of the judge. *Commonwealth v. McLaughlin*, 122 Mass. 449, 454.

The phrase "at chambers" in Const. art. 4, § 23, providing that court commissioners may be appointed in each county, who shall have authority to perform like duties as a judge of the superior court "at chambers," refers to the powers exercised by the judges at chambers at the adoption of the Constitution, which were to entertain, try, hear, and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury. *Peterson v. Dillon*, 67 Pac. 397, 399, 27 Wash. 78.

"A judge at chambers is simply a judge of a court of record acting out of court." *Frawley v. Cosgrove*, 53 N. W. 689, 690, 83 Wis. 441.

The phrase "at chambers," in the statute authorizing an appointment of receivers at chambers, means "at the court." *Chicago & S. E. Ry. Co. v. St. Clair*, 42 N. E. 225, 226, 144 Ind. 371.

When a circuit judge, within his circuit, grants an order to show cause why an order of injunction should not be made, returnable before himself, and concludes the order with the words "done in chambers," and makes an order of injunction reciting that "the judge of said court, having considered the return," etc., concluding with the words, "done at chambers," such an order will be considered a judge's, and not a court's, order. *Black Hills Flume & Min. Co. v. Grand*

*Island & W. O. R. Co.*, 51 N. W. 342, 345, 2 S. D. 546.

The words "at chambers," as used in relation to the action of a judge, means that the judge is acting out of court, so that Code Civ. Proc. § 345, providing for an appeal from the judgment rendered at chambers, will be held to include all judgments rendered out of term time. *Appleby v. South Carolina & G. R. Co.*, 36 S. E. 109, 111, 58 S. C. 33.

#### AT COMMAND.

A will providing that the testator did not wish certain hospital buildings, for which he had devised money, to be commenced until the funds "at command" were sufficient to erect and endow them, does not mean that the money must be in hand, but it is sufficient if the requisite amounts have been subscribed in a manner similar to the method used in making church subscriptions. *Appeal of Seagrave*, 17 Atl. 412, 417, 125 Pa. 362.

#### AT COMPLAINANT'S COSTS.

See "Complainant's Costs."

#### AT DEATH OR DECEASE.

The words "at his decease," in a devise of property to A., with a direction that, if A. should die without issue "at his decease," the real estate should be equally divided among the heirs of another, was held to make the bequest good as an executory devise, as the language does not import an indefinite failure of issue, but only a failure at the death of the first taker. Such a limitation is not within the rule against perpetuities. *Heard v. Horton* (N. Y.) 1 Denio, 165, 167, 43 Am. Dec. 659.

The insertion of the words "at her death," in a bequest to testator's wife of all his personal estate, with power to dispose of it "at her death" in any manner she thinks proper, does not operate to limit the interest of the wife in the estate to that of a trustee, but she is entitled to the absolute and unqualified property in the personal estate, which at her death, without making a will, vested in the distributees. *David v. Bridgman*, 10 Tenn. (2 Yerg.) 557, 561.

In a will bequeathing to the testator's son certain land willed to the testator's wife during her lifetime, to go to the son "at her death," on condition that he takes care of his mother as long as she should live, the words "at her death" cannot be held in and of themselves to postpone the vesting of the estate in fee simple, or to convert the estate devised to the son into a contingent remainder, the devise being subject to a condition, the violation of which would forfeit

the estate. *Gingrich v. Gingrich*, 45 N. E. 101, 102, 146 Ind. 227.

#### AT THE END OF.

See "End."

#### AT INTERVALS.

See "Interval."

#### AT ISSUE.

In construing a rule of chancery requiring a demand for a jury to be made at the next term after the cause was "at issue," it was held that a cause was "at issue" at the time when the issue was joined, and not when the pleadings reached their final state of completion, so that the allowance of an amendment at the term following that at which the issue is joined did not make the cause at issue only at the date of the amendment and not prior thereto. *Hamilton v. Ritchie* (Tenn.) 53 S. W. 193, 204.

Parties are "at issue" in ejectment after the action is brought and the declaration filed. *Wimberly v. Mansfield*, 70 Ga. 783, 784.

#### AT LARGE.

See "Appraisers at Large"; "Corporation at Large"; "Creditor at Large."

"At large" is defined as not limited to any particular place, district, person, matter, or question, and as used in Comp. St. art. 4, c. 18, providing for the election of two supervisors from certain towns to be elected at large, means that said town is not to be divided for the purpose of election. *State v. Welsh*, 87 N. W. 529, 531, 62 Neb. 721.

#### As animals not under control of owner.

"Running at large," as used in a statute making a railroad company liable for the killing of stock running at large, means stock not under the control of the owner, or under the immediate care of any shepherd or herdsman; animals that are left to roam wherever they may go. *Hinman v. Chicago*, R. I. & P. R. Co., 28 Iowa, 491, 497; *Inman v. Chicago, M. & St. P. R. Co.*, 15 N. W. 296, 287, 60 Iowa, 469; *Hammond v. Chicago & N. W. R. Co.*, 43 Iowa, 168, 171.

"Running at large," as used in Gen. St. c. 100, § 29, declaring that any person who shall suffer any cattle to run at large in a public highway shall forfeit a certain sum, means "strolling without restraint or confinement, wandering, rambling at will." *Russell v. Cone*, 46 Vt. 600, 601, 604 (cited and approved in *Wright v. Clark*, 50 Vt. 130, 134, 28 Am. Rep. 496).

Where a herd of cattle being herded by a boy were left by him while he returned to

his father's house, about a half a mile distant, when another boy went to take charge of them, and during his absence one of the cattle strayed away from the others, the cattle were "at large" during the interval between the time the first boy left them and the return of the second. *Valleau v. Chicago, M. & St. P. R. Co.*, 73 Iowa, 723, 36 N. W. 760.

To "run at large," as used in *Consol. St. § 193*, providing that a person permitting a dog to run at large without a collar shall be deemed guilty of a misdemeanor, should be construed to mean "running on a public road or off from the owner's premises, without any person claiming an interest in the dog being near at hand." *Nehr v. State*, 53 N. W. 589, 590, 35 Neb. 638, 17 L. R. A. 771.

The term "running at large," as used in a statute providing that any person suffering certain animals to run at large shall be liable to a fine, means strolling without restraint or confinement, as wandering, or roving or rambling at will unrestrained. *Russell v. Cone*, 46 Vt. 600, 604.

#### A. animals within control of owner.

"Running at large," as used in statutes imposing a penalty on one who suffers animals to run at large in public places, is used in the sense of strolling without restraint or confinement, as wandering, roving, or rambling at will; free from restraint. Probably no abstract rule can be laid down applicable to every case as to the nature, character, and amount of restraint necessary to be exercised over a domestic animal when suffered to be on the highway, incident to its use. But the restraint need not be entirely physical; it may depend much upon the training, habits, and instincts of the animal in the particular case; and the sufficiency of the restraint is to be determined more from its effects upon, and controlling and restraining influence over, the animal, than from its nature or kind. *Elliott v. Kitchens* (Ala.) 20 South. 366, 368, 33 L. R. A. 364, 56 Am. St. Rep. 69.

*Hill's Laws*, §§ 40, 48, providing that the allowing of stock to run at large upon common unfenced or upon inclosed land, owned or in the possession of the owner of such stock, shall not be deemed or held to be contributory negligence, so as to exclude that defense in an action against a railroad for the killing of the stock, means such animals that roam and feed at will, and are not under the immediate direction and control of any one. They may be in an inclosure, which may restrain the limits in which they shall wander and feed, or they may be on an unfenced range, relatively without limit, where they may roam and feed at will, but in either case they are not subject to the direction and control of any one; so to speak, they are masters of their own movements, going whither they will, without personal direc-

tion or control; but the term "stock running at large" is not meant to include stock in charge of a herder, and subject to his control, whether in an inclosed field or on an unfenced range. *Keeney v. Oregon Ry. & Nav. Co.*, 24 Pac. 233, 234, 19 Or. 291.

Cattle which are in a public highway in charge of a person directing or controlling their movements are not "running at large" within the meaning of a statute making it the duty of the overseer of highways to take into his custody any animal forbidden to run at large which may be running at large, etc. *Bertwhistle v. Goodrich*, 19 N. W. 143, 144, 53 Mich. 457; *Beeson v. Tice*, 45 N. E. 612, 613, 46 N. E. 154, 17 Ind. App. 78.

"Running at large," as applied to animals, means strolling about without restraint or confinement; rambling at will. Thus, where cattle were in the highway, eating, in plain view of the owner's family, and watched by them, they were not running at large. *Eklund v. Toner*, 80 N. W. 791, 121 Mich. 687.

The fact that a herder in charge of cattle driven along a road fell asleep, or that they in passing casually ate of the grass growing on the roadside, does not cause them to be "running at large," within the meaning of Act March 18, 1874, declaring that the roadmasters shall deal with all animals found pasturing upon the public highway as provided in an act concerning animals found running at large, etc. *Thompson v. Corstein*, 52 Cal. 653, 654.

Sheep which are being herded by a competent person and are under his control are not "running at large" within the meaning of an ordinance authorizing a marshal to seize sheep found running at large. *Spect v. Arnold*, 52 Cal. 455, 457.

*Rev. St. c. 58, § 10*, requiring the licensing of dogs going "at large," and providing a penalty for violation of such requirement, includes one following his master, or the clerk of his master, through the streets loose, and at such a distance as that such control could not be exercised as would prevent the dog doing mischief. "If a dog going through the streets by the side of his owner or a servant having special charge of him, or so near to him that he might be controlled and prevented from doing mischief, although he was not tied, he was not at large." *Commonwealth v. Dow*, 51 Mass. (10 Metc.) 382, 385.

A hound near a companion of its master in a chase, although its master is out of sight and hearing, is not "running at large," within the meaning of Acts 1862, No. 10, § 3, relating to the killing of dogs running at large. *Wright v. Clark*, 50 Vt. 130, 134, 28 Am. Rep. 496.

The term "running at large," in a statute relating to the liability of a railroad company for killing stock running at large, does not include a horse being driven by its owner. *Johnson v. Chicago & N. W. Ry. Co.*, 39 N. W. 242, 75 Iowa, 157.

The term "running at large," in statutes relative to the liability of railroad companies for the killing of stock running at large, does not apply to a team of horses attached to a sleigh, and wandering on a prairie at night, driven by a man in an unconscious, drunken stupor. *Grove v. Burlington, C. R. & N. Ry. Co.*, 39 N. W. 248, 75 Iowa, 163.

#### **Animals escaping from control of owner.**

A horse, which while being driven becomes frightened and escapes from the control of the driver without his fault, and runs away, is not "running at large" within the meaning of ordinances of a city prohibiting animals from running at large. *Presnall v. Raley (Tex.)* 27 S. W. 200, 201.

A colt that escapes from its owner, while being conducted across depot grounds, and strays upon the track, is regarded as "live stock running at large," within the meaning of Code, § 1289, requiring railroad companies to fence against live stock running at large. *Smith v. Kansas City, St. J. & C. B. R. Co.*, 12 N. W. 619, 620, 58 Iowa, 622.

"Running at large," as used in Code, § 1289, providing that any corporation operating a railway, and failing to fence the same against live stock "running at large" at all points where such right to fence exists, shall be liable to the owner for any such stock injured or killed by reason of the want of such fence, imports that the stock are not under control of the owners, that they are not confined by inclosures to a certain field or place, nor under the immediate care of a shepherd or herdsman, and that they are left to roam wherever they may go. Where an animal escapes from the control of the owner and cannot be caught by him, such animal is "running at large" within the meaning of the statute; and hence, where a team had broken loose from where it was tied, and ran away, not being driven or under the attempted control of anybody, and came upon a railroad track, they were "running at large" within the meaning of the statute. *Inman v. Chicago, M. & St. P. R. Co.*, 15 N. W. 286, 287, 60 Iowa, 459.

#### **Animals escaping from inclosures.**

Animals which escape from an inclosure in which they have been placed for the purpose of confining them, and which the owner, when he learns of their escape, endeavors to recover, cannot be regarded as animals "running at large" within the meaning of the statutes. *Stephenson v. Ferguson*, 30 N. E.

714, 4 Ind. App. 230; *Chicago, St. L. & P. R. Co. v. Fenn*, 29 N. E. 790, 791, 3 Ind. App. 250; *Jones v. Clouser*, 16 N. E. 797, 114 Ind. 387; *Wolf v. Nicholson*, 27 N. E. 505, 506, 1 Ind. App. 222; *McBride v. Hicklin*, 24 N. E. 755, 756, 124 Ind. 499; *Nelson v. Great Northern Ry. Co.*, 53 N. W. 1129, 52 Minn. 276; *Julienne v. City of Jackson*, 10 South. 43, 69 Miss. 34, 30 Am. St. Rep. 526.

The words "at large," as used in Laws 1870, c. 93, imposing penalties on the owners of animals who shall permit or suffer the same to run at large, does not include a case where an animal escapes from the owner's inclosure, inasmuch as the words imply a choice or design on the part of the owner to allow the animal to go at large when he might restrain it. *Montgomery v. Breed*, 34 Wis. 649, 652.

Laws 1862, c. 549, as amended by Laws 1867, c. 841, making it unlawful for any animals to run at large in any public highway, etc., implies permission or assent, or, at least, some fault or neglect, on the part of the owner of the animals. Where animals escaped from their owner's premises after due precautions to secure them have been taken, and without any default or neglect on his part, and he thereafter makes immediate and suitable efforts to secure and recover them, they are not "running at large" within the meaning of the statute. *Coles v. Burns (N. Y.)* 21 Hun, 246, 249.

The words "running at large," as used in Acts 9th Gen. Assem. c. 169, § 6, making a railroad company failing to fence its road against live stock running at large liable to the owner of any such stock killed or injured, import that the stock are not under the control of the owner; that they are not confined by inclosures to a certain field or place, nor under the immediate care of a shepherd or herdsman; that they are left to roam wherever they may go. If such stock are left in an inclosure which is insufficient to restrain them, they are evidently running at large, for they are not under the control of the owner. If placed in such an inclosure, and they escape from it and go upon the track of an unfenced railroad, they will be considered as running at large. *Hinman v. Chicago, R. I. & P. R. Co.*, 28 Iowa, 491, 494.

The fact that hogs are found at large in a township where they are prohibited by law from running at large, is not conclusive evidence that they are trespassers; it depends upon how they came to be at large. If by the deliberate or negligent acts of the owner, then they are to be considered as running at large; but if by accident, without fault of the owner, then they are not running at large, as contemplated by the law. *Leavenworth, T. & S. W. Ry. Co. v. Forbes*, 37 Kan. 445-448, 15 Pac. 595-597.

Within the meaning of Rev. St. § 4202, authorizing the taking up of horses found running at large, a horse which passed from the owner's inclosure over or through a line fence into the inclosure of an adjoining proprietor, and thence through a gap in a fence into the inclosure of another proprietor, is not "running at large." To constitute running at large, the horse should be at liberty through the fault or with the knowledge of the owner. *Rutter v. Henry*, 20 N. E. 334, 335, 46 Ohio St. 272.

Under a statute authorizing the taking up of any animal which shall be found running at large or pasturing upon any uninclosed lands or public commons, hogs which broke out of the owner's yard and entered into a pasture belonging to another were not running at large, and the owner of such pasture was not authorized to impound them as animals at large. *Nafe v. Leiter*, 2 N. E. 317, 319, 103 Ind. 138.

#### Animals on owner's land.

In an order by town selectmen to the constable to kill all dogs running at large which were not licensed and collared as required by statute, "at large" cannot be construed to include a dog at play with his owner's son upon his owner's land. *McAneany v. Jewett*, 92 Mass. (10 Allen) 151, 152.

Laws 1873, c. 20, § 1, providing that the owner of any ram who shall suffer the same to run at large shall forfeit to the town in which the animal shall be so at large a certain sum for each day such animal is at large, means without constraint or confinement. Hence, if such ram is suffered to go about without restraint or confinement, either by keeping it in an inclosure, or by tying it, or by watching or otherwise, even though it be on land belonging to its owner, it is running "at large" within the meaning of the statute. *Goener v. Woll*, 2 N. W. 163, 26 Minn. 154.

To "run at large," as used in Comp. Laws 1879, c. 105, p. 926, providing for the punishment of any owner of a bull who permits it to run at large, does not mean to keep it confined, where such animal was kept within the owner's pasture, which was inclosed with a good and lawful fence; and it did not run at large when it passed upon a railroad track, running through the owner's pasture, because of the neglect and wrong on the part of the railroad company in not inclosing its road with a lawful fence. *Gooding v. Atchinson, T. & S. F. R. Co.*, 4 Pac. 136, 137, 32 Kan. 150.

"Stock running at large" are animals which roam and feed at will, and which are not under the immediate direction and control of any one. They may be in an inclosure which may restrain the limits in which they shall wander and feed, or they may be on an unfenced range relatively without limit,

but in either case they are not subject to the direction or control of any one, but are masters of their own movements, going whither they will, without personal direction or control. *Keeney v. Oregon Ry. & Nav. Co.*, 24 Pac. 233, 234, 19 Or. 291.

#### AT LAW.

See "Attorney at Law"; "Case at Law"; "Charge at Law."

In the act of 1829 providing that no mortgage or deed of trust shall be valid at law but from the registration of it, the words "at law" do not mean in a court of law only, but in all courts. "At law" is an expression in a statute which does not mean merely a legal tribunal, as distinguished from an equitable jurisdiction, but the general system of jurisprudence, whether legal or equitable. *Hooker v. Nichols* (N. C.) 21 S. E. 207, 208; *Fleming v. Burgin*, 37 N. C. 584, 588.

Provisions of an act in relation to corporations, requiring certain things to be done in regard to the canvassing of votes at an election, the administration of an oath to the elector by the judges, and the form of the oath to be taken by a person voting stock owned by a corporation, and the mode of voting by proxy, are not a full and adequate remedy at law for any alleged fraud at the election. *Webb v. Ridgely*, 38 Md. 364, 305, 372.

#### AT LEAST.

In an action for work, labor, goods, wares, merchandise, done, performed, sold, and delivered to defendant at his request in which he counterclaimed a similar indebtedness against the plaintiff which conceded a part of plaintiff's claim, an instruction that if the jury believed the plaintiff stated truly then he ought to recover the amount admitted as a set-off by the defendant "at least," and their verdict should be for the plaintiff for "at least" that sum, should be construed as intimating that, although an alleged statement between the parties was conclusive upon the defendant, yet it was not binding upon the plaintiff. *Duffy v. Hickey*, 23 N. W. 707, 63 Wis. 312.

"At the least," as used in a statute requiring the affidavit in attachment to state that a certain amount was due "at the least," qualifies the amount stated, and not the mode of statement, and were added to purge the conscience of the affiant with giving all credits and allowing all proper discounts, and not making loose and random statements as to the amount of damage he has suffered, as is often done in the writ and declaration. *Altmeyer v. Caulfield*, 37 W. Va. 847, 851, 17 S. E. 409, 410.

"At least," as used in an affidavit for an attachment, is synonymous with and equiva-

lent to the phrase "at the least," as used in West Virginia statutes relating to such affidavit. *Courson v. Parker*, 20 S. E. 583, 584, 39 W. Va. 521.

#### As clearly.

"At least," as used in an instruction by the court in a trial for murder, the court stating that if the facts were such as supposed, then the prisoner would be "at least" guilty of manslaughter, means "clearly," and did not imply any view of the court unfavorable to the prisoner. *State v. Kennedy*, 91 N. C. 572, 580.

#### As not less than.

In Rev. St. § 1170, declaring that the county clerk shall, at least 6 months before the expiration of the time limited for redeeming lands sold for taxes, cause to be published once a week, for 12 successive weeks, a list of the unredeemed lands, "at least" means that such publication shall be made during a period not less than 6 weeks before the expiration of the time, the time of such period being discretionary with the clerk. *Hoffman v. Clark County*, 20 N. W. 378, 377, 61 Wis. 5.

Under an act requiring fences to be at least five feet high, the fence must be of that height throughout. The words "at least" are emphatic, and expressive of its minimum, and are applied to it as a whole, and to every part. *Polk v. Lane*, 12 Tenn. (4 Yerg.) 36, 38.

"At least," as used in a grant of a cartway of eight feet wide at least, should be construed as implying that the width of the passage may be more than the measure given; that more may be taken if more should be indispensable. *Roberts v. Wilcock* (Pa.) 8 Watts & S. 464, 470; *In re Hoffman* (Pa.) 14 Wkly. Notes Cas. 563, 565.

#### As not more than.

"At least once a week for four successive weeks," as used in Act April 27, 1863, relating to the publication of notice to creditors, means in effect that there shall be four publications not more than seven days apart from each other. *Hernandez v. His Creditors*, 57 Cal. 333, 334.

A lease conveyed so much land as at the time was covered by water of the Gunpowder Falls backed up by the dam then erected, and as might be or should be requisite or necessary to be covered by the backing or damming of such stream according to the terms employed, "so as to make the fall thereof 'at least' 12 feet at common water mark" at the point designated. Held, that the words "at least," as there used, should be read with the context, and as so read should be construed to mean the same thing as "at most" or "not to exceed" 12 feet. *Warren Mfg. Co. v. Hoffman*, 62 Md. 165, 170.

#### Exclusion and inclusion of days.

Rev. St. § 1130, declaring that the treasurer shall, "at least four weeks previous to" the day of tax sale, cause notice of the sale to be posted, means that the day on which the notices are to be posted must be excluded from the computation of time. *Ward v. Walters*, 22 N. W. 844, 846, 63 Wis. 39 (citing *Pitt v. Shew*, 4 Barn. & Ald. 208; *Mitchell v. Foster*, 12 Adol. & E. 472; *Zouch v. Empey*, 4 Barn. & Ald. 522; *Hardy v. Ryle*, 9 Barn. & C. 603; *Judd v. Fulton* [N. Y.] 4 How. Prac. 298; *Commercial Bank of Oswego v. Ives* [N. Y.] 2 Hill, 355; *Columbia Turnpike Road Co. v. Haywood* [N. Y.] 10 Wend. 422; *Small v. Edrick* [N. Y.] 5 Wend. 137; *Rankin v. Woodworth* [Pa.] 3 Pen. & W. 48).

A statute incorporating a canal company, and declaring that no meeting of commissioners to settle differences between the company and landowners should be held unless notice of the time of such meeting should be given in the county newspaper "at least" 16 days before such meeting, meant 16 days exclusive of the day of the meeting. In other words, the 16 days were to be computed as 16 clear days, excluding both the day of the meeting and the day on which the notice was first given. *Reg. v. Aberdare Canal Co.*, 14 Adol. & E. (N. S.) 854, 868.

"At least," as used in St. 485, Wm. IV., c. 76, § 81, requiring notice of the grounds of appeal 14 days "at least" before the first day of the session at which the appeal is intended to be tried, means that 14 days must elapse between the day of service and the first day of the session at which the appeal is to be tried. Where an act is required by statute to be done so many days at least before a given event, the time must be reckoned excluding both the day of the act and that of the event. *Queen v. Justices of Shropshire*, 8 Adol. & E. 173, 174.

Rev. 1860, § 2815, requiring that an original notice shall be served "at least ten days between the day of service and the first day of the next term," means that both the day on which the service is made and the first day of the term are to be excluded from the computation. *Robinson v. Foster*, 12 Iowa, 186, 190.

An ordinance requiring a certain oath to be filed in the office of the county clerk, "at least five days before the day of election," meant that the day when the oath was filed should be included in the computation of time. *State ex rel. Reitemyer v. Gasconade County Court*, 33 Mo. 102.

The city charter of Milwaukee, providing that certain resolutions of the city council shall lie over at least four weeks after their introduction, means from the day on which the resolution was introduced until the same day of the week in the fourth week suc-

ceeding, and not the next day of the week in the fourth week succeeding. A resolution introduced on Monday has lain over four weeks after its introduction on the fourth Monday thereafter. *Wright v. Forrestal*, 27 N. W. 52, 54, 65 Wis. 341.

Act March 21, 1772, provides that no writ shall be sued out for any process served on any justice of the peace for anything done by him in the execution of his office until notice in writing of such intended writ or process shall have been served on him at least 30 days before the suing out or serving the same. Held, that the phrase "at least thirty days before suing out or serving" the same meant that the first day should be included, and the last excluded, in the computation of time. *Thomas v. Afflick*, 16 Pa. (4 Harris) 14, 15.

Code Civ. Proc. § 5220, directs that a summons from a surrogate's court must be served, if in the same or adjoining county, "at least eight days before the return day thereof." Held, that "at least eight days before the return day thereof" meant that the day of service should be excluded, and the return day should be counted, in estimating eight days. In *re Carhart* (N. Y.) 2 Dem. Sur. 627, 629.

#### Full or entire days.

Chancery Act, § 8 (Rev. St. 1868, c. 23), providing that notice of the pendency of a divorce action by publication should be made for four successive weeks, the first publication to be "at least" 30 days before the return day of the summons, does not have the effect to require full clear days. *Stebbins v. Anthony*, 5 Colo. 348, 354.

"At least," as used in a statute directing that notices of election should be given for "at least" six days, does not change the requirement of a certain number of days' notice into a requirement that the days shall be entire. *Stroud v. Consumers' Water Co.*, 28 Atl. 578, 579, 56 N. J. Law. (27 Vroom) 422.

Rev. St. c. 120, § 188, requiring the delinquent tax list to be completed "at least five days" before the commencement of the term of court at which the application for judgment is to be made, cannot be construed to require five full days at the shortest, but only requires five days computed by excluding the day of filing and including the day of the commencement of the term. *Prior v. People*, 107 Ill. 628, 630.

6 & 7 Vict. c. 18, §§ 62, 64, declare that no appeal shall be heard by the Court of Common Pleas in any case where the respondent does not appear, unless the appellant proves that notice of his intention to prosecute the appeal was given or sent to the respondent "ten days at least" before the

day appointed for the hearing of such appeal. Held, that the phrase "ten days at least" meant ten clear, full, and complete days, and not nine days and the fractions of two other days. *Adey v. Hill*, 4 C. B. 38, 39; *Norton v. Salisbury Town Clerk*, 4 Man. G. & S. 32, 33, 37.

Where a statute provided that summons must be served 10 days at the least before the time appointed for hearing, the phrase "ten days at the least" meant 10 clear days between the service and the date of hearing, which excludes both the day of service and the date of hearing. *Mitchell v. Foster*, 12 Adol. & E. 472. See, also, *Reg. v. Aberdare Canal Co.*, 14 Adol. & E. (N. S.) 854, 868.

The words "at least," in a statute requiring that plaintiff shall cause a notice to be published at least once a week for three consecutive weeks, cannot be construed to make the statute require a publication for 21 days, but the statute is complied with by a publication once a week for 3 consecutive weeks, though less than 21 days elapse between the first and last publication. *Decker v. Myles*, 4 Colo. 558, 560.

#### As indicating successive days' notice.

Swan's St. 474, providing that land taken in execution should not be sold except on publication of notice "for at least 30 days before the day of sale by advertisement in some newspaper," does not mean that there shall be successive insertions of the notice during the period of 30 days, but its words will be answered by one publication inserted in a newspaper 30 days before the day of sale. *Graig's Adm'r v. Fox*, 16 Ohio, 563, 567.

Laws 1857, c. 446, § 7, enacting that resolutions and reports of committees recommending any improvement involving the appropriation of public money shall be "published at least two days," means that two days shall elapse between the publication of the notice and the passage of the resolution, and not that the notice shall be twice published. In *re Douglass* (N. Y.) 58 Barb. 174, 176.

The street law of Baltimore county, Acts 1886, c. 339, which provides that the examiner for the opening of a thoroughfare shall "give at least 10 days' notice," by publication in two or more newspapers, that application has been made to open the street, and that he shall give 15 days' notice in two or more newspapers that the statement of benefits and damages and an explanatory plat of the work are ready for examination, and that he will hear objections at a designated time and place, requires in terms but one publication of each notice in each of the newspapers. *Philadelphia, W. & B. R. Co. v. Shipley*, 19 Atl. 1, 2, 72 Md. 88.



**AT LIBERTY.**

An instruction, in an action for slander, that in awarding damages the jury were "at liberty" to take into consideration any disgrace, shame, humiliation, mortification, or anguish of mind suffered by plaintiff by reason of the speaking of the actionable words, was not equivalent to an instruction that the jury "should" take into consideration elements of damages mentioned, but was an erroneous departure from the rule. *Nicholson v. Merritt*, 67 S. W. 5, 6, 23 Ky. Law Rep. 2281.

**AT MATURITY.**

The phrase "at maturity" has the same meaning as "according to their tenor and effect," as used in relation to promissory notes. *Third Nat. Bank v. Humphreys* (U. S.) 66 Fed. 872, 876.

"At maturity," as used in Act July 1, 1862, § 6, providing that the grants aforesaid are made on condition that said company shall pay such bonds at maturity, refers to the time fixed for their payment, which is the termination of the period they have to run; and, while the words imply an obligation to pay both the principal and interest when the bond shall become due, it does not imply an obligation to pay the interest as it semiannually accrues. *United States v. Union Pac. R. R. Co.*, 91 U. S. 72, 85, 23 L. Ed. 224.

**AT ONCE.**

See "Come at Once."

Like the terms "forthwith" and "immediately," "at once" does not mean instantaneously, but requires action to be taken within a reasonable time under the circumstances of the case. *Cohen v. Silverman*, 40 N. Y. Supp. 8, 10, 4 App. Div. 503 (citing *Bennett v. Lycoming County Mut. Ins. Co.*, 67 N. Y. 274; *Bamforth v. Raddin*, 96 Mass. [14 Allen] 66; *Roberts v. Brett*, 11 H. L. Cas. 337; *Oldershaw v. King*, 2 Hurl. & N. 399, 517).

"At once," as used in a contract for the sale of a machine, that, when not found to work well, it must be returned at once, means as soon as, under the circumstances, it could reasonably have been done, and is synonymous with "immediately," "forthwith" and "as soon as possible," which are usually construed to mean within such reasonable time as shall be required, under all the circumstances, for doing the particular thing. *Warder, Bushnell & Glessner Co. v. Horne*, 81 N. W. 501, 592, 110 Iowa, 285 (citing *Reg. v. Rogers*, 3 Q. B. Div. 33; *Tufts v. McClure*, 40 Iowa, 317, 318; *Reg. v. Justices*, 4 Q. B. Div. 469; *Scammon v. Germania Ins. Co.*, 101 Ill. 621; *Adams v. Fos-*

*ter*, 59 Mass. [5 Cush.] 156; *Gaddis v. Howell*, 31 N. J. Law [2 Vroom] 313; *Richardson v. End*, 43 Wis. 316). In a contract of warranty in the sale of machines requiring the purchaser, on discovering that the machine is not working satisfactorily, to return it at once to the agent of the seller, "at once" means simply that he shall return it within a reasonable time, and what is a reasonable time is a question of fact, and not of law. *McCormick Harvesting Mach. Co. v. Warfield*, 53 N. Y. Supp. 737, 738, 33 App. Div. 513. A contract to make three or four models of a machine "at once, and without delay," means that the work shall be done as soon as it can reasonably be performed. *Sharpe v. Johnson* (N. Y.) 41 How. Prac. 400; *Sharp v. Johnston* (N. Y.) 3 Lana. 520.

"At once," in a notice to require payment on a contract, means within a reasonable time. *Kraner v. Chambers*, 61 N. W. 373, 375, 92 Iowa, 681.

An order for goods to be sent "at once" is not complied with by delivery 30 days later. *Hirsch v. Annin*, 58 N. Y. Supp. 1019, 1020, 28 Misc. Rep. 228.

In a contract for the purchase of flour to be shipped "at once," such term cannot be construed in its strictly literal sense. Performance according to the literal meaning must have been instantaneous, which would be impossible. *J. C. Smith & Wallace Co. v. Lungar* (N. J.) 46 Atl. 623.

In a contract for the sale of goods to be shipped at once, where the goods were not yet manufactured at the time of the contract, the words "at once" cannot be taken literally, as that would be unreasonable, but indicates a prompt making and sending of the goods. *Ford v. Friedman*, 20 S. E. 930, 932, 40 W. Va. 177.

On an order to ship goods "at once," it is doubtless true that some appreciable time must elapse, and such necessarily elapsing time would be a reasonable time in a sense referable to the urgent words of the order, within the doctrine that, when no time is specified for shipment or delivery, the shipment and delivery are well made in such time as would be reasonable under the circumstances, but such reasonable time would not admit of an investigation as to defendant's solvency, etc., when the shipment is thereby delayed a period of three weeks. *Oklahoma Vinegar Co. v. Hamilton* (Ala.) 32 South. 306, 307.

"At once," as used in a contract of guaranty authorizing one person to furnish another with such building materials as he might wish, not exceeding the value of \$2,000, at once, means at one and the same time. *Platter v. Green*, 26 Kan. 252, 268.

A contract to ship cigars "at once" on acceptance of a draft did not mean that

they would be shipped within a reasonable time, but that the shipment would be made with greater celerity than is ordinarily comprehended by a reasonable time. "At once" is convertible with "prompt," "forthwith." These terms in their ordinary acceptation mean "at the same point of time, immediately, without delay, at one and the same time, simultaneously, directly," and implied a shipment simultaneously with the acceptance, or, at least, with receipt of advice of the acceptance. *Lewis v. Hojer*, 16 N. Y. Supp. 534, 536.

#### AT OWNER'S RISK.

Where a warehouse receipt read "bought," etc., "at owner's risk of fire" the phrase "at owner's risk of fire" imported that the transaction was a bailment, rather than a sale to the warehouseman. *Irons v. Kentner*, 50 N. W. 73, 51 Iowa, 88, 33 Am. Rep. 119.

#### As affecting liability of carrier.

The words "at owner's risk," in a bill of lading, did not excuse a common carrier for a loss by reason of their own negligence, but merely subjects the owner to liability for losses occasioned, without negligence, which occurred in the ordinary course of transportation. *Kiff v. Atchison, T. & S. F. R. Co.*, 4 Pac. 401, 402, 32 Kan. 263.

"At owner's risk," as used in a receipt issued by a carrier, means to carry the goods at the risk of the owner. Unless the carrier was prohibited from entering into such agreement with the owner of the goods, he incurred only the responsibility of an ordinary bailee for hire, and became answerable only for misconduct or negligence. *Moore v. Evans* (N. Y.) 14 Barb. 524, 525.

The phrase "at owner's risk," as used in a bill of lading providing for the delivery of the property on deck at the owner's risk, could not be regarded as intended by the parties to cover risks from all causes, and including negligent or willful acts of the master and crew. *Compania de Navigacion La Flecha v. Brauer*, 18 Sup. Ct. 12, 17, 168 U. S. 104, 42 L. Ed. 398.

Where a contract between a carrier and a shipper of goods provided that the carriage was "at the risk of the master and owners," such phrase should not be construed as exempting the carrier from liability for unlawful misconduct, gross negligence, or the want of ordinary care. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U. S. (6 How.) 344, 383, 12 L. Ed. 465.

A stipulation, in a contract for the carriage of cattle at sea, that the shipment shall be at the owner's risk, does not operate to relieve the shipowner from liability for the act of the officers and crew in driving the cattle overboard when not necessary to the

safety of the ship. Such a provision, as affecting the carrier's liability for negligence, is against public policy and void. *The Hugo* (U. S.) 57 Fed. 403, 411.

"At consignee's risk," within a contract of affreightment providing that the goods shall be at the consignee's risk and expense after they leave the ship's deck, cannot be construed to mean that they could be landed instantly, and without regard to circumstances, at a place and time when they would be more exposed than when on the ship's deck, and such a construction is incompatible with the obligation to deliver in good order and condition, and does not relieve the carrier from the duty of protecting the goods from injury, under the circumstances, until their actual delivery, and until the consignee has had a reasonable opportunity to remove them after their discharge from the ship. *The St. Georg* (U. S.) 95 Fed. 172, 177.

"At his own risk," as used in a contract for the carriage of live stock which provides that the shipper shall load and unload at his own risk, means that all the responsibility arising from the loading and unloading is to be at the risk of the shipper, though he be assisted by the carrier's agents. In respect to those acts the contract devolves all responsibility on the shipper, as principal, in performing them, treating the laborers furnished by defendant as his assistants. The risk of personal injury from the animals themselves, or from his manner of loading or unloading them, or from any negligence of his assistants in doing those acts, is thrown upon him by the contract, but by no sound construction can this clause of the contract be held to include personal injuries which the party may sustain from external causes produced by the negligence of defendant. An injury caused by negligently running a train of cars upon him, over which he has no control, while he is carefully performing the labor he is authorized to do, is not at all within the scope or meaning of this clause of the contract. *Stinson v. New York Cent. R. Co.*, 32 N. Y. 333, 335, 337.

"At owner's risk," as used in a notice in the usual form, posted up by a common carrier of passengers, reading "all baggage at the risk of owners," cannot be construed as meaning that the carrier shall be exempt from loss arising from actual negligence, or from the insufficiency of his machinery or vehicles, or from such losses as arise from his acts or the acts of his servants, but only that he is exempt from losses happening by theft or robbery, and losses happening by means of the conduct of others, in addition to the exemptions of responsibility as common carriers. *Camden & A. R. & Transp. Co. v. Burke* (N. Y.) 13 Wend. 611, 629, 28 Am. Dec. 488.

"At owner's risk," as used in a carrier's advertisement stating the route, fare, etc.,

and "all baggage at owner's risk," such phrase was intended to limit the liability of the carrier as to the baggage of passengers only, and did not constitute a limitation of the carrier's liability for loss of parcels delivered to and accepted by it to carry for hire. *Dwight v. Brewster*, 18 Mass. (1 Pick.) 50, 54, 11 Am. Dec. 133.

"At owner's risk," as used in a contract for the transportation of goods, stating that the same were at owner's risk, imports that the owner assumes the risks, arising from the ordinary dangers of transportation by the means employed, which the reasonable and ordinary care of the common carrier might be insufficient to prevent, and that the latter is liable only for those dangers which with ordinary prudence might be avoided. *French v. Buffalo*, N. Y. & E. R. Co., \*43 N. Y. (4 Keyes) 108, 112, 113.

"At owner's risk," as used in a contract of the transportation of goods, stating that the same were shipped at the owner's risk, covers only the ordinary and known risks of transportation in reasonable time, but not delays or neglect of proper care in such transportation on the part of the railroad. *Nashville & C. R. R. Co. v. Jackson*, 53 Tenn. (6 Heisk.) 271, 277.

#### AT PAR.

See "Par."

#### AT PORT OR SAILED.

The provision in a charter party that the vessel to be chartered is "at Santos or sailed" means that she will soon sail or has sailed therefrom, so that delay in order to unload is a breach of the contract. *Olsen v. Hunter-Benn & Co.* (U. S.) 54 Fed. 530, 531.

#### AT PRESENT.

The words "at present organized," in Act June 15, 1895, requiring all companies at present organized and doing business under the laws of the state, that may hereafter increase their capital stock, to pay a specific fee, does not operate to prevent the statute from including corporations subsequently organized. The term was used as applying to both present and future organized corporations, since the object of the act was to raise revenue, and Rev. St. c. 131, § 1, provides that statutes shall be liberally construed to carry out their intent, and that words in the present tense shall include the future. *People v. Hinrichsen*, 43 N. E. 973, 974, 161 Ill. 223.

#### AT SEA.

The phrases "at sea" or "on a voyage" or "on a passage" are equivalent in meaning, and, when either of them is used in a

marine policy to describe the time during which the liability of the insurer continues, it operates to continue the risk until the arrival of the vessel at the port of destination. *Wales v. China Mut. Ins. Co.*, 90 Mass. (8 Allen) 380, 383.

The words "at sea" in a marine policy on a vessel for 12 calendar months, with liberty of the globe, and if "at sea" at the expiration of 12 months the risk to continue at the same rate of premium until the arrival of the vessel at her port of destination in the United States, did not operate, when construed in connection with the remainder of the clause, to continue the insurance during the time the vessel was at sea on any voyage, but only while at sea on her return voyage. *Eyre v. Marine Ins. Co. (Pa.)* 6 Whart. 247, 255.

A seaman who went on shore on leave and died by an accident will be deemed to have been "at sea," so that his will could be probated as that of a mariner at sea. In *re Lay*, 7 Eng. Ecc. R. 144.

#### While in arm of sea.

A vessel lying at anchor in an arm of the sea where the tide ebbs and flows is "at sea," within the meaning of that term as used in 2 Rev. St. p. 60, § 22, providing that no unwritten will bequeathing personal estate shall be valid unless made by a mariner while at sea. *Hubbard v. Hubbard*, 8 N. Y. (4 Seld.) 196, 199.

#### While in harbor or port.

A policy of marine insurance for one year from a certain date, providing that if the ship was "at sea" at the end of the year the policy should continue at pro rata premium until the vessel arrives at her port of destination, should be construed as meaning that if the vessel, at the expiration of the year, was in any port, or, if then at sea, whenever she should return into port, though it was an intermediate port to which she had resorted for the purpose of the voyage, she was not "at sea" within the meaning of the policy, and the additional extension of the time beyond one year ceased to have any further effect. The vessel cannot be considered at sea at all times until her return to her home port. *Gookin v. New England Mut. Marine Ins. Co.*, 78 Mass. (12 Gray) 501, 509, 74 Am. Dec. 609.

"It is sometimes difficult to determine when the mariner is to be considered at sea. For example, Lord Seymour, the admiral of a station at Jamaica, made a codicil by nuncupation while staying at the house on shore appropriated to the admiral of the station. The codicil was rejected on the ground that he only visited the ship occasionally, while his family, establishment, and place of abode were on the land at the official residence. But where a mariner belonging to a vessel ly-

ing in the harbor of Buenos Ayres met with an accident while on shore by leave, and made a nuncupative will and died there, probate was granted for the reason that he was only casually absent from his ship. In the *Goods of Lay*, 2 Curtels, 375. In the present instance the decedent made a nuncupation when the vessel to which he was attached was lying at the wharf in Bremen. He was at the time in actual service on shipboard. I think he was entitled to the privilege." *Ex parte Thompson* (N. Y.) 4 Bradf. Sur. 154, 158.

A vessel which was chartered to one point, there to receive orders which would indicate to her within 24 hours whether to discharge there or to go to another port, and to be kept at the first port as long and sent to such other port as those from whom she was to take her orders might elect, and which did not, within 24 hours after notice of her arrival at the first port, receive orders to come to another port, had arrived at her port of destination, and was not "at sea" within the meaning of her continuation clause. *Wales v. China Mut. Ins. Co.*, 90 Mass. (8 Allen) 380, 383.

A vessel which, at the expiration of the year of her insurance policy, was actually in the port in which she had been carried by overwhelming force, by proceeding on her voyage in the high seas was "at sea" within the meaning of such a clause. *Wood v. New England Marine Ins. Co.*, 14 Mass. 31, 35, 7 Am. Dec. 182.

The words "at sea" and "on her voyage" are synonymous. Where a ship was insured for a year, the risk to continue if she was "at sea" at the expiration of the term, and she had been delayed by adverse weather, and had been detained in port to be repaired, and was in such port at the time of the termination of the policy, and was making her arrangements to go to sea, but had not yet unmoored or begun to unmoor, she was not sailing, or not even ready to sail, and she was not "at sea" within the meaning of the policy. "At sea" was so used in opposition to being "in port." *American Ins. Co. v. Hutton* (N. Y.) 24 Wend. 329, 330, 331; *Hutton v. American Ins. Co.* (N. Y.) 7 Hill, 321, 325. But it was also held that if the vessel was driven by stress of weather from her voyage into a port of necessity, or is captured and carried there by superior force, she is still "at sea" within the meaning of such a policy. *Hutton v. American Ins. Co.* (N. Y.) 7 Hill, 321, 325.

#### **While outside harbor or port.**

A vessel is "at sea," within the meaning of the United States acts of 1813 and 1819, relating to the bounty on all vessels and boats employed in the banks and cod fisheries as shall be employed at sea for a term of a certain duration, when she is without the

limits of any port or harbor on the seacoast. *The Harriet* (U. S.) 11 Fed. Cas. 588, 592.

#### **While in river or canal.**

A statute permitting nuncupative wills by mariners while "at sea" means while on waters within the ebb and flow of the tides. A will made on the Mississippi river opposite Vicksburg was not made "at sea." In *re Gwin's Will* (N. Y.) 1 Tuck. 44, 45.

"At sea," as used in a marine policy containing a clause that should the vessel be at sea at the expiration of the year the risk should continue until she arrives at her port of destination, includes a river or canal communicating with the ocean, and hence, if the vessel is lying in such a river or canal at the time of the expiration of the policy, she is "at sea," she having quit her moorings and being ready for the voyage, with intent to prosecute it, and this though she be immediately stopped by head winds. *Union Ins. Co. v. Tysen* (N. Y.) 3 Hill, 118, 123.

#### **While in roadstead or strait.**

A vessel anchored in the open roadstead at the Chinch Islands for the purpose of taking in cargo was not at sea within the meaning of a continuation clause in her policy. *Cole v. Union Mut. Ins. Co.*, 78 Mass. (12 Gray) 501, 503, 74 Am. Dec. 609.

A vessel was "at sea" which had left her port of lading fully prepared to proceed to her port of destination and with a real intent to do so and had dropped down the straits seven or eight miles, and then had been obliged by head winds to come to anchor, but without relinquishing the intention of proceeding on her voyage as soon as the weather would permit. *Bowen v. Hope Ins. Co.*, 37 Mass. (20 Pick.) 275, 276, 32 Am. Dec. 213.

#### **As relating to sea service.**

An officer of the navy is at sea and entitled to sea pay when performing services, under order of the navy department, in a vessel employed with authority of law in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions and requirements incident or peculiar to service on the high seas, and it is of no consequence that the vessel was not, during the period in question, in such condition that she could be safely taken out to sea beyond the mainland. *United States v. Symonds*, 7 Sup. Ct. 411, 412, 120 U. S. 46, 30 L. Ed. 557; *United States v. Bishop*, 7 Sup. Ct. 413, 120 U. S. 51, 30 L. Ed. 558; *Symonds v. United States*, 22 Ct. Cl. 481; *Strong v. United States*, 23 Ct. Cl. 10, 17; *Symonds v. United States*, 21 Ct. Cl. 148, 152.

"At sea," within the meaning of the statute entitling officers of the navy to additional compensation when at sea, is to be con-

strued not to depend on the location of the ship, but on its condition with reference to the sea, qualified by the further condition of its officers being subject to such restrictions, regulations, or requirements as are required at sea. *Corwine v. United States*, 24 Ct. Cl. 104, 112.

The phrase "at sea," as used in Rev. St. § 1571, providing that no service shall be regarded as sea service except such as shall be performed at sea, etc., embraces a vessel, although she is used as a training ship, anchored in a bay, and not in a condition to be taken out to sea beyond the mainland, or is used as a receiving ship at anchor in port in a navy yard, communicating with the shore by a rope, and having a roof built over her deck, and not technically in commission for sea service. The claimant, while a vessel was not on a cruise, but anchored at and tied to a wharf in the harbor of New York, who lived on board of her, wore his uniform, and was subjected to the same regulations as while she was upon the high seas, was "at sea" within the meaning of this section. *United States v. Barnette*, 17 S. Ct. 286, 288, 165 U. S. 174, 41 L. Ed. 675.

A ship afloat, officered, manned, equipped, and capable of proceeding to sea, on which seagoing service, discipline, and duty are required, though in a harbor, is, within the intent of Rev. St. § 1571, a ship "at sea." *Barnette v. United States*, 30 Ct. Cl. 197, 202.

#### AT THE WALL.

If an assailant violates the sanctity of another's dwelling by following him thereto and presses on him, the assailed, being in his own house, is regarded as "at the wall," and is justified in using such force as is necessary to repel the assailant and to defend himself and family, even to the taking of life. *Christian v. State (Ala.)* 11 South. 338.

#### AT WHICH TIME.

In Const. § 152, providing that vacancies in elective offices shall be filled by appointment until the next annual election at which either city, town, county, or state officers are to be elected, and then filled by election until the remainder of the term, the words "at which" mean not only "when," but "where," so that a vacancy in the office of circuit judge cannot be filled at an election at which no city, town, county, or state officer is to be elected in the judicial district in question, though a judge of the Court of Appeals is to be elected in another part of the state. *Eversole v. Brown (Ky.)* 53 S. W. 527.

Where a contract for the sale of real estate provided that a payment of a certain sum should be made on a certain day, at which time the vendor should execute and deliver a deed, the phrase "at which time" implied that the payment was a condition

precedent. *Biddle v. Coryell*, 18 N. J. Law (3 Har.) 377, 379, 38 Am. Dec. 521.

#### ATHEIST.

An atheist is one who does not believe in the existence of a God. *Gibson v. American Mut. Life Ins. Co.*, 37 N. Y. 580, 584.

An atheist is "one who disbelieves in the existence of a God, who is the rewarder of truth and an avenger of falsehood." Such a person is incompetent as a witness. *Thurston v. Whitney*, 56 Mass. (2 Cush.) 104, 110; *Commonwealth v. Hills*, 64 Mass. (10 Cush.) 530, 532.

Atheists differ from all other people in owning no religion. *Hale v. Everett*, 53 N. H. 9, 154, 16 Am. Rep. 82.

#### ATLANTIC COAST.

A marine policy on a vessel to be employed in the coasting trade on the United States Atlantic coast, and which permits the use of Gulf ports not west of New Orleans, will be construed to mean the coast of the Atlantic Ocean, and not the Gulf of Mexico. *New Haven Steam Saw Mill Co. v. Security Ins. Co. (U. S.)* 7 Fed. 847, 849.

#### ATLANTIC OCEAN.

"Geographically the Atlantic Ocean is that branch of the general ocean which separates the continents of Europe and Africa from America;" and, as used in a marine insurance policy providing that the ship should navigate the Atlantic Ocean between Europe and America, includes the Gulf of Mexico. *The Orient (U. S.)* 16 Fed. 916, 919.

A contract to insure a vessel "to navigate the Atlantic Ocean" between Europe and America, and to be covered in port and at sea, is not to be construed as strictly limiting the insurance to the Atlantic Ocean, where the insurer knew the home port of the vessel was New Orleans, but the words would include the Gulf. *Merchants' Mut. Ins. Co. v. Allen*, 7 Sup. Ct. 821, 822, 121 U. S. 67, 30 L. Ed. 858.

#### ATRAVESADOS.

"Atravesados" is a Spanish word, used at times as a nautical phrase meaning "lying to." In ordinary use the word would mean at right angles or abeam. *The Hugo (U. S.)* 57 Fed. 403, 410.

#### ATTACH.

In actions.

See "Property Attached."

Gen. St. tit. 1, § 327, authorizing the replevin of goods and chattels "attached in

any suit," is to be construed as meaning "goods held on mesne process only." *Howard v. Crandall*, 39 Conn. 213, 216.

The word "attach," derived remotely from the Latin form "attingo," and more immediately from the French "attacher," signifies to take or touch, and was adopted as a precise expression of the thing. The only object of attachment is to take out of the defendant's possession and to transfer into the custody of the law, acting through its legal officers, the goods attached, that they may, if necessary, be seized in execution, and be disposed of and delivered to the purchaser; hence the legal doctrine that, to constitute an attachment of goods, the officers must take actual possession or custody. *Buckeye Pipe Line Co. v. Fee*, 57 N. E. 446, 448, 62 Ohio St. 543, 78 Am. St. Rep. 743; *Hollister v. Goodale*, 8 Conn. 332, 334, 21 Am. Dec. 674.

In holding that a condition in a fire policy on real property, that it shall become void if the property be levied on, attached, or change takes place in title or possession, was not applicable to real estate, but was confined exclusively to personal property, the court say that they are unable to find any similar case containing the word "attached," but find several cases using the words "levied on" or "taken into possession or custody." They held that these words were meant to have special, if not exclusive, reference to personal property, the policies containing the clause being adapted to insurance of both real and personal property; that as, when personal property is levied upon, there is usually an actual seizure of it by the officer in whose custody it remains until the sale, the phrase was designed to guard against any supposed increase of risk resulting from a change of possession, and therefore that it has no application to a technical levy of execution on real estate. We do not think that the word "attached" adds anything to the meaning of the phrase, or serves any purpose except to clear up a doubt which might possibly arise of its application to the case of an attachment of personal property on a writ, the word "levy" being more commonly used to designate the seizure of property on execution than on a writ of attachment. *Tefft v. Providence Washington Ins. Co.*, 32 Atl. 914, 19 R. I. 185, 61 Am. St. Rep. 761.

The word "attached" in a sheriff's deed, which recited the execution levy, and conveys all the interest of the judgment debtor at the time the premises were attached as aforesaid, shall be construed to refer to the execution levy. *Frazee v. Nelson*, 61 N. E. 40, 41, 179 Mass. 456, 88 Am. St. Rep. 301.

#### As to buildings.

The words "additions attached" in a fire policy on furniture contained in a cer-

tain brick building and "additions attached" was construed to include furniture in a frame building on the next lot, extending over and against the rear of the brick building two inches, and used in connection with the brick building. The court in so ruling says: "It is a fact not to be overlooked that the only building to which the term 'additions attached' can relate is this frame building. The language is therefore surplusage, unless it embraces that building, and we must give effect to every part of the policy, if we can do so without obvious violence to the intentions of the parties to it. The structure impinged against the rear of the brick building. It extended onto lot 967 sufficiently to do this; hence it was not wholly on the lot adjoining. The fact that it was upon the lots is not of sufficient moment to relieve the insurer from liability. Nor was it detached. It was connected as closely to the brick building as the nature of the structure would permit. It is a familiar rule in the interpretation of insurance policies that where any uncertainty exists in the language it will be resolved in favor of the insured. The two buildings were occupied by plaintiff, and we are not required to distort the phraseology of the policy in reaching the conclusion that it covered the furniture in the wooden structure." *Maisel v. Fire Ass'n of Philadelphia*, 69 N. Y. Supp. 181, 183, 59 App. Div. 461.

"The word 'attached,' in a statute exempting from taxation all houses used exclusively for public worship, and the grounds attached to such buildings, is used as an equivalent of the word 'annexed,' which has received legal construction as meaning physically joined to. A lot separated from a lot on which a cathedral stands by another lot is not 'attached' thereto, within the meaning of the latter term as used in the statute." *Hamilton County Com'rs v. Mannix*, 9 Ohio Dec. 189, 191.

#### As to crops.

"Attached," as used in Laws Ex. Sess. 1870, Act No. 8, § 2, providing for the punishment of any one who shall fraudulently sever from the soil of another any produce or any fruit from a crop growing thereon or "attached thereto," etc., means attached to the soil by roots; a growing or standing or ungathered crop of some kind. If the crop be already severed or detached from the soil by the owner, and be left on the ground, and there be a taking and carrying away of the same, such act, though probably larceny, is not an offense under the section cited. *State v. Green*, 30 South. 898, 106 La. 440.

#### As to districts or territory.

Property is attached to an independent school district for school purposes where it is connected with it, and territory is included

which forms a part of the district when organized, or is attached thereto afterwards. *Albin v. Directors of West Branch*, 58 Iowa, 77, 80, 12 N. W. 134.

Const. art. 5, § 5, declares that whenever a county shall contain 40,000 inhabitants it shall constitute a separate judicial district, and shall select one judge; but counties containing a population less than is sufficient to constitute separate districts may be attached to contiguous districts. Held, that "attached" is employed in its usual sense, as meaning to tie or fasten, to bind, to fasten one thing to another; and hence a county containing less than 40,000 inhabitants attached to a contiguous district does not become a part thereof. *Commonwealth v. Dumbauld*, 97 Pa. 293, 303.

#### As to homestead or exemption rights.

In act of Congress granting certain lands in aid of railroads, but excepting those to which the right of pre-emption or homestead settlement has attached, the word "attached" did not mean settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated. It meant by such a proceeding a right of homestead had fastened to that land which could ripen into a perfect title by future residence and cultivation. *Hastings & D. R. Co. v. Whitney*, 10 Sup. Ct. 112, 114, 132 U. S. 357, 33 L. Ed. 363; *Kansas Pac. R. Co. v. Dunmeyer*, 5 Sup. Ct. 566, 573, 113 U. S. 629, 28 L. Ed. 1122; *Sioux City & I. F. Town Lot & Land Co. v. Griffey*, 143 U. S. 82, 12 Sup. Ct. 362, 364, 36 L. Ed. 64; *Weeks v. Bridgman*, 48 N. W. 81, 83, 41 Minn. 352; *United States v. Union Pac. R. Co.* (U. S.) 61 Fed. 143, 145.

"Attached," as used in 12 Stat. 492, granting land to a railroad, but exempting lands to which a pre-emption or homestead claim may have attached, means the filing of an entry in regular form by a settler, and the company acquires no right to the land, though such homestead or pre-emption entry is afterwards set aside. *McIntyre v. Roeschlaud* (U. S.) 37 Fed. 556.

#### ATTACH SUF'T.

The words, "Mr. Officer, attach suf't," when indorsed on a writ of attachment, are a sufficient direction to the officer to attach property, though such indorsement is not signed. *Abbott v. Jacobs*, 49 Me. 319.

The words, "Mr. Officer, attach suff.," when written on the back of a writ of attachment, are sufficient notice to apprise the officer that the plaintiff desires an attachment to be made, and hence the former is responsible for failing to attach. *Kimball v. Davis*, 19 Me. (1 App.) 310.

#### ATTACHING CREDITOR.

The term "attaching creditor," as used in a provision authorizing a subsequent attaching creditor to contest the validity of the debt or claim on which a previous attachment is founded, shall include creditors claiming to hold by trustee process personal property or funds in the hands of any person against such previous attachment. V. S. 1894, 1399.

#### ATTACHIAMENTA DE FLACITUS CROONÆ.

"Attachiamenta de flactus croonæ" means attachment as well of pleas of the crown, and was used in Duke of Lancaster, charter (23 Edw. III), which among other things declared that the Duke of Lancaster might have the return of all writs of the King and his heirs, and summons of the exchequer, and "the attachment as well of pleas of the crown" as of other pleas, in all lands or fees, so that no sheriff or other bailiff or minister of the King, or his heirs, might enter those lands or fees to execute the same writs and summons, or to make attachment of pleas of the crown, or to do any other office there, unless in default of the same or under his bailiff, etc. Held, that such words authorized the Duke of Lancaster to appoint coroners within the duchy, which was exclusive, and that, notwithstanding a modern usage to the contrary, the coroner of the county had no authority to exercise the office within the duchy possessions, concurrently with the duchy coroners. *Jewison v. Dyson*, 9 Mees. & W. 540, 544.

#### ATTACHMENT.

See "Ancillary Attachment"; "Foreign Attachment"; "Warrant of Attachment."

"Attachment" is a statutory proceeding, and is defined as a provisional remedy, whereby a debtor's property, real and personal, or any interest therein capable of being taken under a levy and execution, is placed in the custody of the law, to secure the interests of the creditor pending the determination of the cause. *United States Capsule Co. v. Isaacs*, 55 N. E. 832, 833, 23 Ind. App. 533 (citing *Drake*, *Attachm.* § 5); *Ferguson v. Glidewell*, 2 S. W. 711, 712, 48 Ark. 195.

Bouvier defines "attachment" as "taking into the custody of the law the person or property of one already before the court, or of one whom it is sought to bring before it. A writ issued at the institution or during the progress of an action, commanding the sheriff or other proper officer to attach the property, rights, credits, or effects of the de-

fendant to satisfy the demands of the plaintiff. The original design of this writ was to secure the appearance of one who had disregarded the original summons by taking possession of the property as a pledge. 3 Bl. Comm. 280. By an extension of this principle in the New England states, property attached remains in the custody of the law after the appearance and until final judgment." *Beardsley v. Beecher*, 47 Conn. 408, 414.

"Our proceedings by attachment against absent and absconding debtors are borrowed from what is called a foreign attachment under the custom of London." *Welsh v. Blackwell*, 14 N. J. Law (2 J. S. Green) 344, 346.

"The remedy by attachment is in derogation of the common law, and exists only by virtue of the statute; and being summary in its effects, and liable to be abused and used oppressively, its application must be carefully guarded, and confined strictly within the limits prescribed by the statute. An order of attachment is an execution by anticipation. It empowers the officer to seize and hold the estate of the alleged debtor for the satisfaction of a claim or demand to be established in the future, and for which a judgment may never be obtained. The proceeding is to some extent the reverse of the ordinary course of judicial proceedings. The latter subjects the demand of the plaintiff to judicial investigation, and permits the seizure of the debtor's property only after judgment obtained; while the former commences with the seizure of the debtor's property, and afterwards subjects the plaintiff's claim to such investigation." *Delaplain v. Armstrong*, 21 W. Va. 211, 213.

The purpose and essence of the remedy of attachment, as created and regulated by the statutes, is to establish by judgment a claim or debt against the defendant, and to subject to the satisfaction of the judgment property or effects within the territorial jurisdiction of the court. Process by attachment was unknown to the common-law, and is wholly of statutory creation. *Exchange Nat. Bank of Spokane v. Clement*, 19 South. 814, 815, 817, 109 Ala. 270.

Attachment is a factor of that system of law which charges the property of a debtor with the payment of his debts. Its purpose is to give to the creditor from the very commencement of his suit a lien on the estate of his debtor. It is an anterior process, the purpose of which is to make the jurisdiction of the court in ulterior proceedings more effectual, and to afford the plaintiff security for the satisfaction of the judgment which he may obtain. It is an effort to create a lien upon the debtor's property. The attachment levy from its date operates as such a lien; that is to say, it charges the property levied upon with the payment of the judgment to be rendered in priority of any subsequent

incumbrances he may create. *Campbell v. Keys*, 89 N. W. 720, 721, 130 Mich. 127.

"Attachment of property is a method prescribed by statute for creating a lien on the debtor's property without his consent to satisfy any judgment that may be obtained against him." To constitute a valid lien, all the requirements of the statute must be strictly followed, and it is a general principle that any failure to comply with the statute is fatal to any lien attempted to be acquired thereby. *Clark v. Patterson*, 5 Atl. 564, 565, 58 Vt. 676.

"At common law as well as under our statute attachment is a proceeding to create and enforce a lien. It is a remedy for the collection of an ordinary debt by a preliminary levy upon the property of a debtor, to conserve it for eventual execution after the lien shall have been perfected by judgment." *Crisman v. Dorsey*, 21 Pac. 920, 922, 12 Colo. 567, 4 L. R. A. 664.

An attachment is an equitable assignment of the thing attached; a substitution of the creditor for the debtor, and to the latter's right against the garnishee, and places a judgment creditor in the shoes of his debtor, with all his rights and privileges, just as the debtor stood at the day of the service of the attachment. *Kuhn v. Warren Sav. Bank (Pa.)* 11 Atl. 440, 442.

An attachment is an anticipated execution to take and hold property subject to a judgment in an action. *Patterson v. Perry (N. Y.)* 10 Abb. Prac. 82, 96 (citing *Thayer v. Willet*, 18 N. Y. Super. Ct. [5 Bosw.] 344).

An attachment is an extraordinary writ; to use it when the debtor is within the reach of ordinary process is inconsistent with the spirit and designs of this mode of procedure, and it is only when the creditor cannot employ the latter that he is permitted to resort to the former. *New York City Bank v. Merrit*, 13 N. J. Law (1 J. S. Green) 181, 134.

The writ of attachment is an exceptional and extraordinary remedy, whereby the property of the defendant is first seized, and afterwards publication of notice made that he may appear and plead to the action. *Leonard v. Stout*, 36 N. J. Law (7 Vroom) 370, 371.

The writ of attachment or garnishment is in the nature of an execution in advance, and the office and purpose of such writ is to hold and bind the property seized until final judgment in the attachment proceeding, and, if on final hearing judgment is rendered for plaintiff, the effect is to give the plaintiff the right to enforce any lien he shall have acquired by his attachment or the garnishment against whatever interest the defendant may have in the property attached or garnished, subject to be applied to the pay-



ment of plaintiff's claim. *Rempe & Son v. Ravens*, 67 N. E. 282, 286, 68 Ohio St. 113.

The writ of attachment based on no privilege, no claim of ownership or possession, no mortgage, no judgment, is merely a right given a creditor, under certain circumstances, to hold his debtor's property in statu quo until his claim can be ripened into judgment. The interest of the attaching creditor in and to the property seized is more remote than is the interest of creditors whose claims warrant the seizure of property under the writs of sequestration, seizure of sale, and fieri facias. Under the writ of attachment the sheriff's possession imposes no duty of administration, and he is under no legal obligation to cultivate land attached. *American Nat. Bank v. Childs*, 22 South. 384, 385, 49 La. Ann. 1359.

A writ of attachment is nothing more than a remedy afforded by law for the collection of a debt. It is like a capias ad respondendum, and a remedy of that nature may be abolished by the Legislature which created it. *Evans-Snyder-Buel Co. v. McFadden*, 105 Fed. 293, 298, 44 C. C. A. 494, 58 L. R. A. 900.

"A writ of attachment was a very ancient judicial process, designed to coerce an appearance on pain of eventual outlawry. Normally it followed the summons in default of appearance, but in some cases might be issued without previous resort to that writ." *Watson v. Noblett*, 47 Atl. 438, 65 N. J. Law, 506.

The process of attachment is a creature of statute, and is a remedy only given in case of indebtedness arising on contract. *Griswold v. Sharpe*, 2 Cal. 17, 24.

The writ of attachment issued at the beginning of a suit is really a preliminary execution dependent for its ultimate efficacy upon the rendering of the judgment in favor of the plaintiff. It has all the characteristics of an execution in its first stage. *Herman Goepper & Co. v. Phoenix Brewing Co.*, 74 S. W. 726, 729, 25 Ky. Law Rep. 84.

#### **As an action, cause, or suit.**

See "Cause"; "Suit."

An attachment is a special proceeding ancillary to the action, but so independent of it that an order in the attachment proceeding may, when final, be subject of a petition in error during the pendency of the action. *Harrison v. King*, 9 Ohio St. 388. But such is not the rule in New Mexico. *Schofield v. American Val. Co.*, 54 Pac. 753, 754, 9 N. M. 485.

An attachment is not an ordinary proceeding in the action, but an extraordinary and collateral proceeding, within the meaning of a statute requiring notice of all or-

dinary proceedings in the action. *Schundt v. Cahn*, 3 Alb. Law J. 389.

#### **As action in rem or in personam.**

Attachment is a proceeding in rem to enforce a debt from a nonresident, fraudulent, or absconding debtor. *Myers v. Farrell*, 47 Miss. 281, 283.

Attachment suits partake of the nature of suits in rem, and are distinctly such when they proceed without jurisdiction having been required of the person of the debtor in the attachment suit. *Blanc v. Tennessee Coal, Iron & R. Co.*, 87 N. Y. Supp. 906, 907, 2 App. Div. 248.

Attachment is in the nature of a proceeding in rem. There is an actual seizure of property except where it is in the form of garnishment. In the case of garnishment it retains its character as one in the nature of a proceeding in rem, though there is no actual seizure of property under the order of attachment; for by service of the order upon the garnishee it arrests the debt in his hands and holds it through him, subject to the judgment of the court. The claim subjected by garnishment is the estate of the principal debtor in the hands of the garnishee, and the proceeding is against it as a res, a thing, and not against the garnishee personally, except to compel him to turn it over to the creditor of the principal defendant in satisfaction of his claim. In every practical sense it amounts to a seizure of the thing. Without such seizure no jurisdiction over the res is acquired, and no judgment against it can be rendered, though the court may have jurisdiction of the parties. *Pennsylvania R. Co. v. Rogers*, 44 S. E. 300, 302, 52 W. Va. 450, 62 L. R. A. 178.

The attachment act is a remedial process allowed to a creditor against the property of a debtor when he is absent from the state and beyond the reach of the ordinary process of law. It is nevertheless a proceeding in personam, and its object is to make the defendant a party in the court. *Robinson v. Crowder*, 1 Bailey, 185, 186.

Proceedings by attachment partake ordinarily of the nature and character of a proceeding in personam, and not a proceeding in rem. *Exchange Nat. Bank v. Clement*, 19 South. 814, 815, 817, 109 Ala. 270.

#### **Actual possession implied.**

"Attachment" imports the taking of property into the custody of an officer of the law by virtue of a mandatory precept issued by the authority and in the name of the state. *Bryant v. Warren*, 51 N. H. 213, 215.

An attachment is the taking or seizing of a person or property by virtue of a legal process. *Barr v. Warner*, 62 Pac. 899, 900, 38 Or. 109.

"Attachment of property" is the taking out of the defendant's possession and transferring into the custody of the law the goods attached. They may, if necessary, be seized in execution, and be disposed of and delivered to the purchaser. "To attach is to take actual possession of the property." To constitute an attachment of goods, the officer must have actual possession of the property. The word "attach" is derived from the Latin "attingo," and more directly from the French "attacher," and signifies to touch. Hence goods neither seized nor reduced to possession by an officer are not attached. *Pennsylvania R. Co. v. Pennock*, 51 Pa. (1 P. F. Smith) 244, 253.

#### **As an ancillary remedy.**

An attachment is auxiliary to the action in which it issues. *Bowen v. Port Huron Engine & Thresher Co.*, 80 N. W. 345, 109 Iowa, 255, 47 L. R. A. 131, 77 Am. St. Rep. 539; *Reed v. Maben*, 33 N. W. 252, 253, 21 Neb. 696; *Bishop v. Smith*, 72 Pac. 220, 221, 66 Kan. 621.

"Attachment is a proceeding ancillary to an action at law, by which a party is enabled to acquire a lien for the security of his demand by a levy made before instead of after the entry of a judgment. This ancillary proceeding may be taken at the time of the commencement of the action or at any time afterwards. Neither the action nor the judgment in any manner depend upon the attachment, although the attachment depends upon the action, and the judgment in the action is precisely the same whether the attachment is dissolved or not." *Sheppard v. Yocum*, 3 Pac. 824, 825, 11 Or. 234; *Windt v. Banniza*, 26 Pac. 189, 190, 2 Wash. 147. And such is its nature. *Quebec Bank v. Carroll*, 44 N. W. 723, 1 S. D. 1.

An attachment is not an original proceeding, but is a mere proceeding in an action. Its office is not to give justice, but to obtain possession of and hold the debtor's property until recovery of judgment. *Finn v. Mehrbach*, 65 N. Y. Supp. 250, 256.

An attachment is an ancillary remedy provided by statute by means of which a contingent lien is obtained and impressed upon property of the defendant, which becomes vested and perfected on entry of judgment and levy of execution. *McFadden v. Blocker*, 48 S. W. 1043, 1049, 2 Ind. T. 260, 58 L. R. A. 878.

An attachment has no bearing whatever upon the merits of a suit. It is only ancillary to secure the fruits of any judgment to be obtained. It brings under control of the court, not of the plaintiff, property to be held for the purpose. The ownership is not changed. The plaintiff has no right to it in any case as property, and to remove and sell it with or without the consent of the sheriff is a contempt of court.

If the plaintiff falls in his action the defendant is entitled to its return. *Simmons Clothing Co. v. Davis*, 58 S. W. 655, 656, 3 Ind. T. 379 (citing *Atkins v. Swope*, 38 Ark. 528).

In New York an attachment is not an original process commencing a suit, but a provisional remedy adopted in a suit already commenced; while on the contrary, in South Carolina, a writ of attachment is an original process, and, although a proceeding in rem, its purpose and effect is to make the absent debtor a party to the cause in court, and through it to subject the property attached to the payment of the debt demanded. *Clawson v. Sutton Gold Min. Co.*, 3 S. C. (3 Rich.) 419, 422.

#### **As an assignment.**

"An attachment operates as an involuntary assignment in bankruptcy or insolvency, and places the whole estate of a debtor in the custody of the court." *lauch v. De Socarras*, 39 Atl. 381, 385, 56 N. J. Eq. 524.

An attachment is a sequestration of the debtor's property to pay a single debt. An assignment in insolvency is a sequestration of all his property to pay all his creditors pro rata. The one may work a preference, the other cannot. *Maltbie v. Hotchkiss*, 38 Conn. 80, 85, 9 Am. Rep. 364.

#### **As species of distress.**

An attachment, as a part of the service of process in a civil suit at common law, was a species of distress, under which the effects attached were the ancient *vadli* or pledges. *Bond v. Ward*, 7 Mass. 123, 128, 5 Am. Dec. 28.

#### **Garnishment distinguished.**

The difference between an attachment of personal property and a garnishment is very great. In the former the property attached is actually taken into the possession of the officer holding the writ, and is under his custody and control, while in garnishment proceedings the property is left in the hand of the garnishee. *Santa Fé Pac. R. Co. v. Bossut*, 62 Pac. 977, 978, 10 N. M. 322.

#### **As incumbrance.**

See "Incumbrance (On Title)."

#### **Injunction distinguished.**

The personal jurisdiction exercised by a court of equity, however it may affect property, as by an injunction to restrain the disposition thereof, is not an "attachment" of property, and does not constitute a lien upon property, within the meaning of the statute authorizing, in certain cases, the lien created by the attachment of property of an insolvent debtor to continue after his assignment for the benefit of the assignee. *Squire v. Lincoln*, 137 Mass. 399, 403.

**As a lien.**

See "Lien."

**As process.**

See "Mesne Process"; "Process."

**Of person.**

Attachment is a process of civil execution, which is sometimes issued against a party to a civil action for disobeying rules or orders of court made in progress of a cause for the benefit of the party injured, and when so used the writ is a mere execution in a civil suit. *Ex parte Hardy*, 68 Ala. 303, 328.

"An 'attachment' may very well be defined to be a process issued from a court of record to punish any person concerned in or attendant on the administration of justice for misconduct, malpractice, or neglect of duty, and to compel a performance of its orders, judgments, or decrees, interlocutory or final." *Ex parte Thurmond* (S. C.) 1 Bailey, 605, 606.

"Attachment" is defined as a writ issued by a court of record commanding the sheriff to bring before it a person who has been guilty of contempt of court, either in neglect or abuse of process, or of subordinate powers. *Burbach v. Milwaukee Electric Ry. & Light Co.*, 96 N. W. 829, 831, 119 Wis. 384.

Attachment is a criminal process in form, though in fact civil. It issues in the name of the people against the supposed offender. It is in theory granted on account of some supposed contempt. It is merely intended to bring the party into court. The officer to whom an attachment is issued is bound only to have the person in court on the return day. *Morrison v. Lester*, 15 Hun, 538, 541.

An attachment is a writ issued by the clerk of a court, or by any magistrate, or by the foreman of a grand jury, in any criminal action or proceeding authorized by law, commanding some peace officer to take the body of a witness and bring him before such court, magistrate, or grand jury on a day named, or forthwith, to testify in behalf of the state or of the defendant, as the case may be. *Code Cr. Proc. Tex.* 1895, art. 523.

**ATTACHMENT EXECUTION.**

An attachment execution is of a twofold nature. As to the defendant in the judgment on which it is issued, it is a species of execution process; but as to the garnishee, who becomes a party defendant therein, it is an original process—a summons commanding him to appear and show cause, if any he has, why the judgment in favor of the plaintiff should not be levied on the goods and effects of defendant in his hands. *Kennedy v. Agricultural Ins. Co.*, 30 Atl. 724, 725, 165 Pa. 179.

"An attachment in execution is simply a species of execution, the purpose of which is to obtain satisfaction of the judgment upon which it is founded. It is not an original proceeding instituted to enforce a real or supposed or equitable liability by the procurement of a judicial decree as its result. In other words, it is not a remedial process, and can scarcely be spoken of as a remedy in the sense in which that term is used in considering the subject of an adequate legal remedy, which excludes a bill in equity." *Appeal of Lane*, 105 Pa. 49, 61, 51 Am. Rep. 166.

**ATTACHMENT ON MESNE PROCESS.**

An attachment of property on mesne process is a mode of obtaining security for the satisfaction of any judgment which the plaintiff may finally recover. *Morgan v. New York Nat. Building & Loan Ass'n*, 46 Atl. 877, 73 Conn. 151.

An attachment by mesne process is an actual seizure of the goods of a debtor in order that they may be held to satisfy the judgment which the plaintiff may recover in the future. If the goods are so situated that they cannot be actually seized and taken into the possession of the officer, they cannot be attached. *Dunklee v. Fales*, 5 N. H. 527, 528.

**ATTACHMENTS.**

"Attachments," as used in a contract of the agent of a sewing machine company to purchase from the company all parts and "attachments," means mechanisms belonging to the original machine. *Wheeler & W. Mfg. Co. v. Lyon* (U. S.) 71 Fed. 374, 378.

**ATTACK.**

See "Collateral Attack"; "Direct Attack"; "Indirect Attack."

Webster defines an "attack" to mean to fall upon with force, to assault, as with force of arms, and in common understanding such is the meaning of the term. The word does not include an immediate preparation for an attack, and therefore an instruction in a homicide case that defendant had a right to act in self-defense if deceased had made an attack on him was erroneous, the only evidence of an attack being that deceased was preparing to make an attack. *Philpps v. State*, 81 S. W. 397, 400, 34 Tex. Cr. R. 500.

**ATTAINDER—ATTAIN.**

See "Bill of Attainder."

Conviction distinguished, see "Convicted—Conviction."

"Attainder" is described in English criminal law to be that extinction of civil rights and capacities which takes place wherever a

person who has committed treason or felony receives sentence of death for his crime. *Green v. Shumway*, 39 N. Y. 418, 431; *Shepherd v. Grimmer*, 31 Pac. 793, 798, 3 Idaho (Hasb.) 403. The person so sentenced is called attaint or an attainer, and is no longer of any credit or reputation, and cannot be a witness in any court. *Shepherd v. Grimmer*, 31 Pac. 793, 798, 3 Idaho (Hasb.) 403.

The word "attainder" is defined to be the corruption of the blood of the criminal capitally condemned, which takes place by the common law on sentence of death. The party attainted lost all power to receive or give by inheritance. This attaint or corruption of blood continued to be the law of England at the time our Constitution was formed, and may be the law on condemnation of treason to this day. The second section of the Constitution declares that Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the party attainted. In *re Garland* (N. Y.) 32 How. Prac. 241, 251.

"Attainder" is defined to be a stain or corruption of the blood of a criminal capitally condemned. *Green v. Shumway*, 39 N. Y. 418, 431.

"Attainder at the common law is the consequence of a judgment in treason or felony, and that whether the judgment be of death on conviction or an outlawry on a quinto exactus return." Hence, where the owner of an estate had not been condemned to death on conviction, and was neither indicted nor tried nor convicted, and there was no judgment of outlawry on a quinto exactus return, but there had only been a forfeiture of his property under revolutionary confiscation act because the person had joined the army of the King of Great Britain and had otherwise connived against the form of his allegiance, there was no attainder of treason upon an outlawry, and the forfeiture was not consequent thereupon, and hence there was no attainder of such person so as to affect his wife's right of dower in his lands. *Cozens v. Long*, 3 N. J. Law (2 Penning.) 764, 766.

Attainder is the extinction of civil rights and capacities—a mark of infamy by means of which the offender becomes "attinctus" or blackened. While technical attainder, working a corruption of the blood, does not exist in the United States, yet a sentence of disqualification to hold or enjoy any office of honor, profit, or trust, which is provided by the Constitution in case of conviction by impeachment, is within the primary definition of the term. *State v. Hastings*, 55 N. W. 774, 781, 37 Neb. 98.

In the statutory provision "that he that shall be attainted of waste shall lose the thing that he hath wasted, and moreover

shall recompense thrice so much as the waste shall be taxed," the word "attaint" is used in the law to denote the conviction of crime, the forfeiture of the place wasted, and the treble damages show that it is a highly penal statute. *Browne v. Blick*, 7 N. C. 511, 518.

## ATTEMPT.

Any attempt, see "Any."

To attempt is to make an effort to effect some object; to make a trial or experiment; to endeavor; to use exertion for some purpose. *Commonwealth v. McDonald*, 59 Mass. (5 Cush.) 365, 367.

An "attempt" is defined as follows: To make trial or experiment of; to try; to endeavor; an act tending towards the accomplishment of a purpose which exceeds a mere intent or design, but falls short of an execution of it. *Atkinson v. State*, 30 S. W. 1064, 1065, 84 Tex. Cr. R. 424; *Lovett v. State*, 19 Tex. 174, 177.

An insurance policy providing that all fraud or "attempted fraud," by false swearing or otherwise, should cause a forfeiture of all claim under the policy, does not mean that a willful false oath to a material fact would work a forfeiture of the claim, but that there must be an attempt to deceive the company to its injury, as well as a false statement, in order to work a forfeiture. *Shaw v. Scottish Commercial Ins. Co. (U. S.)* 1 Fed. 761, 763.

On a prosecution for murder, where the accused adduced evidence tending to prove an alibi, an instruction that if the jury believed from the evidence that the accused had "attempted" to prove an alibi the burden was on him, etc., was not objectionable as calculating to impress upon the jury that the court was of the opinion that the accused "attempted" but failed to prove an alibi. *Allen v. State*, 68 S. W. 28, 30, 70 Ark. 337.

"Attempt but too successful," as used in the alleged libelous statement of an attempt by plaintiff to destroy religious institutions which was but too successful, is to be construed as meaning "an act or design or endeavor that has at least been partially accomplished, and conduct which merely conduces to such end will not be held to be an attempt." *Stow v. Converse*, 4 Conn. 17, 37.

"Attempted to prove" means introduced testimony tending to prove. *Hogan v. Town of Northfield*, 56 Vt. 721.

To suffer an attachment by a debtor with a fraudulent intent to give a preferment is an attempt to fraudulently transfer the attached property, within the meaning of the Code providing for a creditors' bill to reach property which has been attempted to be fraudulently disposed of by the debtor. *Cartwright v. Bamberger*, 8 South. 264, 265, 90 Ala. 405.

**ATTEMPT TO COMMIT ARSON.**

An attempt to commit arson was an indictable misdemeanor at common law, and the statutes of Iowa, declaring that if any person set fire to any building or any material, with intent to cause such building to be burned, he shall be punished, was intended to punish a like attempt, though the fire be put out or go out itself before consuming any part of the building, nor can it make any difference that the material used was a candle instead of hay, shavings, straw, or anything else. If the intention existed, and the candle was placed and left lighted in a position to consummate that intent, the offense is complete. *State v. Johnson*, 19 Iowa, 230, 232.

Under 3 Rev. St. (5th Ed.) p. 583, § 3 (2 Rev. St. 698, § 3), on the trial of an indictment for an attempt to commit arson, where it appeared that the prisoner, having prepared camphene and other combustibles, and placed them in his room, solicited another to use them in burning the barn of a third person, and promised to give him a deed of land if he would do so, the proof was sufficient to warrant a conviction for an attempt to commit arson. The intent to do the wrongful act, coupled with the overt acts toward its commission, constitutes the attempt spoken of by the statute. *McDermott v. People*, 5 Parker, Cr. R. 102, 104, 105.

**ATTEMPT TO COMMIT CRIME.**

An act done with intent to commit a crime, and tending, but failing, to effect its commission, is an attempt to commit that crime. Rev. Codes N. D. 1899, § 7693; Pen. Code N. Y. 1903, § 34; Rev. St. Utah 1898, § 4495; *People v. Spolascio*, 15 N. Y. Cr. R. 184, 185, 67 N. Y. Supp. 1114; *People v. Moran*, 7 N. Y. Supp. 582, 584, 54 Hun, 279, 7 N. Y. Cr. R. 329; *People v. Moran*, 123 N. Y. 254, 256, 257, 25 N. E. 412, 10 L. R. A. 106, 20 Am. St. Rep. 732; *People v. Gardner*, 25 N. Y. Supp. 1072, 1078, 73 Hun, 66 (quoting 1 Bish. Cr. Law [8th Ed.] § 728).

The word "attempt" may be defined as an intent to do a thing, coupled with an act which falls short of the thing intended. *Gandy v. State*, 13 Neb. 445, 449, 14 N. W. 143 (citing *State v. Marshall*, 14 Ala. 411); *Scott v. People*, 141 Ill. 195, 201, 30 N. E. 329 (citing 1 Bish. Cr. Law, § 728).

An attempt is to endeavor; to make an effort to effect some object; to make trial; to use exertion for any purpose. *Commonwealth v. Harris* (Pa.) 1 Leg. Gaz. R. 455, 460.

The word "attempt," as used in an indictment for an "attempt" to assault, signifies both the act and the intent with which the act is done. *United States v. Barnaby* (U. S.) 61 Fed. 20.

An attempt is an inchoate effort towards action. An attempt to commit a crime is, in

many cases, of itself a misdemeanor. *Willis v. Jolliffe*, 11 Rich. Eq. 447, 489.

The word "attempt" itself implies an intent formed, and also an endeavor to commit the offense. *State v. Evans* (Utah) 73 Pac. 1047, 1048.

An attempt to commit crime is composed of two elements—First, the intent to commit; second, a direct, ineffectual attempt towards its commission. *Johnson v. State*, 43 N. W. 425, 27 Neb. 687.

"Attempt" is a term peculiarly indefinite, and consequently the facts which develop the attempt should be set out in an indictment charging the accused with an "attempt" to commit a crime, so as to show that the attempt is itself criminal. *State v. Hefner*, 40 S. E. 2, 3, 129 N. C. 548.

The authorities describe an "attempt to commit a crime" as consisting of three elements, to wit, the intent to commit the crime, the performance of some act toward the commission of the crime, and the failure to consummate its commission. In *Scott v. People*, 141 Ill. 195, 30 N. E. 329, it was said: "An attempt is an intent to do a particular thing, with an act toward it falling short of the thing intended. When we say that a man attempted to do a thing, we mean that he intended to do specifically it, and proceeded a certain way in the doing." *Graham v. People*, 55 N. E. 179, 182, 181 Ill. 477, 47 L. R. A. 731 (citing *Thompson v. People*, 96 Ill. 158).

An attempt to commit larceny is an act intending to effect a commission of larceny, and if the act merely tends to show a guilty purpose, and does not tend to effect the commission of the crime, as where there is in fact no subject of larceny, there is no attempt. *People v. Moran*, 7 N. Y. Supp. 582, 585, 54 Hun, 279.

An attempt is committed only when there is a specific intent to do a particular criminal thing, which intent imparts a special culpability to the act performed towards the doing. It cannot be founded on mere general malevolence. When we say a man attempted to do a thing, we mean that he intended to do specifically it, and proceeded a certain way in the doing. The intent in the mind covers the thing in full; the act covers it only in part. *Brown v. State*, 11 S. W. 412, 413, 27 Tex. App. 330.

The word "attempt" is generally used in the law in describing the offense of an unsuccessful effort to commit a crime, but it has no technical meaning importing sufficient legal certainty as to the manner, the means used, and the intention of the wrongdoer. Its force and effect in an indictment was dependent upon a statement of the facts and circumstances that accompanied and constituted the illegal effort alleged. In an at-

tempt to commit a crime, the acts and words of a wrongdoer are essential ingredients to constitute an offense, and show the purpose he had in view. An attempt imports something done towards the accomplishment of a concealed purpose without success. An attempt to commit a crime is an incomplete effort made by some act intermediate to a criminal intention and a consummated crime. *United States v. Ford* (U. S.) 34 Fed. 26, 27.

The failure to consummate the crime is as much an element of an attempt to commit it as the intent and the performance of an overt act towards its commission. The act must fall short of the completed crime. *Graham v. People*, 55 N. E. 179, 182, 181 Ill. 477, 47 L. R. A. 731.

An "attempt to perpetrate a robbery" means the wrongful doing of an act or acts towards the commission of a robbery for that purpose, and with that intent, but a failure in the perpetration thereof. *State v. McGinnis*, 59 S. W. 83, 87, 158 Mo. 105.

A man may make an attempt or an effort to steal by breaking open a trunk, and be disappointed in not finding the object of pursuit, and so not steal in fact. *Commonwealth v. Bonner*, 97 Mass. 587. So a man may make an attempt to pick a pocket by thrusting his hand into it, and not succeed because there is nothing in the pocket. The attempt to steal from a person by thrusting the hand into the pocket is complete. *State v. Willson*, 80 Conn. 500.

The only safe rule is that the attempt is complete and punishable when an act is done with intent to commit the crime which is adapted to the perpetration of it, whether the purpose fails by reason of interruption or for other extrinsic cause, or because there was nothing in the pocket. *State v. Mitchell*, 71 S. W. 175, 177, 170 Mo. 633, 94 Am. St. Rep. 763.

#### **As assault with intent.**

As used in Code, § 3207, declaring that every slave or free negro who commits or attempts to commit a rape on any white female must on conviction suffer death, the word "attempt" is not synonymous with "assault with intent," but the attempt contemplated may be committed without an actual assault. *Lewis v. State*, 35 Ala. 380, 388.

#### **Declarations alone insufficient.**

An attempt to commit a felony is a criminal act punishable under the law, but to constitute such offense there must be some act done towards the accomplishment of the crime. Mere declarations of purpose on the part of a person to kill another, but where there is no proof of any attempt to carry that purpose into effect, do not constitute an attempt to commit a felony. *State v. McCarty*, 86 Pac. 338, 340, 54 Kan. 52.

#### **Intent distinguished.**

"Attempt" means to make an effort or endeavor, or an attack. An attempt implies more than an intention formed. Some step towards consummation must be taken before the intention becomes an attempt. Attempt to strike in striking distance, or to shoot in shooting distance, includes the intention, present ability, and some effort or endeavor to carry that intention into execution. An effort to strike within striking distance is assault. An attempt to shoot within shooting distance imports that the assailant had in his possession some description of firearm, that he made an effort to use it, and the person on whom he attempted to use it was within the distance the firearm would effectively project or discharge its ball. Less than this would not be an attempt to shoot in shooting distance." *Gray v. State*, 63 Ala. 66, 73.

The only distinction between an "intent" and an "attempt" to do a thing is that the former implies the purpose only, while the latter both the purpose and the natural effort to carry that purpose into execution. Therefore a mere "intent" to commit a particular offense does not involve an "attempt" to do it. *Prince v. State*, 35 Ala. 367, 369; *Witherby v. State*, 39 Ala. 702, 703; *State v. Bullock*, 13 Ala. 413, 416; *Atkinson v. State*, 30 S. W. 1064, 1065, 34 Tex. Cr. R. 424; *Hart v. State*, 38 Tex. 382, 383. The intent in the mind covers the thing in full, the act covers it only in part. *Prince v. State*, 35 Ala. 367, 369. See, also, *Hollister v. State*, 59 N. E. 847, 848, 156 Ind. 255.

The word "attempt" ordinarily implies an act, an effort, but in Pen. Code, div. 15, § 2, making it criminal for any person to attempt to commit an offense prohibited by law, and in such an attempt to do any act toward the commission of such offense, it is used as synonymous with "intend"; and thus taking an impression of the key which unlocks the door of a storehouse, for the purpose of making or procuring a false key with the intent of entering the house and stealing therefrom, is an intent to commit larceny by taking the impression of the key, whether he intends to enter and steal, himself, or procure another to do it. *Griffin v. State*, 26 Ga. 493, 497; *State v. Hayes*, 78 Mo. 307, 317.

Where a statute makes it a capital felony for any person of color to make an assault on a white woman with an "intent" to commit rape, it is not sufficient to allege that the defendant feloniously "attempted" to commit such crime, "attempt" not being synonymous with "intent." "Intent" refers to an act, denotes a state of the mind with which the act is done. "Attempt" is expressive rather of a moving towards doing the thing than of the purpose itself. An "at-

tempt" is an overt act itself. An assault is an "attempt" to strike, and is very different from a mere "intent" to strike. *State v. Martin*, 14 N. C. 329, 330.

#### **Intent alone insufficient.**

A statute prohibiting any person from "attempting" to contract an incestuous marriage contemplates an attempt manifested by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the party, and therefore an "intention" merely on the part of the defendant to commit the offense is not sufficient, but requires in addition a direct movement toward the commission of the offense after the preparations therefor are made. *People v. Murray*, 14 Cal. 159.

"A mere intention to commit a specific crime does not itself amount to an 'attempt,' as that word is employed in the criminal law. There must be, in addition to the remote intention, the mens rea, some act done toward the accomplishment of the proposed crime." *People v. Stits*, 17 Pac. 693, 696, 75 Cal. 570.

In an attempt to commit an offense, an intent to commit it must be present; but the presence of intent alone is not sufficient, there must be some concomitant act or movement toward the execution of that purpose. Thus an attempt to commit rape is not an offense unless the intent to commit it is accompanied with some act or movement toward its accomplishment which constitutes an assault. *Fox v. State*, 34 Ohio St. 377, 379.

In order to constitute an attempt to commit a crime, there must appear to have been more than the mere design or intention to commit the offense. There must have been some ineffectual act or acts towards its accomplishment. An attempt may be immediate; for instance, an assault. But it is very commonly a remote effort or indirect measure taken with intent to effect an object. *People v. Lawton*, 56 Barb. 126, 135; *People v. Kane*, 55 N. E. 946, 949, 161 N. Y. 380.

An "attempt," says Mr. Bishop, in 1 Cr. Law (5th Ed.) § 729, "always implies a specific intent, not merely a general mental culpability. When we say that a man attempted to do a thing, we mean that he intended to do specifically it, and proceeded a certain way in the doing. The intent in the mind covers the thing in full. The act covers it only in part." An attempt, therefore, embodies both the intent to do a thing, and a direct ineffectual act done towards its execution. Hence the charge of an attempt necessarily includes and is equivalent to the charge of an attempt to accomplish what was intended. *State v. Daly*, 70 Pac. 706, 707, 41 Or. 515.

#### **Intent required.**

"When we say a man 'attempted' to do a thing, we mean that he intended to do specifically it, and proceeded a certain way in the doing." *Prince v. State*, 35 Ala. 367, 369.

An "attempt" "is defined to be a deliberate crime, which is begun, but, through circumstances independent of the will of the actor, left unfinished. More strictly, it is such an intentional preparatory act as will apparently result, if not extrinsically hindered, in the crime which it was designed to effect. 1 Whart. Cr. Law, § 173. With reference to attempt, it has also been said that if all which the accused person intended would, had it been done, constitute no crime, it cannot be a crime under the name 'attempt' to do with the same purpose a part of this thing. One reason is that the specific intent, which we have seen is always necessary in a criminal intent, is wanting. Another reason relates to the act, namely, if a series of acts together will not constitute an offense, one of the series alone will not." In re Schurman, 20 Pac. 277, 282, 40 Kan. 533 (quoting 1 Bish. Crim. Law, § 747).

"An indictable attempt is committed only when the intent is specific, namely, to do the particular thing which constitutes the substantive crime. If, therefore, one is too drunk to entertain such specific intent, he cannot become guilty of the offense of attempt, however culpable, in a general way, he may be for his drunkenness." Hence, in a trial for conspiring with the intent and for the purpose of committing murder, it was error to charge that the fact that accused was intoxicated must not be considered by the jury. *Booher v. State*, 60 N. E. 156, 160, 156 Ind. 435, 54 L. R. A. 391.

#### **Offer synonymous.**

Webster defines the word "offer" as (1) a proposal, to be accepted or rejected; (2) first advance; (3) the act of bidding a price, or sum bid; (4) attempt; endeavor. "Attempt" is defined to make an effort to effect some object; to make a trial or experiment; to direct; to endeavor; to use exertion for any purpose. Accordingly the words "offer" and "attempt" are convertible terms. Consequently an indictment for bribery which alleged that the accused did "offer" to do a certain act was sufficient, as the "offer" to bribe was an "attempt" to do so within the meaning of the statute. *Commonwealth v. Harris* (Pa.) 1 Leg. Gaz. R. 455, 457.

#### **As sufficient charge of intent.**

An indictment charging that a person made an assault upon one, and by putting him in fear of life did "attempt" to fraudulently take property from his person, suffi-

ciently charges the intent within Pen. Code, art. 720, which defines "robbery" as a fraudulent taking of property from another's person or possession, with intent to appropriate it by means of an assault. *Atkinson v. State* (Tex.) 30 S. W. 1064, 1065.

An indictment charging that A., "with force and arms," etc., unlawfully "did attempt to pick the pocket of one B.," etc., is too indefinite. The courts cannot say what it is that the defendant was charged with doing, and without knowing this they cannot determine whether what he did was an indictable offense or not. If he committed an assault with intent to commit a felony, it should have been so stated. *Randolph v. Commonwealth* (Pa.) 6 Serg. & R. 398.

The word "attempt" is equivalent to "intent," so that an indictment charging an intent to commit rape is sufficient as an assault with intent to commit rape. *Taylor v. State* (Tex.) 69 S. W. 149.

An indictment for murder, charging the defendant with assaulting the prosecutor with an "attempt" him, etc., to kill and murder, instead of charging that the assault was made upon the prosecutor with "intent" him, etc., to kill and murder, was insufficient, since the word "attempt" is not synonymous nor substantially the same as "intent." *State v. Marshall*, 14 Ala. 411, 415.

In charging an assault with intent to commit a crime, the use of the word "intention," instead of the word "intent," is not fatal, but it is otherwise as to the use of "attempt." *State v. Hearsey*, 23 South. 372, 373, 50 La. Ann. 373.

Where a statute makes it a capital felony for any person of color to make an assault on a white woman with intent to commit rape, it is not sufficient to allege that the defendant feloniously "attempted" to commit the crime, since "attempt" is not synonymous with "intent." "Intent," referred to an act, denotes a state of the mind with which the act is done. "Attempt" is expressive rather of a moving towards doing a thing, than of the purpose itself. An "attempt" is an overt act itself. An "assault" is an attempt to strike, and is very different from a mere "intent" to strike. *State v. Martin*, 14 N. C. 329, 330.

#### Overt act required.

An attempt to commit a crime is an act done with intent to commit that crime, and tending to be fully shown by its commission. The two essential elements of the offense are: (1) The act must be such as would be proximately connected with the completed crime. (2) There must be an apparent possibility to commit the crime in the manner proposed. To constitute an attempt, there must be an act done in pursuance of the attempt, and more or less directly tending to the commission of the crime; but mere pre-

paratory acts for the commission of a crime, and not proximately leading to its consummation, do not constitute an attempt. *Groves v. States*, 42 S. E. 755, 756, 118 Ga. 516, 59 L. R. A. 598.

An attempt, in general, is an overt act done in pursuance of an intent to do a specific thing, tending to the end, but falling short of complete accomplishment of it. In law the definition must have this further signification: that the overt act must be sufficiently proximate to the intended crime to form one of the natural series of acts which the intent requires for its full execution. So long as the acts are confined to preparation only, and can be abandoned before any transgression of the law, they are within the sphere of "intent," and do not amount to "attempts," and hence, where one went to another's place and watched the house, and prepared a rope to tie the owner of the house in order to prevent his interference while he burglarized the house, such acts do not go beyond mere preparation, and did not rise to the dignity of an "attempt." But when on the appearance of the owner of the house he changed his mind and attacked him, and then proceeded toward the house, but abandoned his purpose on being frightened by an approaching team, such conduct justified the submission to the jury of the question as to an attempt at robbery or burglary, or both. *Commonwealth v. Eagan*, 42 Atl. 374, 377, 190 Pa. 10.

"Attempt" is expressive rather of a moving towards doing the thing, than of the purpose itself. An attempt is an overt act itself. *State v. Martin*, 14 N. C. 329, 330 (cited and approved *Lewis v. State*, 35 Ala. 380, 388).

Acts are necessary to constitute an attempt. *Kelly v. Commonwealth* (Pa.) 1 Grant, Cas. 484, 488.

"Attempt to cause," mentioned in Comp. Laws, § 7557, providing that every person who shall set fire to any building mentioned in the preceding sections, or to any other material, with intent to cause any such building to be burned, or shall by any other means "attempt to cause" any building to be burned, shall be punished, etc., "must be by some act of the same general nature as the acts before mentioned; that is, some physical act sufficiently proximate to the result to be caused as to stand either as the first or some subsequent step in the actual endeavor to really bring about or accomplish such result. It must amount to something more than a preparation for an attempt to cause. The specific provisions in the fore part of the sections require a physical act of causation very near to the effect, and I can discover no ground in this subject, or in the arrangement or phraseology, for exempting the general clause from the rule of law before stated by which generals are subordinat-



ed by the sense of preceding and connected particulars." *McDade v. People*, 29 Mich. 50, 55.

An attempt is an intent to do a particular thing which the law, either common or statutory, has declared to be a crime, coupled with an act towards the doing, sufficient, both in magnitude and proximity to the fact intended, to be taken cognizance of by the law, that does not concern itself with things trivial and small. *State v. Smith*, 24 S. W. 1000, 1001, 119 Mo. 439.

"Attempt," as used in connection with the crime of perjury, includes and requires not only an intent to pervert the course of justice, but also some act done which is in some degree adapted to accomplish the thing intended, but a perfect adaptedness in the act performed to accomplish the intent is not requisite. *State v. Whittemore*, 50 N. H. 245, 249, 9 Am. Rep. 196.

#### **Preparation alone insufficient.**

An attempt is an endeavor to accomplish a crime, carried beyond mere preparation, but falling short of the ultimate design or any part of it. *Franklin v. State*, 29 S. W. 1088, 34 Tex. Cr. R. 203; *Patrick v. People*, 24 N. E. 619, 620, 132 Ill. 529; *People v. Mason*, 45 Pac. 182, 183, 113 Cal. 76; *United States v. Reeves* (U. S.) 38 Fed. 404, 408; *State v. McCarty*, 86 Pac. 338, 340, 54 Kan. 52.

In *Reg. v. Cheeseman, Leigh & C.* 140, it is said: "There is, no doubt, a difference between the preparation incident to the offense, and the actual attempt. But if the actual transaction has commenced which would have ended in the crime, if not interrupted, there is clearly an attempt to commit a crime." Thus, where persons had proceeded so far in the attempt to defraud a man of his money, by playing a confidence game, that they would have secured it had it not been for the presence of his wife, they were guilty of an attempt to commit crime. *People v. Mason*, 45 Pac. 182, 183, 113 Cal. 76.

In *Hicks v. Commonwealth*, 9 S. E. 1024, 86 Va. 223, 19 Am. St. Rep. 891, *Lewis, P.* said: "An 'attempt' to commit a crime is compounded of two elements: (1) The intent to commit it, and (2) a direct ineffectual act done towards its commission. Wharton defines it, 'An attempt is an intended, apparent, unfinished crime.' Therefore the act must reach far enough toward the accomplishment of the desired results to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement toward the commission of the

offense after the preparations are made." "So purchasing liquor in San Francisco by a party in Alaska would not be an 'attempt' to introduce this liquor into Alaska, it being merely an attempt to purchase, an act harmless and indifferent in itself, whatever the purpose for which it was done." *State v. Fraker*, 49 S. W. 1017, 1021, 148 Mo. 143 (citing *United States v. Stephens* [U. S.] 12 Fed. 52); *Johnson v. State*, 43 N. W. 425, 27 Neb. 687.

To constitute an attempt at common law, something more than an intention or purpose to commit crime is necessary. Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made. *People v. Youngs*, 81 N. W. 114, 115, 122 Mich. 292, 47 L. R. A. 108.

Acts done toward the accomplishment of the purpose intended do not always of themselves amount to an attempt, or to an offense of human laws take cognizance for if they be but acts of preparation, however elaborate, our municipal law would not assume to deal with them. In considering whether a particular act done amounts to an "attempt," in the criminal sense, the proximity or remoteness of the person or thing intended to be injured is generally an important element. *People v. Stits*, 17 Pac. 693, 696, 75 Cal. 570.

"Attempt" implies the exercise of physical force directed to some definite end, the actual entering upon the execution of a purpose which, if not prevented or diverted, will result in the injury indicated. There is a marked distinction between "attempt" and "intent." The former conveys the idea of physical effort to accomplish the act, the latter the state of mind with which the act is done or contemplated. Neither mere words or threats, nor preparation to commit a crime, are sufficient to constitute an attempt. It is essential that there shall be some overt act which will apparently result in the crime unless interrupted by circumstances independent of the doer's will, and such is its meaning in the rule that, to make out the crime of assault with intent to commit rape, there must be, first, an attempt, and, second, intent to accomplish sexual intercourse, forcibly and against the will of the woman. *Hollister v. State*, 59 N. E. 847, 848, 156 Ind. 255.

#### **Solicitation alone insufficient.**

An "attempt" to commit a misdemeanor includes something more than mere solicitation, and requires some overt act. In a high moral sense it may be true that solicitation is an attempt, but in the legal sense it is

not until something has been done which may be called an "overt act" that it can be said that an attempt has been made to commit a misdemeanor. *Smith v. Commonwealth*, 54 Pa. (4 P. F. Smith) 209, 212.

Act March 31, 1860 (Purd. Dig. § 340), making it a felony to "attempt to administer poison" to any one with intent to commit the crime of murder, means an attempt which is the approximate attempt, or an attempt to do a thing which, if done, would be the immediate cause of death; and hence, where one solicited another to place poison in a certain spring, and such person refused so to do, and subsequently during the conversation the accused placed the package containing the poison in the pocket of the one solicited, it was held that there was no attempt under the statute. *Stabler v. Commonwealth*, 95 Pa. 318, 321, 40 Am. Rep. 653.

"Attempt," as used in Rev. St. 1874, p. 393, § 273, providing that whoever attempts to commit any offense prohibited by law, and does any act towards it, but fails or is interrupted or prevented in its execution, shall be punished, must be construed as meaning a physical act, as contradistinguished from a verbal declaration; that is, it must be a step taken towards the actual commission of the offense, and a mere effort by persuasion to produce the condition of mind essential to the commission of the offense is not an attempt to commit it. *Cox v. People*, 82 Ill. 191, 192, 193.

#### ATTEMPT TO COMMIT RAPE.

For a man to be guilty of an attempt to commit rape, he must have intended to use the force necessary to accomplish his purpose notwithstanding the woman's resistance, or, in the case of constructive force, to either destroy her power to resist by the administration of liquors or drugs, or to take advantage of the fact that she was already in a condition in which either the mental or physical ability to resist is wanting. In addition to this, there must have been some act done which, in connection with this intent, constitutes the attempt. *State v. Lung*, 28 Pac. 235, 236, 21 Nev. 209, 37 Am. St. Rep. 505.

The words "attempt to commit rape," in their ordinary meaning, are not equivalent to the words "assault with intent to commit rape," since the former phrase may describe a state of facts which does not constitute an assault with intent to ravish. If it were otherwise, the exact definition of "assault" would be "an attempt to commit a battery," and an indictment charging the defendant with an attempt to ravish would be good under a statute making an assault with intent to rape a crime. *Fox v. State*, 34 Ohio St. 377, 379.

An attempt to commit a rape is an ineffectual offer, by force, with intent to have carnal connection. Acts are necessary to constitute an attempt, and, if such acts with such intent are not proved, there can be no conviction. *Kelly v. Commonwealth (Pa.)* 1 Grant, Cas. 484, 488.

#### ATTEND.

Authority "to attend to" the business of the principal generally does not authorize the agent to sell and convey real estate, nor allow him to dispose of the personality of his principal, unless necessary to conduct the business. *Coquillard's Adm'rs v. French*, 19 Ind. 274, 287.

In a subcontract by which a contractor assigned the main contract, with an agreement that the assignee should furnish all materials, and that the original contractor should "attend to and build the house" and receive the profit on the contract after the bills were paid, the clause "attend to and build" merely means to superintend the work. *McPhee v. Young*, 21 Pac. 1014, 1016, 13 Colo. 80.

#### ATTENDANCE.

See "Medical Attendance"; "Nonattendance."

Under a statute allowing members of the Legislature certain compensation for each day's "attendance," it could not have been intended that the members should receive pay for those days only on which they were actually engaged in the business of legislation. A member may be engaged in attendance during the periods of temporary cessation of legislative functions by the respective bodies. It was never intended that the members of the Legislature should not receive pay for Sundays, or pending temporary adjournments on holidays, or on the occasion of the death of a member. *Ex parte Pickett*, 24 Ala. 91, 95; *State v. Hastings*, 16 Wis. 337, 339.

In Laws 1889, c. 93, § 4, providing that trustees of the penitentiary shall be entitled to receive a certain sum for each day employed in attendance on the sessions of the board, the word "attendance" will be construed to mean the actual period during which the member is traveling to and from his place of residence to the place of the session, as well as while at the place of the session. *State v. Briggs*, 63 N. W. 206, 207, 5 N. D. 69.

#### By physician.

The mere calling into a doctor's office for some medicine to relieve a temporary indisposition, or the calling at the home of the insured by the doctor for the same pur-

pose, cannot be considered an "attendance by a physician," within the meaning of the question in an application for life insurance as to the attendance by a physician upon the applicant. *Billings v. Metropolitan Life Ins. Co.*, 41 Atl. 516, 518, 70 Vt. 477.

A denial by an applicant for insurance that she had been "attended by a physician" within a certain period prior to her application meant the attendance of physicians for some sickness or disease of more seriousness than a mere temporary ailment. *Brown v. Metropolitan Life Ins. Co.*, 32 N. W. 610, 612, 65 Mich. 313, 8 Am. St. Rep. 894.

Merely calling a physician to prescribe for a temporary indisposition, not serious in its nature, and not affecting the person's sound bodily health, is not being "attended" by a physician, within the meaning of such word in an application for insurance, in response to the printed question, "How long since you were attended by a physician, or professionally consulted one?" *Plumb v. Penn Mut. Life Ins. Co.*, 65 N. W. 611, 614, 108 Mich. 103.

Where the applicant for an insurance policy had been to the office of a physician and told him that he coughed and spat blood, and submitted to a physical examination, and paid for the services of the physician, and called again and paid him a fee, it shows that he was as really "attended" by the physician as if the latter had seen him at his home. *White v. Provident Sav. Life Assur. Soc.*, 39 N. E. 771, 773, 163 Mass. 108, 27 L. R. A. 398.

A policy of life insurance contained a condition requiring, among other things, that the proofs of death should contain the name of the physician or physicians in attendance, and the place and date of burial, and the affidavit of medical attendance. Held, that a physician not engaged in practice, who was present as a friend and neighbor when the wounded man was brought to his own house, and who at the request of another neighbor examined the wounds and administered an opiate, was not necessarily an "attending physician" within the policy, so that the proofs of death would be insufficient by reason of their failure to contain such physician's affidavit and certificate. *Gibson v. American Mut. Life Ins. Co.*, 37 N. Y. 580, 581.

#### ATTENDANCE ON COURT.

"Attendance on court," within the meaning of the statute prohibiting the arrest of a person on civil process while in attendance on court, includes the time a defendant from a foreign state remains at the place where the court is held, although his case is passed from day to day, without any new assignment, on account of the illness of the other

party. *Ellis v. Degarmo*, 24 Atl. 579, 580, 17 R. I. 715, 19 L. R. A. 560.

A juror may be in attendance on court without being impaneled to try any cause. After he has been drawn he may be excused for a definite period, and after a jury has been impaneled the remaining jurors may be excused until some future day. In such cases they are not in "attendance" upon the court during any period that they are excused therefrom with the opportunity to be engaged in ordinary vocations. *Mason v. Culbert*, 41 Pac. 464, 108 Cal. 247.

#### ATTENDANT.

See "Medical Attendant"; "Stated Attendant."

His attendants, see "His."

"Attendant," as used in Rev. St. c. 137, § 17, declaring that the officer taking a deposition shall annex thereto a statement that the opposite party or his attorney was attendant at the taking of the deposition, or that a certain notice was served on him on a day named, means something more than a mere personal presence, and signifies that the party was present and participated in the examination of witnesses. *Miller v. McDonald*, 13 Wis. 673, 675.

#### ATTENTION.

"Attention" signifies the act or state of attending or heeding. A letter by a wholesale dealer, in response to an order of goods by a retailer, stating that the former would give the order prompt attention, is not sufficient to constitute an acceptance, but was no more than a courteous promise to give it consideration. *Manier v. Appling*, 20 South. 978, 980, 112 Ala. 663.

#### ATTEST—ATTESTATION.

Webster defines the word "attest" as follows: "To bear witness to; to certify; to affirm to be true or genuine; \* \* \* appropriately used for the affirmation of persons in their official capacity to test the truth of a writing; to attest the copy of a record." *McGuire v. Church*, 49 Conn. 248, 249.

Attestation is the act of witnessing the actual execution of the papers, and subscribing one's name as a witness to that fact. *White v. Magarahan*, 13 S. E. 509, 510, 87 Ga. 217.

"Attestation" means that the subscribing witness saw the writing executed or heard it acknowledged, and, at the request of the party, thereupon signed his name as witness. *Luper v. Werts*, 23 Pac. 850, 855, 19 Or. 122.

The word "attested" as used in an indictment charging the violation of a statute pro-

hibiting the officers and directors of a national banking association from making any false entry in any book, by charging that such entries were attested, does not necessarily intend that, in any legal sense, they made the reports or any entries in them. *United States v. Potter* (U. S.) 56 Fed. 83, 94.

A note bearing an indorsement acknowledging it to be due, signed by the promisor, and attested by a witness, is not an attested promissory note, within the meaning of Rev. St. c. 120, §§ 4, 7, extending the limitation of actions upon such notes to 20 years. *Gray v. Bowden*, 40 Mass. (23 Pick.) 282, 283.

**As authentication by officer.**

"The word 'attested,' when used with reference to judicial writings or copies thereof, as copies of records or judicial process, seems to have a legal meaning which is an authentication by the clerk of the court so as to make them receivable in evidence." Thus, as used in Rev. St. 1874, §§ 52, 53, authorizing the taking of the interest of the stockholder in any corporation by execution, but providing that, if the property has not been attached in such suit, the officer shall leave an attested copy of the execution with the clerk, etc., means "authenticated." *Goss & Phillips Mfg. Co. v. People*, 4 Ill. App. (4 Bradw.) 510, 515.

Gen. St. c. 117, § 10, requiring an attested copy of the reasons of an appeal to be filed on the adverse party, requires it to be attested by the register, who is the legal custodian of the original paper, and whose official attestation is of itself a sufficient verification of the copy, and therefore the service of a copy attested by the attorney of the appellant did not constitute a compliance with the statute. *Wait v. Demeritt*, 119 Mass. 158.

**As certify or verify.**

The expression "attested account," as used in Acts 1830, p. 412, § 2, providing that the owner of the building shall furnish a copy of the attested account delivered to him to his contractor, and that, if there shall be any disagreement between such contractor and his creditor, they may, by amicable adjustment or by arbitration, ascertain the true sum, includes an account made out against the contractor, and verified by the claimant's oath that the balance of such account is justly due him from such contractor for labor done, and does not require the claimant to produce legal evidence of the correctness and justice of his claim in the first instance. *Donaldson v. Wood* (N. Y.) 22 Wend. 395, 400.

The word "attest," as used in Rev. St. U. S. § 5211, requiring reports of national bank directors to be attested by the signatures of at least three directors, and attested by the oath of the president or cashier, means

something more than to witness the execution of the report by the president of the cashier. It means to certify its correctness. *Gerner v. Mosher*, 78 N. W. 384, 388, 58 Neb. 135, 46 L. R. A. 244.

**Copy included.**

The word "attest" is defined as "to certify to the verity of a copy of a public document," and the word "attestation," therefore, as used in Code Civ. Proc. § 1906, providing that the judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court, etc., authorizes a copy of such record to be so proven, for, while the word "copy" is not expressly used, it is included in the word "attestation." *Wickersham v. Johnston*, 38 Pac. 89, 90, 104 Cal. 407, 43 Am. St. Rep. 118.

**Presence required.**

Code 1876, § 2707, providing that the property of a wife may be sold by the husband and wife, and conveyed by them jointly by instrument of writing attested by two witnesses, means that such witnesses shall sign the conveyance as witnesses to the signatures of the husband and wife, grantors, but the word "attested" does not require that the witnesses should sign their names to the conveyance in the presence of each other; it being sufficient that they attest, by signing their names to the document, that the husband and wife duly signed the paper for the purpose of executing it. *Logwood v. Hussey*, 60 Ala. 417, 424.

"Attest," as used with regard to deeds, implies that a witness shall be present to testify that the person who is to execute the deed has done the act required. *Freshfield v. Reed*, 9 Mees. & W. 404, 405.

"The word 'attestation' implies the presence of some person who stands by, but is not a party to the transaction" (*Seal v. Claridge*, 7 Q. B. Div. 516); and a statute requiring a mortgage of personal property to be signed by the mortgagor in the presence of two persons, who must sign the same as witness thereto, implies a common attestation of it, so that the mortgagee is disqualified from being one of the two witnesses. *Donovan v. St. Anthony & D. Elevator Co.*, 80 N. W. 772, 774, 8 N. D. 585, 46 L. R. A. 721, 73 Am. St. Rep. 779.

**Knowledge of nature of instrument.**

The term "attested," in Gen. St. p. 369, § 2, requiring a will to be in writing, subscribed by the testator, and attested by three witnesses in his presence and the presence of each other, does not import that the attesting witness must know that the instrument is a will, but the object of the attestation is that the witness may be able to testify that the testator put his name upon the identical piece

of paper upon which the witness put his own. Appeal of Canada, 47 Conn. 450, 460.

Under a statute providing that the will must be attested by three or more credible witnesses in the presence of the testator and each other, it is not necessary that the witnesses know at the time they sign that the instrument is a will; the word "attest" not including such knowledge in its meaning. In re Claffin's Will, 52 Atl. 1053, 1056, 75 Vt. 19.

#### Signature.

A proper attestation may be made by the mere signature of a witness. It is sufficient that the signature appears to be made for the purpose of attesting the execution of the conveyance. Arrington v. Arrington, 26 South. 152, 154, 122 Ala. 510 (citing Jones v. Hagler, 95 Ala. 529, 10 South. 345).

The word "attest," as used in the statute requiring that wills shall be attested and subscribed in the testator's presence, does not require the attesting witness to sign his own name or touch the pen while another signs, but the will is attested, within the meaning of the statute, if the witness is present and has another sign at his request. Lord v. Lord, 58 N. H. 7, 9, 42 Am. Rep. 565.

Where the law required an attestation, by the officer serving an original writ of foreign attachment, on the copy thereof, there was no attestation on the copy when the signature of the officer was not attached to the document by himself, but by the clerk. McGuire v. Church, 49 Conn. 248, 249.

#### Subscribe distinguished.

There is a very marked distinction between attesting and subscribing a will. Attesting is the act of the senses. Subscribing is the act of the hand. The one is mental, the other mechanical; and to attest a will is to know that it is published as such, and to certify the facts required to constitute an actual and legal publication, but to subscribe a paper published as a will is only to write on the same paper the names of the witnesses for the sole purpose of identification. There may be a perfect attestation in fact without subscription, and there may be a subscription in fact without attestation. Tobin v. Haack, 81 N. W. 758, 761, 79 Minn. 101; Swift v. Wiley, 40 Ky. (1 B. Mon.) 114, 115; In re Downie's Will, 42 Wis. 66, 76. Nevertheless Rev. St. Ill. c. 148, § 2, providing that a will shall be attested in the presence of the testator by two or more credible witnesses, requires the subscription of the names of the witnesses to the attestation clause, as a declaration that the signature was made or acknowledged in their presence. Sloan v. Sloan (Ill.) 56 N. E. 952, 953, 184 Ill. 579 (citing Drury v. Connell, 177 Ill. 43, 52 N. E. 368; Gibson v. Nelson, 181 Ill. 122, 54 N. E. 901, 72 Am. St. Rep. 254).

#### ATTESTING WITNESS.

"Attesting witness," as used in Gen. St. c. 125, § 4, providing that a promissory note, in order to be taken out of the general statute of limitations, must be signed in the presence of an attesting witness, must be one who at the time of the attestation would be competent to testify in court to the matter which he attested, and not one who might be or might not be competent to testify on a trial at some future time. Jenkins v. Dawes, 115 Mass. 599, 601.

The Century Dictionary defines an "attesting witness" to be a person who signs his name to an instrument to prove it, and for the purpose of identifying the maker or makers. The Standard Dictionary defines "attestation" to be the subscription by a person of his name to a written instrument to signify that the same was executed in his presence, or that it is correct. Since it is well settled in this state that it is not necessary to the validity of a will that the witnesses, at the time that they attest it, shall know the nature of the instrument they are attesting (Allen v. Griffin, 69 Wis. 529, 35 N. W. 21), it is not clear what, if anything, attestation is intended to add to the mere fact of subscription. However that may be, it is settled that an instrument in writing, signed by the testator, and subscribed in his presence and at his request, which may be implied from circumstances, by two competent witnesses, is *prima facie*, and so far as formality of execution goes, a valid will. Skinner v. American Bible Soc., 65 N. W. 1037, 1039, 92 Wis. 209.

#### ATTITUDE.

In an instruction that the question before the jury was whether or not the defendants were, at the bringing of a suit to quiet title to certain land, in an attitude of claiming an adverse interest in the real estate, the word "attitude" means the complex mental state or condition which an adverse claim is in or to the land of another, considered apart from the evidence by which its existence is usually manifested to others. In this sense a claim differs from any and all assertions of it, and these last are but evidence of its existence. Miles v. Strong, 86 Atl. 55, 59, 68 Conn. 273.

#### ATTORNEY.

See "Certain Attorney"; "Private Attorney."

"Attorney," in English law, signifies, in its widest sense, any substitute or agent appointed to act in the turn, stead, or place of another. In re Ricker, 29 Atl. 559, 563, 66 N. H. 207, 24 L. R. A. 740.

An attorney is one put in place of another. The expression "agents" or "attorneys" is not necessarily equivalent to attorneys in fact. The verb "attorn," among other meanings, signifies to transfer or to turn over to another. *Michelberger v. Sifford*, 27 Md. 320, 329.

The United States pension law relating to the compensation of an "attorney, agent, or other person" procuring a pension, cannot be construed to include a guardian who procures a pension for his ward. *Southwick v. Evans*, 21 Atl. 104, 17 R. I. 198.

The provision of Comp. St. p. 274, § 10, that no "agent or attorney" shall write or draw up the deposition of any witness, includes an agent or attorney employed to attend to the taking of the deposition, although not otherwise employed in the case, but does not extend to one employed to assist the magistrate in drawing up the deposition, who has no other agency in the matter, although he is paid by the party. *Moulton v. Hall*, 27 Vt. 233.

"Attorney," as used in the act of 1839 prescribing the salary of attorneys of the State Bank and its branches, applies to the regular attorney who is elected by the directors as an officer in the respective banks, and does not restrain the directors from employing such other professional assistants as the interests of the bank may require. *Bank of State v. Martin*, 4 Ala. 615, 621.

"Attorney," as used in the statute creating assistant justice courts, and authorizing the appearance of a party in person or by his attorney, is to be construed in its enlarged sense, as including any person to whom a party chooses to delegate his appearance, and is not limited to licensed attorneys at law. *Hughes v. Mulvey*, 3 N. Y. Super. Ct. (1 Sandf.) 92, 95.

#### As attorney at law.

"Attorney," when used in connection with proceedings of courts, and the authority to conduct business in them, as well as when employed in a general sense with reference to transactions of business usually and almost necessarily confided to members of the legal profession, has a fixed and universal signification, on which a technical and popular sense unite, and is generally understood as having reference to a class of persons who are by license constituted officers of courts of justice, and who are empowered to appear and prosecute and defend, and on whom peculiar duties, responsibilities, and liabilities are devolved by law in consequence. *People v. May*, 3 Mich. 598, 605.

"The word 'attorney,' when used in connection with the proceedings of courts and the authority to conduct the business of men, as well as when employed in a general sense

with reference to the transaction of business usually and almost necessarily confided to members of the legal profession, has a fixed and universal signification, in which the technical and popular senses unite. The Legislature and the judge, the lawyer and the layman, understand it alike, as having reference to a class of persons who are by license constituted officers of courts of justice, and who are empowered to appear and prosecute and defend, and upon whom peculiar duties and responsibilities and liabilities are devolved by law in consequence." *People v. May*, 3 Mich. 598, 605.

"Attorney," as used in a guaranty of a judgment, authorizing any attorney to enter judgment against the guarantor, is to be construed as meaning an attorney at law. *Cooper v. Shaver*, 101 Pa. 547, 549.

"Attorney," as used in Act May 25, 1887, requiring the declaration or statement of a claim to be filed by the plaintiff or his attorney, means an attorney at law, and not an attorney in fact. *Kelly v. Herb*, 23 Atl. 889, 147 Pa. 563.

"Attorney," as used in St. 1841, p. 125, providing that, when an execution defendant is in custody, it shall be lawful for the execution plaintiffs, or their agent or attorney, to direct the defendant to be discharged, means attorneys at law, and refers to and was intended to embrace the plaintiffs' attorney in the action at law. *Neff v. Powell* (Ind.) 6 Blackf. 420, 421.

"Attorney," as used in Code Prac. art. 177, authorizing an attorney to accept and acknowledge service of process, means an attorney at law, and not an attorney in fact. *Ingram v. Richardson*, 2 La. Ann. 839, 840.

"Attorney," as used in the act of 1828 amending the Code of Practice, and declaring that, in all cases where judgments are demurrable, the plaintiff, his agent or attorney, shall make an affidavit, means an attorney at law; the term "attorney" being distinguished from "agent" by the disjunctive conjunction. *Dwight v. Weil*, 6 La. Ann. 706.

The Code of Practice, providing that, when an oath is required of a party, it may be made by his agent or attorney, means an attorney at law, and not necessarily an attorney in fact, as the word "attorney," when not coupled with any qualifying expressions, is ordinarily understood to mean attorney at law, and has not infrequently been used in that sense in legislative enactment. Webster says that the word formerly signified any person who did business for another, but that its sense is chiefly or wholly restricted to persons who act as substitutes for the persons concerned in prosecuting and defending actions before courts of justice, etc. *Clark v. Morse*, 16 La. 575, 576.

**As attorney of record.**

"Attorney," as used in Rev. St. 1879, § 3506, providing that, if neither the adverse party nor his attorney reside in this state, a notice may be posted in the office of the clerk of the court where the suit is pending, means an attorney of record. *Wilson v. St. Louis & S. F. Ry. Co.*, 18 S. W. 286, 292, 108 Mo. 588, 32 Am. St. Rep. 624.

"Attorney," as used in Code Civ. Proc. § 940, providing that a notice of appeal shall be served on the adverse party or his attorney, means attorney of record. *Whittle v. Renner*, 55 Cal. 395.

**ATTORNEY AD HOC.**

The words "attorney ad hoc," "curator ad hoc," and "advocate," when used with respect to an absent defendant, indicate the person named and appointed by the court to defend him in the suit in which the appointment is made. *Bienvenu v. Factors' & Traders' Ins. Co.*, 33 La. Ann. 209, 212.

**ATTORNEY AT LAW.**

See "District Attorney"; "Practicing Attorney"; "Prosecuting Attorney."

An attorney at law is one who is put in the place, stead, or turn of another, to manage his matters of law. 3 Bl. Comm. 25, 26. "Attorney," in English law, signifies, in its widest sense, any substitute or agent appointed to act in the turn, stead, or place of another. The term is now commonly confined to a class of qualified agents who undertake the conduct of legal proceedings for their clients. In *re Ricker*, 29 Atl. 559, 565, 66 N. H. 207, 24 L. R. A. 740.

"An attorney is a man set apart by the law to expound to all persons who seek him the laws of the land relating to the high interests of property, liberty, and life. To this end he is licensed and permitted to charge for his services." *Planters' Bank v. Hornberger*, 44 Tenn. (4 Cold.) 531, 571.

"Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys at law, within the meaning of that designation as used in this country; and all such, when they undertake to conduct legal controversies or transactions, profess themselves to be reasonably well acquainted with the law and the rules and practice of the courts, and they are bound to exercise in such proceedings a reasonable degree of care, prudence, diligence, and skill. Authorities everywhere support that proposition, but attorneys do not profess to know all the law, or to be incapable of error or mistake in applying it to the facts of every case, as even the most skillful of the profession would hardly be able to come up

to that standard. *National Sav. Bank v. Ward*, 100 U. S. 195, 199, 25 L. Ed. 621.

Attorneys at the bar are properly termed the "court's constituency," to aid it in the due administration of justice. *Dodge v. State*, 39 N. E. 745, 746, 140 Ind. 284.

An attorney is a person duly admitted to practice law, and authorized to appear for and represent a party in the written proceedings in any action or proceeding in any stage thereof. An attorney other than the one who represents the party in the written proceedings may also appear for and represent a party in court or before a judicial officer, and then he is known in the particular action or proceeding as counsel only, and his authority is limited to the acts that are done in the court or before such officer at that time. *Ballinger's Ann. Codes & St. Wash.* 1897, § 4758; *B. & C. Comp. Or.* § 1049.

**As acting in fiduciary capacity.**

See "Fiduciary Capacity or Character."

**Authority of.**

An attorney at law is merely an agent of the plaintiff, and a special agent at that, in the sense that his authority extends only to the particular matter in which he is employed. *Douglass v. Folsom*, 33 Pac. 660, 663, 21 Nev. 441.

"An attorney is an advocate counsel or official agent employed to take charge of cases at law. An attorney is invested with a large discretionary power in anything pertaining to the collection of a demand intrusted to him for that purpose, and his client must answer in damages if injury is occasioned by his conduct in the general scope of his employment. While he cannot discharge a debt or an execution without receiving satisfaction, he has control of the selection of legal remedies and processes which he may deem most effectual in accomplishing his object. The confidence reposed in him by his client, and the supposed ignorance of the latter as to the most appropriate remedies, require this." *Shattuck v. Bill*, 7 N. E. 39, 42, 142 Mass. 56.

An attorney at law is a special agent limited in duty and authority to the vigilant prosecution or defense of the rights of his client. His authority to enter into bargains or contracts binding on his client, unless expressly conferred, is confined within the limits of that professional action which may be necessary for the conduct of the proceedings in the course of pending suits, and of direction to ministerial officers in the issue, levy, and return of executions on judgments which he may have obtained. He has no authority by virtue of the general retainer to accept in satisfaction of his judgment which he has obtained a less sum than that actually due, or for such sum to transfer the judgment; and all persons who deal with an at-

torney must ascertain the extent of his authority, and, if they do not inquire, they act at their peril. *Robinson v. Murphy*, 69 Ala. 543, 547.

**As agent or clerk.**

See "Agent"; "Clerk."

**As attorney in actual practice.**

Gen. Prac. Rule 5, providing that in no case shall an attorney or counselor be surety on any undertaking or bond required by law, means an attorney and counselor in practice, or following the profession of law as a vocation; and hence, where an attorney had not practiced for a year, and was engaged in another vocation, the fact that he was an attorney did not preclude him from becoming a surety on a bond. *Evans v. Harris*, 47 N. Y. Super. Ct. (15 Jones & S.) 366, 367.

**As constitutional officer.**

Const. art. 16, § 30, provides that all terms of office not otherwise fixed by the Constitution are limited to two years. Held that, since the office of an attorney is one for life, he cannot be regarded as a constitutional officer. *Ex parte Williams*, 20 S. W. 580, 581, 81 Tex. Cr. R. 262, 21 L. R. A. 783.

**As counselor or solicitor.**

An attorney at law is an officer of the court whose duty it is to manage cases for the litigants. "In this country the distinction between an attorney or solicitor and counsel is practically abolished in nearly all the states. The lawyer in charge of a case acts both as solicitor and counsel. His services in the one capacity and the other cannot be well distinguished." *In re Paschal*, 77 U. S. (10 Wall.) 483, 493, 19 L. Ed. 992.

There is practically no distinction between the terms "attorney" and "counselor." The only distinction made is the purely arbitrary one between proceedings in equity and at common law. The practice of the bar generally is that, when a member signs a common-law pleading, it is as attorney; if an equity pleading, he signs it as solicitor. But this is a distinction arising merely from the two kinds or modes of proceeding. In this connection the court remarks: "I am somewhat at a loss to know what is the distinction in our practice between the terms 'solicitor' and 'counselor.' I should be very much inclined to think that, if there were the signature of counsel to the bill, whether he was described as 'counselor,' as 'solicitor,' or as 'attorney,' that the description might be rejected as surplusage, and that it would stand as a compliance with the rule." *Stinson v. Hildrup* (U. S.) 23 Fed. Cas. 107, 108.

The word "attorney," as used in the civil procedure act, includes a counselor, and every

other person authorized to appear and represent a party in an action or special proceeding in any stage thereof. *Horner's Rev. St. Ind.* 1901, § 1285.

**As employé or servant.**

See "Employé"; "Servant."

**As federal officer.**

"Attorneys are officers of the court, admitted as such by its order, and upon the evidence of their possessing sufficient legal learning and fair private character." They are not officers of the United States. *Ex parte Garland*, 71 U. S. (4 Wall.) 333, 378, 18 L. Ed. 366.

**As officer of court.**

An attorney at law is an attorney employed to appear for parties to actions or other judicial proceedings, and is an officer of the court. *Treat v. Tolman* (U. S.) 113 Fed. 892, 894, 51 O. C. A. 522; *National Press Intelligence Co. v. Brooke*, 41 N. Y. Supp. 658, 18 Misc. Rep. 373; *In re Lawyers' Tax Cases*, 55 Tenn. (8 Helsk.) 565, 651; *Sanborn v. Kimball*, 64 Me. 140, 145, 146; *Baur v. Betz*, 1 How. Prac. (N. S.) 344, 347.

An attorney at law is an officer of the court, and the latter may exercise its summary jurisdiction over him to the extent of depriving him of his office and striking his name from the rolls. *In re Mains*, 80 N. W. 714, 716, 121 Mich. 608; *State v. Holding* (S. C.) 1 McCord, 379, 380.

Attorneys are officers of the court, and answerable to it for the proper performance of their professional duties. They appear and participate in its proceedings only by the license of the court, and, if they undertake to appear without any authority from the party whom they profess to represent, the act is in opposition to the license of the court, which, upon the application of the supposed client, the court has power to inquire into and correct summarily. *Clark v. Willett*, 35 Cal. 534, 539.

Attorneys are officers of a court, on whom duties are imposed, among which are to uphold and maintain the dignity of the court, and to refrain from all offensive conduct that would have a tendency to bring it into disrepute, or weaken the confidence that the people have always reposed in the judiciary. These are obligations that attorneys must recognize and observe both in and out of court. *Morrison v. Snow*, 72 Pac. 924, 930, 26 Utah, 247.

An attorney at law is an officer in a court of justice, whose profession and business it is to prepare and try cases in the courts, and to give advice and counsel on legal matters to those employing him. There is no presumption that any one is a member of the bar of the commonwealth. Com-



*monwealth v. Branthoover*, 24 Pa. Co. Ct. R. 353.

An attorney at law is an officer of the court. The terms of the oath exacted of him at his admission to the bar prove him to be so; the oath being, "You shall behave yourself in your office of attorney within the court with all due fidelity." It is also declared in Const. art. 1, § 18, that no member of Congress, or any other person holding any office, except an attorney at law, shall be a member of either house. *In re Austin* (Pa.) 5 Rawle, 191, 202, 28 Am. Dec. 657.

It is elementary law that an attorney is an officer of the court in which he is admitted to practice. His admission and license to practice raise a presumption, *prima facie*, in favor of his right to appear for any person whom he undertakes to represent. *Danville, H. & W. B. R. Co. v. Rhodes*, 86 Atl. 648, 649, 180 Pa. 157.

"An attorney at law, says Blackstone, answers to the procurator or proctor of the civilians and canonists, and he is one who is put in the place, stead, or turn of another, to manage his matters of law. These attorneys, he adds, are now formed into a regular corps. They are admitted to the execution of their office by the superior courts of Westminster Hall, and are in all points officers of the respective courts in which they are admitted." *People v. Hallett*, 1 Colo. 352, 355.

Attorneys at law are officers of the court—an inherent part of the machinery designed for the administration of justice—and are subjected to an oath of fidelity to the court as well as their clients. The position and practice of an attorney imply and require something higher than simply an endeavor to secure results favorable to his client. *In re Murray's Estate*, 13 Pa. Co. Ct. R. 70, 72.

An attorney at law is a person employed to appear for parties to actions or judicial proceedings. He is an officer of the court, and the mere addition of the word "attorney" after the name of a principal does not of necessity carry with it the idea that the attorney is an officer of the court or an attorney at law. *Hall v. Sawyer* (N. Y.) 47 Barb. 116, 119.

#### **As public officer.**

See "Civil Officer"; "Officer."

#### **As subject to license tax.**

The manner of regulating the admission of persons to practice law is the subject of legislative action and control. At common law the courts had no power to admit attorneys or counselors. Their duties are of such character that, in order to secure proper qualification for their discharge, the Legislature imposes the duty of examination and determination upon the courts. The only dif-

ference between this pursuit and that of any other for which a license is not required is that a qualification looking to competency is required in one, and the right, independent of qualification, is in the other. Because the law prescribes certain methods by which the existence of the qualification to follow a pursuit is determined, and, after determining their existence, a general authority to follow such pursuit is granted, gives no greater right to follow that pursuit than exists in any citizen to follow any other legitimate calling or avocation, and the state has the same right to tax the business of an attorney by way of license fees than it has to tax any other business. *Young v. Thomas*, 17 Fla. 169, 173, 35 Am. Rep. 93.

In discussing the constitutionality of an act imposing a license tax upon attorneys at law, the court observes that in the technical sense of the word, which is the sense in which it is used in the statute, a person is not an attorney unless he has procured the required attorney's license, which confers that privilege upon him. The license creates his occupation, and one who does not engage in the practice is not an attorney, within the meaning of the act, and is not bound to pay the license. There is, says the court, nothing particularly sacred in the profession of a lawyer, which puts him above the legislative power to place on his shoulders his just share of the necessary burdens of the state. *Cousins v. State*, 50 Ala. 113, 115, 20 Am. Rep. 290.

#### **ATTORNEY GENERAL.**

The Attorney General is the principal law officer of the state. His duties are general. His authority is coextensive with the public legal affairs of the whole community. His advice often affects the rights of all persons within the state, and, excepting judgments and orders of court, his opinions control public interests more largely than do the acts of any other official of the state. *State v. First Judicial District Court*, 55 Pac. 916, 917, 22 Mont. 25.

"The Attorney General in England occupies a very different position than an Attorney General in a government like ours. He is appointed by patent authorizing him to hold office during the pleasure of the crown, and he is required, with the aid of others, to manage all legal affairs and suits in which the crown is interested. He is a necessary party to all proceedings affecting the crown, and has extensive powers of control in matters relating to charities, lunacies, estates, criminal prosecutions, etc. 3 Enc. Brit. 63. In all such matters he acts as the representative and agent of the crown, and, as its servant, he has for centuries enjoyed high prerogative rights." *State v. Cunningham*, 53 N. W. 35, 51, 83 Wis. 90, 17 L. R. A. 145, 35 Am. St. Rep. 27.

The Attorney General, at common law, was the chief legal representative of the sovereign in the courts, and it was his duty to appear for and prosecute in behalf of the crown any matters—criminal as well as civil. It was said by Blackstone (3 Bl. Comm. 27): "He represents the sovereign, in whose name all criminal process issue, and his power to prosecute all criminal offenses is unquestioned at common law." In *People v. Miner*, 2 Lans. 396, 397, it was said: "As the powers of the Attorney General were not conferred by statute, a grant by the statute of the same or other powers would not operate to deprive him of those belonging to the office at common law, unless the statute, either expressly or by reasonable intendment, forbade the exercise of powers not thus expressly conferred. He must be held, therefore, to have all the powers belonging to the office at common law, and such additional powers as the Legislature sees fit to confer on him." Under the colonial government, the Attorney General received his appointment from the Governor of the colony, and exercised his duties under the common law, but later he was commissioned by the crown. *People v. Kramer*, 68 N. Y. Supp. 383, 386, 33 Misc. Rep. 209.

#### ATTORNEY IN FACT.

An attorney in fact is one who is given authority by his principal to do a particular act not of a legal character. *Treat v. Tolman* (U. S.) 113 Fed. 892, 893, 51 C. C. A. 522.

An attorney in fact is one who is authorized by his principal either for some particular purpose, or to do a particular act not of a legal character. *Hall v. Sawyer* (N. Y.) 47 Barb. 116, 119.

In *Porter v. Harmann*, 8 Cal. 619, 620, it was held that by "attorneys in fact" are meant persons who are acting under a special power created by deed, and that all attorneys in fact are agents, so that the construction of the power of attorney is largely a question of agency. *White v. Furgeson*, 64 N. E. 49, 51, 29 Ind. App. 144.

#### ATTORNEY OF RECORD.

An attorney of record stands in a two-fold relation. He is the representative of his client, and he is an officer of the court. In the former relation he is to defend and enforce his client's rights, and is subject to his client's orders, but he should not in that relation use his position to prosecute his own claims which are adverse to his client. In his relation as an officer of the court there are certain rights belonging to him against his client which the court will permit him to secure by force of his position as attorney on the record; but the nature of these rights is defined by general rules, and

is not to be enlarged by private contract. Thus an attorney of record cannot be removed without leave of the court, and such leave will not ordinarily be granted except on paying or securing to the attorney his proper fees and disbursements in the case. *De-laney v. Husband*, 45 Atl. 265, 266, 64 N. J. Law, 275.

#### ATTORNEY'S COSTS.

Attorney's costs are those fixed amounts which are allowed by law to an attorney for specified services rendered in the conduct of a cause, and authorized to be taxed up against a party thereto, and are distinguished from an attorney's disbursements, which are an expenditure or outlay of money which he is authorized by law to make, and which he does make, in the conduct of a cause—as, for instance, the expense of printing the papers for any hearing when required by rule of court. So that an act repealing all acts relating to attorney's costs does not apply to attorney's disbursements. *Durham Fertilizer Co. v. Glenn*, 26 S. E. 796, 797, 48 S. C. 494.

#### ATTORNEY'S FEES.

See "Reasonable Attorney's Fee."  
As costs, see "Costs."

"Attorney's fees," as used in a note providing for attorney's fees in case the note is not paid at maturity, construed to include all attorney's services in collecting the note, and not to be limited to services performed in a suit instituted on the note. *Moore v. Staser*, 33 N. E. 665, 666, 6 Ind. App. 364.

The words "attorney's fee," as used in section 64 of the Bankruptcy Act of 1898, should not be construed in the narrowest and strictest sense, so as to exclude necessarily such services by counsel as were really required. But, for obvious reasons, claims on this ground should be admitted only most sparingly and with great caution; and they should be confined to services during the bankruptcy proceeding itself, excluding previous consultations or advice, as well as all unnecessary attendance as "counsel" in the course of the proceeding. In *re Kross* (U. S.) 96 Fed. 816, 819.

#### ATTORNEY'S LIEN.

An attorney's lien is the right of an attorney to apply part of the proceeds of a judgment recovered by him in his client's behalf for the payment of services rendered for such client, and is a lien on the judgment, and is properly denominated a lien, in the broad sense of the term, though it rests merely on the equity of the attorney to be paid his fees and disbursements out of the judgment which he has obtained. It is not a lien that attaches on possession, and in

this it is distinguished from other liens, for an attorney's lien exists only in intestament and by operation of law. The execution on a judgment does not represent the judgment, and the possession of the execution is not possession of the judgment. A lien, therefore, not arising from a right on the part of the attorney to retain something in his possession, but having a right to recover for his services in obtaining the judgment for his client, is called an "attorney's charging lien"; it being a right by the attorney to subject the proceeds of the judgment to the payment of his charge for services, and to recover the same, and pay himself therefor from the proceeds. *Fowler v. Lewis' Adm'r*, 14 S. E. 447, 457, 36 W. Va. 112.

An attorney has a lien of two kinds—one, a retaining lien, which is the right to retain possession of another's property until a debt to him has been satisfied; and the other is a charging lien, constituting a right to charge property in the possession of another with a debt due him. *Butchers' Union Slaughterhouse & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughterhouse Co. (La.)* 6 South. 508, 511, 41 La. Ann. 355.

Two classes of liens are recognized at common law in favor of attorneys, namely, a retaining lien and a charging lien. A retaining lien gives to the attorney a right to retain all papers of his client which come to him by reason of his professional character for any balance due him for his employment; also the right to retain from funds of the client in his hands for his fees and disbursements in the case. This lien is not different from those accorded to all persons in respect to things on which they have bestowed labor. A charging lien is a special lien to which an attorney or solicitor is entitled upon funds in court recovered through his exertions. A lien attaches on the fruits of a judgment or decree. It attaches to the money payable to the client thereunder or by virtue of an award, and to money paid or payable into court in the course of an action or suit, or in any other way, if the proceeds of the labor and skill of an attorney. *Jennings v. Bacon*, 51 N. W. 15, 16, 84 Iowa, 403. A charging lien does not extend further than the services and expenses in the suit or other proceedings by which the judgment or fund was recovered. *In re Wilson (U. S.)* 12 Fed. 235, 238.

The lien of an attorney is merely an equitable right to be paid for his services out of the proceeds of the judgment or other proceedings, which has been obtained by his labor and skill, which the court will compel to the extent of its equitable power. It is distinguishable in this respect from the ordinary lien which a party has upon a thing in possession, which he is enabled himself to protect in refusal to deliver the property until his claim is satisfied. The attorney,

unless the proceeds have come into his hands, must invoke the equitable aid of the court, and the court must be satisfied of the existence of the equitable right before any steps can be taken to enforce it. *Ackerman v. Ackerman (N. Y.)* 14 Abb. Prac. 229, 232.

An attorney is entitled to a lien on a judgment or decree that he may have obtained for his client, to the extent of reasonable compensation for the services rendered in and about obtaining such judgment or decree. This lien does not arise or attach until the rendition of the judgment or decree, and it is limited to compensation for services rendered or disbursements made for the client in and about obtaining the judgment or decree. It is not a general lien, operating as a security for any other claim or judgment, however meritorious it may be. For other debts, or for a balance due him, the attorney may have a lien on papers or documents coming to his possession in the course of his professional employment, but that lien is distinguishable from the particular lien he may have on a judgment or decree. *Mosley v. Norman*, 74 Ala. 422, 424.

"An attorney's lien resembles an assignment of a chose in action." *Hobson v. Watson*, 34 Me. 20, 23, 56 Am. Dec. 632.

The lien of an attorney, when it attaches to money in the hands of the adverse party, is in effect an equitable assignment by the client of so much as may be necessary to satisfy the attorney's demands. *Stoddard v. Lord*, 59 Pac. 710, 36 Or. 412.

The lien of an attorney is not measured by the taxable costs, but covers any portion of the demands which may have been stipulated for as compensation for the attorney's services. *Rooney v. Second Ave. R. Co.*, 18 N. Y. 368, 372.

An attorney has a lien on a judgment obtained by him for the amount of his costs and agreed compensation, and to that extent the attorney may be regarded as an equitable assignee of the judgment. In the absence of notice of such lien, the judgment debtor may in good faith pay the judgment to the judgment creditor. *Wright v. Wright*, 70 N. Y. 98, 100.

An agreement between an attorney and his client that the attorney shall have a lien on a certain judgment to be recovered for, and specified the sum as compensation for his services, constitutes a valid, equitable assignment of the judgment, which attaches to the judgment as soon as it is rendered. *Terney v. Wilson*, 45 N. J. Law (16 Vroom) 282, 286.

## ATTORNMEN

An attornment is the acknowledgment by a tenant of a new landlord on the alienation of land and an agreement to become tenant

to the purchaser. *Lindley v. Dakin*, 13 Ind. 388, 389; *Freeman v. Moffit* (Mo.) 25 S. W. 87, 91; *Wilson v. Lyons* (Neb.) 94 N. W. 636, 637; *Souders v. Vansickle*, 8 N. J. Law (3 Halst.) 313, 317.

"Attornment" is the act of recognizing a new landlord. The word comes from a feudal law, where it signifies the transfer by act of the lord with the consent of the tenant of all service, and homage of the tenant to some new lord who had acquired the estate. *Willis v. Moore*, 59 Tex. 628, 636, 46 Am. Rep. 284.

Attornment is an acknowledgment or agreement by the tenant that the freehold is in another, or that such person is his landlord. *Foster v. Morris*, 10 Ky. (3 A. K. Marsh.) 610, 611, 13 Am. Dec. 205.

## AUCTION.

### See "Dutch Auction."

An auction is a public sale of property to the highest bidder by one licensed and authorized for that purpose. *Russell v. Miner* (N. Y.) 61 Barb. 534, 539.

An auction is a sale by consecutive bidding, intended to reach the highest price of the article by exciting competition for it. By the usual practice the buyers successively bid more and more till the highest point is attained. The same result is obtained by the process in vogue in Holland by proposing the articles at prices successively lower till a purchaser is found at its outside value. *Hibler v. Hoag* (Pa.) 1 Watts & S. 552, 553.

An auction is a public competitive sale at which it is a part of the auctioneer's engagement to invite and excite competition of bidding and to dispose of the property to the highest bidder. This practice is said to have originated with the Romans, who gave it the descriptive name of "auctio," an increase, because the offered property was sold to him who would offer the most for it. This method of sale was established by the Romans for the disposal of military spoils, and was conducted *sub hasta*; that is, under the spear. On such occasions the spear was stuck in the ground. This practice has passed away as to the spear, but the method of sale by auction continues. At a later day another mode of sale by auction came into practice called "the sale by the candle," or "by the inch of candle." The origin of this expression arose from the use of candles as a means of measuring time. It was declared the goods would be continued to be offered to bidders for so long a time only as would suffice for the burning of one inch of candle. When the measure was wasted to that extent the highest bidder was then declared to be the purchaser. 3 P. Cyc. Still another method of auction sale

is practiced in modern times. This one is called a "Dutch auction," indicating the local origin of the practice. This method consists in the public offer of the property at a price beyond its value and then gradually lowering the price until some one becomes the purchaser. 3 P. Cyc. At auction the bidders fix by competition the price at which the offered property is sold. This competition is an element of each offer and each bid. Into each of the methods named competition is a necessary element in the offer, the bid, and the act of selling the offered property. In the Dutch method the person wishing to buy can, at any time while the article is offered for sale, accept the auctioneer's offer, claim the property at that price, and close the sale thereof. *Crandall v. State*, 28 Ohio St. 479, 481.

In a notice of sale under a foreclosure the words "at public auction for cash to the highest bidder" are sufficient to convey the meaning that a sale will be had, without being preceded by the words "will be sold." *Nau v. Brunette*, 48 N. W. 649, 650, 79 Wis. 684.

Where a private bargain is made beforehand between the party who wishes to buy and the person authorized to sell, as to the price and other incidents of a contract that the forms of a public sale with competition are invoked to give effect to a private bargain does not constitute a public auction. *Porter v. Graves*, 104 U. S. 171, 174, 26 L. Ed. 691.

There can be no legal auction if no one is present but the auctioneer. *Campbell v. Swan* (N. Y.) 48 Barb. 109, 113.

A city ordinance provided that before "any person shall proceed to sell at public auction" merchandise of any class whatsoever he shall first obtain a license for an auction. Held, that such phrase was intended to refer to the person who has goods which he is seeking to have sold by auction, and did not apply to the auctioneer or person by whom such goods were to be sold at public vendue. *Fretwell v. City of Troy*, 18 Kan. 271, 276.

A "sale at auction" is a sale to the highest bidder, its object a fair price, and its means competition; and hence any agreement to stifle competition is a fraud, and not only vitiates the contract, so that the parties thereto can claim nothing from each other, but also any purchase made under it. *Kline v. Turner*, 41 Pac. 664, 665, 27 Or. 356.

"Auction sales" are within both private and public consideration. They are the means of converting things into money under urgent circumstances, of settling estates of deceased persons, and the like, so that the interest both of the individual and of the public requires them to be conducted with freedom and fairness, and agreements con-

travening these interests are void. *Clark v. Stanhope*, 59 S. W. 856, 858, 109 Ky. 521 (quoting *Bish. Cont.* § 528).

"Auction sale," as used in a statute requiring an assessor's certificate to state that lands were assessed at the cash value thereof and not at the price it would sell for at forced or auction sale, is not equivalent to "forced sale." A forced sale is not necessarily an auction sale, and an auction sale is not necessarily a forced sale. *Dickison v. Reynolds*, 12 N. W. 24, 25, 48 Mich. 158.

A sale by auction is a sale by public outcry to the highest bidder on the spot. *Civ. Code Cal.* 1903, § 1792; *Civ. Code Mont.* 1895, § 2410; *Rev. Codes N. D.* 1899, §§ 3989, 3990; *Civ. Code S. D.* 1903, §§ 1341, 1342.

The sale by auction is that which takes place when the thing is offered publicly to be sold to whoever will give the highest price. *Civ. Code La.* 1900, art. 2601.

A sale by auction is complete when the auctioneer publicly announces by the fall of his hammer or in any other customary manner that the thing is sold. *Rev. Codes N. D.* 1899, §§ 3989, 3990; *Civ. Code S. D.* 1903, §§ 1341, 1342.

#### Outcry synonymous.

The word "outcry," as used in Act April 2, 1830, imposing a penalty on hawkers and peddlers selling goods by outcry, is synonymous with "auction." *Hibler v. Hoag* (Pa.) 1 Watts & S. 552, 553.

#### AUCTION POOLS.

"Auction pools," is a term used to designate a method of gambling on horse races, which is conducted as follows: "A certain number of horses are entered to run at a certain race, to be held at a certain time and place. Any person desiring to invest money in a pool or race offers to the auctioneer a certain amount of money for the choice or selection of a horse which he supposes will be the winner of the race. A number of bids may be offered for the first choice. The person offering the highest amount obtains the first choice or selection of the horse which he supposes will be the winner, which horse he then and there names. The amount then and there offered for the first choice is then and there deposited in the hands of the parties conducting the pools. The amounts so deposited for each choice are added together, and each person so depositing his money on his choice receives a card or receipt for the same, showing the horse or horses selected, the amount so deposited, and the total amount in the pool. The money in the pool (less the commission of 5 per cent. to the person or persons conducting the pool) is paid to the person having selected the winning horse in the race, upon presentation

of the card or receipt." *James v. State*, 63 Md. 242, 248.

#### AUCTIONEER.

The word "auctioneer" is sometimes used to designate the crier who simply calls for bids and strikes the bargain at an auction sale. His connection with the sale may begin with calling for bids and end with striking the bargain. *White v. Dahlquist Mfg. Co.*, 60 N. E. 791, 792, 179 Mass. 427.

A city ordinance, providing that any person desiring to exercise the office or calling of an auctioneer shall first procure a license therefor, means any person by whom the outcry of the sale of goods at public vendue is made. *Fretwell v. City of Troy*, 18 Kan. 271, 276.

An auctioneer is a person who conducts a public competitive sale. He is supposed to adopt the occupation as a business and mode of acquiring pecuniary gain to himself, and the government demands a sum of money for the right to the exclusion of other persons from exercising the occupation. *Crandall v. State*, 28 Ohio St. 479, 481.

A person is an auctioneer, within a statute requiring a license, though he ask no compensation for his services in making the sale. *State v. Rucker*, 24 Mo. 557, 559.

The mere fact that defendant's name appeared in a catalogue of goods to be sold at auction as the auctioneer was not an indication of agency, so as to relieve him from personal responsibility for acts and conduct during the sale, his character as agent not being indicated to the purchaser in any other way; it being very old law that an auctioneer who sells without at the time of sale disclosing the name of his principal contracts in his own name. *Franklyn v. Leonard*, 4 C. B. 636, 644.

An auctioneer is one who sells goods at auction. "An auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference whether the sale be on the premises of the owner of the goods, or in a public auction room, an actual possession is given to the auctioneer and his servants by the owner, and not merely an authority to sell. I have said possession coupled with an interest, but an auctioneer has also a special property in him, with a lien for the charges of the sale, the commission, and the auction duty which he is bound to pay." *Williams v. Millington*, 1 H. Bl. 81, 83.

The business of an auctioneer is to sell by public outcry the property of others on an agreement expressed or implied that he shall receive for his labor and skill a just compensation. *City of Philadelphia v. Hunt* (Pa.) 8 Phila. 440, 441.

An "auctioneer" is defined by Webster as "a person who sells at auction," and an "auction" as "a public sale of property to the highest bidder by one licensed and authorized for that purpose." The services, therefore, which an auctioneer, as such, performs, are selling property at public sale to the highest bidder. All else is beyond his mere calling as auctioneer, and it is only for services as auctioneer that the compensation is given by 1 Rev. St. (Edmonds' Ed.) 493, fixing the amount of an auctioneer's compensation for his services in the absence of an agreement. *Russell v. Miner* (N. Y.) 5 Lans. 537, 539.

#### **As affected by ownership of goods.**

Any one who sells goods at public auction is an auctioneer, and the question of the ownership of the goods has nothing to do with the occupation, so that a person who sells his own goods as well as one who sells the goods of another is an auctioneer. *City of Goshen v. Kern*, 63 Ind. 468, 469, 80 Am. Rep. 234.

#### **As agent of both parties.**

An auctioneer is an agent acting for both buyer and seller. *Simon v. Motivos*, 3 Burr. 1921; *Hinde v. Whitehouse*, 7 East. 558, 572.

An auctioneer may be considered as the agent and witness of both parties, and under Statute of Frauds, § 17, he cannot bind one of the parties by his signature, the statute requiring such signature to be by a third person, and not by the other contracting party. *Farebrother v. Simmons*, 5 Barn. & Ald. 333.

#### **As agent of buyer or seller.**

An auctioneer is the duly authorized agent of a buyer, so that his signing a contract for the purchase of real estate on behalf of the highest bidder is a sufficient compliance with the statute of frauds, as is also the entering the name of the buyer in the auctioneer's book. *White v. Proctor*, 4 Taunt. 209, 212.

An auctioneer is an agent of the seller of the goods, and for certain purposes he is deemed the agent of both the seller and buyer, as by knocking down the goods sold to the highest bidder, and inserting his name in a book as such, he is considered the agent of both parties. *Thomas v. Kerr* (Ky.) 8 Bush, 619, 621, 96 Am. Dec. 262.

"An actioneer is the agent of the seller in making the sale; when, however, the property is struck off, he becomes also the agent of the purchaser to the extent of binding both parties by his memorandum of sale. Up to this point his duty is to the vendor." *Randall v. Lautenberger*, 16 R. I. 159, 13 Atl. 100. The fact, undisclosed to bidders, that an auctioneer, officiating at a judicial sale, is a party to the action and interested in the property sold, renders the sale voidable at the op-

tion of the purchaser, though no actual fraud or bad faith is shown, and though the auctioneer's interest was only that of tenant by the curtesy. *Smith v. Harrigan*, 27 Abb. N. C. 322, 323, 15 N. Y. Supp. 852, 853.

An auctioneer is the agent of the person who employs him to sell. From the nature of his business he is the agent of the buyer for the single purpose of binding him by a memorandum in writing to satisfy the statute of frauds, but in all other respects he is the agent of the seller. *Curtis v. Aspinwall*, 114 Mass. 187, 195, 19 Am. Rep. 332.

An auctioneer in the ordinary discharge of his duties is only an agent to sell, and when selling for a marshal at a judicial sale he acts only as a special agent of the marshal, without any authority, express or implied, to go beyond the single act of selling the goods, and the marshal as an officer to execute the orders of the court has no authority in his official character to do any act that shall expressly or impliedly bind any one by warranty. *The Monte Allegro*, 22 U. S. (9 Wheat. 616) 618, 644, 645, 6 L. Ed. 174.

#### **Broker or jobber distinguished.**

An "auctioneer" differs from a "broker" in that the latter both buys and sells, while an auctioneer only sells. By a charter of Henry VII, the business of selling by auction was confined to an officer called an "out-roper," and all other persons were prohibited from selling goods or merchandise by public outcry. But long before, and at that time, brokers exercised their trade, so that the two characters were different at that time. *Wilkes v. Ellis*, 2 H. Bl. 555, 557.

An "auctioneer" does not purchase goods at all, but sells the goods of others for a commission. He differs from a "jobber," who is a merchant who purchases goods from importers and sells to retailers. *Steward v. Winters* (N. Y.) 4 Sandf. Ch. 587, 590.

#### **As limited to selling.**

An auctioneer is a person who sells at auction to the highest bidder, hence a statute fixing the compensation of auctioneers relates only to their services in selling the property; anything further will not come within the meaning of the term "auctioneer." *Russell v. Miner* (N. Y.) 61 Barb. 534, 539.

#### **As trading person.**

See "Trader—Tradesman."

## **AUDIT.**

"The word 'audit' means to examine and adjust." *Maddox v. Randolph County*, 65 Ga. 216, 218; *People v. Orleans County Sup'rs*, 38 N. Y. Supp. 890, 891; *People v. Barnes* (N. Y.) 44 Hun, 574, 576; *In re Murphy* (N. Y.) 24 Hun, 592, 594 (affirmed in 86 N. Y. 627); *People v. Board of Sup'rs of Jef-*

erson County, 54 N. Y. Supp. 782, 784; *Morris v. People* (N. Y.) 3 Denio, 381, 391.

To audit is to examine an account, compare it with the vouchers, adjust the same, and to state the balance, by persons legally authorized for the purpose. It is not a judicial act. *Machias River Co. v. Pope*, 35 Me. 19, 22.

The word "audit" in its technical sense means to examine, to pass upon. It is in this sense that the word is used in Rev. Code, § 506, making it the duty of the ordinary to audit all claims against the respective counties. The party presenting the claim need not use the word "audit," it is sufficient if he presents it for that purpose, and the ordinary examines it and refuses to allow it; that is, refuses to audit it and approve it, but rejects and disallows it. If a party shows that this has been done, he has a right to sue in court on the claim. *Cobb County v. Adams*, 68 Ga. 51, 53.

To audit an account is to examine and digest it, or examine and verify it, or examine and adjust it. In actual practice to audit an account is to see that the accountant is charged with everything with which he is justly chargeable, and that nothing is placed on the credit side of the account for which he is not justly entitled to credit; and then, after the debit and credit are thus made up, to ascertain the balance remaining in his hands. In *re Heath's Estate*, 33 Atl. 46, 47, 52 N. J. Eq. (7 Dick.) 807.

In a statute requiring the necessary expenses of witnesses to be audited by the proper executive department, the word "audit" does not necessarily imply that these expenses must be audited in the first instance by an executive department or officer. The statute fixes the amount to be allowed for attendance and mileage to witnesses entitled to compensation; therefore the auditing contemplated must be done primarily in the court in which the case is pending. *Sanborn v. United States*, 10 Sup. Ct. 812, 816, 185 U. S. 271, 34 L. Ed. 112.

Defendant was convicted under a statute providing that a public officer holding or discharging the duties of any office, a part of whose duty it is to audit or take part in auditing, allowing, or paying claims or demands upon the state, who knowingly audits, allows, or pays, or directly or indirectly consents to the auditing, allowance, or payment of any claim which is false and fraudulent, or which contains charges or items which are false or fraudulent, is guilty of a felony. Defendant had manufactured the claim, and it was insisted that he was not guilty, because the manufacturer of a false claim could not be said to be auditing in any sense of the word. Defendant's contention was held to be fallacious, the court saying: "Upon a sensible view of the statute it must be held to include within its fair intent a case where an

official charged with the duty to audit a valid claim intentionally makes unlawful use of his official signature and seal to give a deceptive value to any fraudulent demand upon the public funds." *State v. Bourne*, 90 N. W. 1105, 1106, 86 Minn. 428.

An audit is an examination in general; an examination of accounts, comparing the charges with the vouchers. To audit charges in bills rendered does not simply mean to determine their amount in the sense of binding the other party. Upon such auditing a bill will be approved or rejected, and on an auditing by municipal authorities a rejection would not preclude recovery, if the claimant had a meritorious cause of action. *Clement v. City of Lewiston*, 53 Atl. 984, 985, 97 Me. 95.

#### Claims ex contractu.

An audit is an examination and adjustment of bills and claims on contract. *Cavan v. City of Brooklyn*, 5 N. Y. Supp. 758, 759.

Municipal Corporation Act, § 864 (St. 1883, p. 266), declares that all demands against a city or town of the sixth class shall be presented and audited by the board of trustees, etc. Held, that the term "audit" was not applicable to demands arising from torts. *Adams v. City of Modesto*, 181 Cal. 501, 502, 63 Pac. 1063.

"Audit" applies only to claims ex contractu and not to claims for unliquidated damages for injuries, and was used with such meaning in Code, § 757, providing that no person shall sue any city unless the claim is first presented to be audited and allowed. *Shields v. Town of Durham*, 24 S. E. 794, 118 N. C. 450, 36 L. R. A. 293.

In Code, § 1733, providing that the board of directors of a district township shall audit and allow all just claims against the district, "audit" refers to claims arising on contract, and means the comparison of the claim with the vouchers. A claim for personal injuries against a town is not one arising in the course of business, and is not the subject of county audit in the proper sense of the word. The examination of such a claim may, and usually would, require the aid of experts and other means of determination which would render the examination inconsistent with the idea of an audit of the claim. *Green v. Incorporated Town of Spencer*, 25 N. W. 681, 67 Iowa, 410.

#### Disallowance or reduction.

Laws 1873, c. 593, § 2, declaring that the expenses of the examination of any insurance company shall be borne by the company after being approved by the superintendent of the insurance and audited by the controller, means that the controller should make an examination for the purpose of seeing whether the preliminary steps had been taken, and he had no power arbitrarily either to in-

crease, decrease, or reject the bill. In *re* Murphy (N. Y.) 60 How. Prac. 258, 259.

"Audit," as used in Laws 1863, c. 172, § 2, providing that the board of town auditors shall audit the accounts of the commissioners of highways for all moneys received and disbursed by them by virtue of their offices, means to hear or to examine an account, and in its broader sense includes adjustment, allowance, or disallowance or rejection; and hence, where bills for the expenditures of the commissioners of highways were presented to the board of town auditors, and examined by them, and decided to be not legal liabilities of the town, and rejected, such bills were audited by the auditors within the meaning of the statute. *People v. Barnes*, 20 N. E. 609, 610, 114 N. Y. 317.

In its broad sense "audit" means to hear, examine, and determine a claim, by its allowance or disallowance or rejection in toto or in part, so that the examination and consideration of all the items of a claim constitutes an audit, though some items may be allowed and others rejected. *People v. Orleans County Sup'rs*, 38 N. Y. Supp. 890, 891, 60 Misc. Rep. 213.

"Audit," as applied to the action of a board of town auditors, means to hear and examine. It includes both the adjustment or allowance or the disallowance or reduction of an account. *People v. Town Board of Salina*, 50 N. Y. Supp. 533, 535, 27 App. Div. 476.

#### Hearing imported.

The auditing of a claim signifies a hearing on examination, and includes its adjustment or disallowance or rejection. *People v. Board of Town Auditors*, 26 N. Y. Supp. 122, 124, 74 Hun, 83.

Laws 1874, c. 323, declared that, in all proceedings before the Governor for the removal of any county officer on charges preferred against him, all the costs and charges thereof shall be a county charge upon the county, which shall be audited by the board of supervisors. Held, that "audit" meant that the board of supervisors shall examine all accounts relative to the matter, comparing the charges with the vouchers, examine parties and witnesses, allow or reject charges, and state the balance. *People v. Oneida County Sup'rs* (N. Y.) 24 Hun, 413, 419.

To audit implies to hear, and upon the hearing to adjust or to allow or to reject or otherwise decide according to the nature of the claim. *Territory v. Grant*, 21 Pac. 693, 3 Wyo. 241.

It is not an "audit" by a town board, where, without allowing or disallowing any specific item charged in the account, and without deciding that any definite or particular days were not spent in the services of the town, they arbitrarily cut down the bill to

suit their own notions. The auditors must perform their duties by passing specifically upon the specified charges; their correction must be, not an arbitrary guess at the gross sum, but an actual audit of the amount presented. *People v. Town Auditor of Elmira*, 82 N. Y. 80, 83.

#### Judicial discretion implied.

As used in Laws 1892, conferring power on supervisors to annually audit all accounts and charges against the county, "audit" means simply to examine or to adjust, and clearly implies the exercise of judicial discretion. *People v. Jefferson County Sup'rs*, 54 N. Y. Supp. 782, 784, 35 App. Div. 239 (citing *In re Murphy* [N. Y.] 24 Hun, 592, which is affirmed in 86 N. Y. 627).

"Audit," as used in St. 1841, p. 267, § 4, providing that the supervisors shall audit and allow the account of associate judges for the arrears of salary, etc., means to hear, examine, adjust, pass upon, and settle the account. It matters not whether the duty was difficult or easy; in its nature it required the exercise of judgment. *Morris v. People* (N. Y.) 3 Denio, 381, 391. "Audit" means "to hear, examine, adjust, pass upon, and settle the account; \* \* \* in its nature it requires the exercise of judgment." *In re Clark* (U. S.) 5 Fed. Cas. 853, 854 (citing *Morris v. People* [N. Y.] 3 Denio, 391).

In a statute providing that claims against a town should be presented to the board of town auditors for audit and to be certified by the board of supervisors, "audit" means to examine and pass upon the claim, and imports the exercise of judgment, thus vesting a discretion in the board of auditors. *People v. Barnes* (N. Y.) 44 Hun, 574, 576.

To audit a claim *ex vi termini* embraces the exercise of judgment. *People v. Board of Apportionment and Audit*, 52 N. Y. 224, 227.

#### Reasonable time for examination authorized.

"Audit" implies an examination and consideration, so that a reasonable time must be allowed after the presentation of a claim to the county commissioners in which they will audit the claim before an action can be brought for refusing to allow the claim. *Board of Com'rs of Rio Grande County v. Bloom*, 59 Pac. 417, 419, 14 Colo. App. 187.

#### As verify.

"Audit" means to make an audit of, examine, and verify by reference to vouchers, as an account or accounts, as to audit the accounts of a treasurer; and as used in a contract providing that certain estimates of work done, furnished by the engineers, shall be audited by the company, does not mean to examine, measure, and compute the work, but to examine and compare the estimates



and vouchers with previous estimates, vouchers, and payments made thereof. *Ford v. Springer Land Ass'n*, 41 Pac. 541, 550, 8 N. M. 37.

"Audit" means to examine, settle, and adjust accounts; to verify the accuracy of the statements submitted to the auditing officer or body. The term is confined to the investigation of "accounts," the examination and allowance of which is termed "auditing." *People v. Green* (N. Y.) 5 Daly, 194, 200.

To audit an account is to examine and ascertain whether it is accurate, and such is its use in Laws 1898, c. 568, as amended by Laws 1891, c. 291, providing that the board of estimate and apportionment was authorized to audit and allow claims for advertising notices, etc. *People v. Gilroy*, 31 N. Y. Supp. 776, 780, 82 Hun, 500.

## AUDITA QUERELA.

"Audita querela" is a writ to be delivered against an unjust judgment or execution by setting it aside for some injustice of the party that obtained it, which could not be pleaded in bar to the action. *Longworth v. Screven* (S. C.) 2 Hill, 298, 299, 27 Am. Dec. 381; *Hopkins v. Hayward*, 34 Vt. 474, 477; *Scott v. Larkin*, 13 Vt. 112, 114; *Griswold v. Town of Rutland*, 23 Vt. 324, 326; *Town of Poultney v. State Treasurer*, 25 Vt. 168, 170; *Wardell v. Eden* (N. Y.) 2 Johns. Cas. 258, 261; *McLean v. Bindley*, 114 Pa. 559, 8 Atl. 1, 2; *Fischer v. Johnson*, 74 Mo. App. 64, 68.

"Audita querela" is a summary proceeding against a judgment of a court when it is clear that new matter arising after judgment is of such a nature that the judgment ought not to be executed. *Wetmore v. Law*, (N. Y.) 34 Barb. 515, 517.

The writ of audita querela is a commencement of a suit at common law, recognized also by statute, in which plaintiff asks to be relieved from a judgment or execution or both, by reason of some matter affecting their validity which he has not had an opportunity to plead. *Foss v. Witham*, 91 Mass. 572.

The writ of audita querela was anciently the mode of obtaining relief against judgments, either by a party to the record upon matter which he could not have pleaded, or by strangers. So late as 1824 it was said by Best, J., that it was neither an obsolete or difficult proceeding. 2 Bing. 41. But it has been superseded to a very great extent, if not entirely, in our state, by a motion to vacate the judgment, upon which, whenever the question offered is not clear, an issue may be directed. *Kendall v. Hodgins*, 14 N. Y. Super. Ct. (1 Bosw.) 659, 665.

The writ of audita querela in England was a form of action which lies for a defend-

ant to recall or prevent an execution on account of some matter occurring after judgment, amounting to a discharge. One of the characters of the suit was that its venue was of the court issuing the execution, its province was to deal with its own judgment, and the Legislature of Georgia, in adopting the illegality proceeding, seems to confine the office of illegality to executions and judgments issuing out of and returnable to the courts, and by express provision of law requires the illegality to be returned by the levying officer to the court from which it was issued. *Manning v. Phillips*, 65 Ga. 548, 550.

"An audita querela is an equitable action which lies for a person who either is in execution or in danger of being so on a judgment, when he has matter to show that such execution ought not to have issued or should not issue against him, and is of a most remedial nature, and seems to have been invented lest in any case there should be an oppressive defect of justice when the party has a good defense, but had not, nor has any, other means to take advantage of it." *Stanford v. Barry* (Vt.) 1 Aik. 321, 323, 15 Am. Dec. 692.

The writ of audita querela is a common-law writ which is recognized by statute as an existing remedy. Pub. St. c. 186, §§ 1-6. By section 3 the cause is to be heard by the court on any issue of law or fact, and such judgment is to be rendered as law and justice shall require. As was said of the earliest statute on this subject in this commonwealth (St. 1780, c. 47), the present statute "has left the cases in which it is a suitable remedy to be determined by rules and precedents at common law." *Lovejoy v. Webber*, 10 Mass. 101. In the case above cited the writ was held to be a suitable remedy where the debtor, after service of an original writ upon him, and before its return, satisfied the demand, and the creditor afterwards entered the action, recovered judgment, and caused his execution to be levied on the debtor's property. See, also, *Thatcher v. Gammon*, 12 Mass. 268, 270. So, where one of two judgment debtors pays the judgment, and the execution, instead of being returned satisfied, is returned unsatisfied, and an alias execution is taken out on which the other debtor is arrested. *Brackett v. Winslow*, 17 Mass. 153. So, where the execution calls for a larger sum than is authorized by the judgment. *Stone v. Chamberlain*, 73 Mass. (7 Gray) 206. So, if the judgment debtor resides out of the commonwealth, and the creditor, having obtained judgment by default, takes out execution within one year thereafter, without first giving bond, as required by law. *Radclyffe v. Barton*, 161 Mass. 327, 330, 37 N. E. 373 (citing *Dingman v. Myers*, 79 Mass. [13 Gray] 1; *Barker v. Walsh*, 96 Mass. [14 Allen] 172; *Barrett v. Vaughan*, 6 Vt. 243; *Avery v. United States*,

79 U. S. [12 Wall.] 304, 20 L. Ed. 405; Com. Dig. "Audita Querela," C).

A writ of audita querela is of a remedial nature, and is said to have been invented principally to relieve a party who has a good defense, but is too late to make it in the ordinary form of proceeding. The practice of the courts in granting summary relief on motion has almost rendered it useless and unnecessary in modern times. In Massachusetts this form of proceeding still remains in practice, and has the direct sanction of legislative authority. Rev. St. c. 112. From the nature of the writ it indicates a proceeding in a case which has been the subject of a judicial decision or judgment in a court of law, and where defendant in the original suit will be unjustly deprived of his right if the judgment or execution is allowed to be treated as valid. *Coffin v. Ewer*, 46 Mass. (5 Metc.) 223, 230, 231.

"Audita querela" is a judicial writ. Formerly it was issued only in discretion, but afterwards was sued out of chancery; but it must always be to the court having the record. Its purpose is to set aside a judgment or execution, and consequently, like error, certiorari, and other judicial writs, it must be between the parties to the former proceeding. *Gleason v. Peck*, 12 Vt. 56, 59, 86 Am. Dec. 329.

"Audita querela" does not lie to set aside an execution issued in pursuance of a decree of the court of chancery. *Garfield v. Vermont University*, 10 Vt. 536.

"Audita querela" is not available where the injury of which the plaintiff complains is attributable to his own neglect, nor to correct an error of the court in rendering the judgment. *Walter v. Foss*, 32 Atl. 643, 67 Vt. 591.

"Audita querela" cannot be sustained for error in law or in fact. *Sutton v. Tyrrell*, 10 Vt. 87, 89.

The writ of audita querela, though authorized by statute, is derived from the common law, and is governed by the rules of the common law as to its proceedings, mode of trial, rendition, and effect of final judgment. *Johnson v. Plimpton*, 30 Vt. 420, 422.

## AUDITOR.

An auditor is one authorized to examine accounts, compare charges with vouchers, examine parties and witnesses, allow and reject charges, and state a balance. *People v. Oneida County Sup'rs* (N. Y.) 24 Hun, 413, 419.

An auditor is a person appointed and authorized to audit or examine an account or accounts, compare the charges with the vouchers, examine the parties and witnesses, allow or reject charges, and state the bal-

ance. *Sawyer v. Mayhew*, 71 N. W. 141, 142, 10 S. D. 18.

### Comptroller synonymous.

The words "auditor" and "comptroller," as used in the Constitution and statutes of the states of the Union, are synonymous. *State v. Doron*, 5 Nev. 399, 413.

Const. 1872, art. 14, § 1, declares that county officers shall consist of sheriffs, coroners, prothonotaries, registers of wills, recorders of deeds, commissioners, treasurers, surveyors, auditors or controllers, clerks of the courts, district attorneys, and such others as may from time to time be established by law. Held that, by the fair import of the language, "auditors or controllers," in the connection in which it is used with other official titles, admits of but one construction, which is that it assumes that each substantially exercises the same powers and performs the same duties, and when those duties are coextensive with the county by whichever name the officer performing them may be designated, they shall be county officers. *Taggart v. Commonwealth*, 102 Pa. 354, 364.

### Of county.

As judicial officer, see "Judicial Officer."

### Of courts.

The term "Auditor" is often used to designate an officer whose duties are properly those of a master. *Blain v. Patterson*, 48 N. H. 151, 152.

A person appointed in an action at law in cases where a preliminary or tentative investigation becomes a necessity is ordinarily designated as an "auditor," while in proceedings in equity, the designation is that of "master." *Fenno v. Primrose* (U. S.) 119 Fed. 801, 804, 58 O. O. A. 813.

"An auditor is an officer either at law or in equity assigned to state the items of debit and credit between the parties and exhibit the balance." *Whitwell v. Willard*, 43 Mass. (1 Metc.) 216-218; *Fisk v. Gray*, 100 Mass. 191, 193.

"Auditor" is a term which designates an agent or officer of the court who examines and digests accounts for the decision of the court. He does not decree, but prepares materials on which a decree may be made. *Field v. Holland*, 10 U. S. (6 Cranch) 8, 21, 3 L. Ed. 136; *Whitehead v. Perle*, 15 Tex. 7, 11.

St. 1817, c. 96, § 25, provides that, whenever a cause is at issue, and it shall appear that the trial will require an investigation of accounts or an examination of vouchers by the jury, the court may appoint one or more auditors to hear the parties, and examine their vouchers and evidence, and state the account, and make report thereof to the

court. Held, that such auditors "are not the same as auditors in an action of account at common law. They are the same only in name. The powers of the one are by no means the measure of the powers of the other. In the words of the statute, they are to hear the parties, in the most general terms. They are to hear them as to everything, without limit, and without restriction, bearing upon the matter which they have in charge, and the duty which they have to perform; that is, taking and stating an account. They are to hear them upon everything material in relation to the account; everything proper to be considered in deciding upon the merits of the claims of the respective parties. They are not only to examine vouchers, but evidence in relation to all questions arising in the investigation of accounts." *Locke v. Bennett*, 61 Mass. (7 Cush.) 445, 449.

A person or persons called in by the court to hear matters of detail which the court has not time to hear, and to inform the conscience of the court as to facts which are essential to be known before a particular judgment or decree can be pronounced. A peculiar example of the jurisdiction of an auditor is in the determination of an executor's accounts, for the executor, instead of paying the funds over at his own risk, may bring the assets into court for distribution, and then the court, instead of going into a minute settlement of his accounts and into all those questions which may affect distribution, refers the whole matter to auditors for hearing and determination in strict analogy to references of a chancellor to a master. *Appeal of Miller*, 30 Pa. (6 Casey) 478, 490.

"Auditors" are instruments of the court by which the law is administered. They are appointed without the consent of the party, and their decisions are subject to review by the court. *Read v. Barlow* (Vt.) 1 Aikens, 145, 147.

It is immaterial on a writ of inquiry by what name a person is designated to whom the question of damages is referred, whether it be by the name of auditor, which is not unusual, or assessor, as he is sometimes designated in some of the states, or master, as may perhaps be the more appropriate designation. The name is immaterial, the duties being the same, namely, to investigate the damages sustained by the plaintiff and the cause of action, and to report thereon for the information of the court. *Price v. Dearborn*, 34 N. H. 481, 486.

#### Of state.

"Auditor," as used in Const. art. 6, § 2, declaring that the Secretary of State shall, by virtue of his office, be auditor of public accounts, cannot be construed as conferring any judicial power on him, so that his determination of a claim would be as binding upon the parties as the judgment of a court.

Abbott defines the power of an auditor of public accounts as "an officer of government whose function it is to examine, verify, and approve or report accounts of persons who have had the disbursements of government moneys, or have furnished supplies for government use." Burrill's definition of the term "auditor" is this: "An officer or person whose business is to examine and verify accounts of persons entrusted with money. A person appointed to examine a particular account, and state or certify the result, in doing which he is said to audit the account." "The office of public auditor is to be found in the administrative department in every organization of government, and, even where he is empowered to act upon his official judgment, his functions are only quasi judicial." *State v. Brown*, 10 Or. 215, 220.

"Auditor," as used in Const. art. 6, § 2, describing the duties of the Secretary of State, and declaring that he shall be ex officio auditor, signifies an officer whose business is to examine and certify accounts and claims against the state, and to keep an account between the state and its treasurer. *State v. Hastings*, 10 Wis. 525, 530.

A state auditor is an officer of the state connected with its fiscal operations. The taxes, after the rate is prescribed by the Legislature, are to be levied by him. *Auditor v. Treasurer*, 4 S. C. (4 Rich.) 311, 312.

## AUGMENTATION.

The term "augmentation" is defined to mean the act of increasing or making larger by addition, expansion, or dilation; the act of adding to or enlarging. *Vejar v. Mound City Land & Water Ass'n*, 97 Cal. 659, 663, 32 Pac. 713, 715.

## AUNT.

Where a will provided that "my Aunt C. and my cousins [naming seven persons] shall take an equal share" in certain real estate, the word "aunt" and the word "cousins" will be regarded as merely descriptive of the persons named for the purpose of identification, and not as indicating a class. *Moffett v. Elmendorf*, 46 N. E. 845, 847, 152 N. Y. 475, 57 Am. St. Rep. 529.

## AURA EPILEPTICA.

"Aura epileptica" is a term used to designate the sensation of a cold vapor frequently experienced by epileptics before the loss of consciousness occurs in an epileptic fit. *Aurentz v. Anderson*, 8 Pittsb. R. (Pa.) 310, 311.

## AUTHENTIC.

"Authentic," as used in Rev. St. p. 208, c. 22, § 69, providing that every person who

shall falsely make, alter, forge, or counterfeit any record or other authentic matter of a public nature, shall be deemed guilty of forgery, means vested with all due formality and legally attested; and hence a filing book, which was merely a probate judge's memorandum book, and not required by law to be kept, being merely a convenient book of reference in which entries were made generally by the probate judge, purporting to give the names of certain persons who had made applications for lots, was not an authentic matter of a public nature. *Downing v. Brown*, 8 Colo. 571, 590.

Under Spanish jurisprudence the "authentic interpretation of laws" is that given by the legislator himself, who alone has authority to resolve the doubts and fix the sense of words, and whose decision is obligatory on citizens and tribunals and must be obeyed, both within and without courts of justice. *Houston v. Robertson's Adm'r*, 2 Tex. 1, 26 (citing *Diccionario de Legislacion*, p. 816).

#### AUTHENTICATE—AUTHENTICATION.

See "Legally Authenticated"; "Properly Authenticated."

"Authenticate" is defined by Webster "to render authentic, to give authority to or proof, attestation or formality required by law as sufficient to entitle to credit"; in *Bouvier's Dictionary* as "the proper or legal attestation, or acts done with a view of executing an instrument to be known and identified"; and in *Burrill's Dictionary* as "the act or mode of giving legal authority to a statute, record, or other legal instrument or certified copy thereof, so as to render it legally admissible in evidence." There is no inherent meaning in the word which requires the authentication to be in writing. The words "properly and legally authenticated so as to entitle them to be received in evidence," in a statute requiring such authentication of certain papers, must be construed as if the expression were "so properly and legally authenticated as to entitle"; that is, "so properly and legally authenticated that they would be entitled to be," etc. *In re Fowler* (U. S.) 4 Fed. 303, 310.

In legal parlance "authenticate" means vested with all due formalities and legally attested, and cannot apply to a memorandum book kept by a probate judge which he is not required to keep. *Downing v. Brown*, 8 Colo. 571, 590.

The word "authenticate," as applied to the certification of a check, is not a definite signification as forming part of the certification. *United States v. Potter* (U. S.) 56 Fed. 83, 92.

"Authenticate" means to give verity, to impart to the instrument its validity and operative effect. Until an ordinary deed has

been signed, sealed, and delivered, it is totally invalid as a deed, and all of these several acts must concur, or it cannot be said to have been executed and capable of authentication within a statute providing for the attesting and authentication of a deed of a husband and wife. *Hartley v. Ferrell*, 9 Fla. 374, 380.

"The authentication of a written instrument is such official attestation as will render it legally admissible in evidence." *Mayfield v. Sears*, 32 N. E. 816, 133 Ind. 86.

"Authentication" of any document is that which is certified concerning it by the proper certifying officer. *Ordway v. Conroe*, 4 Wis. 45, 50.

#### AUTHOR.

An "author" is defined to be one "who produces, creates, or brings into being; the beginner, former, or first mover of anything; hence the efficient cause of a thing." The term is especially applicable to one who composes or writes a book or writing, and, in a more general sense, to one who occupies his time composing or writing books or writings. *Leidersdorf v. Flint* (U. S.) 15 Fed. Cas. 260, 261.

An author may be said to be the creator or inventor both of the ideas contained in his book, and the combination of words to represent them. *Stowe v. Thomas* (U. S.) 23 Fed. Cas. 201, 206.

The term "author" is used in the copyright laws to designate the person who primarily develops a mental production by means of a series of written or printed words arranged for an intelligent purpose in an orderly succession of expressive combinations. *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 192.

"Author," as used in a statute protecting the works of an author, includes originating, making, producing, as the inventor or master mind, the thing which is to be protected, whether it be a drawing, painting, or photograph. *Nottage v. Jackson*, 11 Q. B. Div. 627, 637; *Foulk v. Donaldson* (U. S.) 57 Fed. 32, 34; *Courier Lithographing Co. v. Donaldson Lithographing Co.* (U. S.) 104 Fed. 993, 995, 44 C. C. A. 296.

"Author," as used in the provision of the Constitution authorizing Congress to secure for a limited time to authors and inventors the exclusive right to their respective writings and discoveries, includes photographers who contrive artistic posing, costuming, etc. *Burrow-Giles Lithographic Co. v. Sarony*, 4 Sup. Ct. 279, 280, 111 U. S. 53, 28 L. Ed. 349.

As used in a statute conferring copyrights on authors, the person who forms the plan and scheme of the work and pays different artists of his own selection, who on

certain conditions contribute to the work, is the author and proprietor of the work within the equitable meaning of the term. The words "author" and "inventor" are said to be synonymous. *Shepherd v. Conquest*, 17 C. B. 427, 443.

When a person submits himself or herself as a public character to a photographer for the taking of a negative and the making of photographs therefrom for the photographer, the negative and the right to make photographs from it belong to the photographer, and he is the author and proprietor of the photograph within the meaning of the copyright laws. *Press Pub. Co. v. Falk* (U. S.) 59 Fed. 324, 328.

#### Of book.

One who originates a new and original combination of materials, and produces a book which exhibits a substantial and original system of arranging material, is an author. *Bullinger v. Mackey* (U. S.) 4 Fed. Cas. 649, 653.

The term "author" does not apply to a person who hires another to write a book and gives him the description and scope of the work, but applies to the literary man who writes the book and prepares it for publication. *De Witt v. Brooks* (U. S.) 7 Fed. Cas. 575.

#### Of judicial headnotes and statements.

Rev. St. § 4952 [U. S. Comp. St. 1901, p. 3406], providing that any citizen of the United States or resident therein, who shall be the "author or proprietor" of a book, shall have the sole liberty of printing, publishing, and copying the same, does not apply to a judge who in his judicial capacity prepared headnotes and statements of the case for his opinions, so as to confer on such judge the right to convey a title by assignment to such headnotes and statements to any other person sufficient to entitle such person to a copyright as the assignee of the author or proprietor. *Banks v. Manchester*, 9 Sup. Ct. 36, 40, 128 U. S. 244, 32 L. Ed. 425.

#### Of opera.

An author is one who by his own intellectual labor, applied to the materials of his composition, produces an arrangement or compilation new in itself, and includes one who made many alterations and additions to an original opera and arranged and adapted the music for publication. *Atwill v. Ferrett* (U. S.) 2 Fed. Cas. 195, 197.

#### Of power.

The author of a power, as used in the chapter relating to powers, is the person by whom a power is created, whether by grant or devise. Rev. St. Okl. 1903, § 4101; Rev. Codes N. D. 1899, § 8405; Civ. Code S. D. 1903, § 322.

### AUTHORSHIP.

Generally speaking, authorship implies that there has been put into the production something meritorious from the author's own mind. But the product embodies the thought of the author as well as the thoughts of others, and would not have found existence in the form presented but for the distinctive individuality of mind from which it sprang. *National Tel. News Co. v. Western Union Tel. Co.* (U. S.) 119 Fed. 294, 297, 56 C. C. A. 198, 60 L. R. A. 805.

### AUTHORITY—AUTHORIZE.

See "Actual Authority"; "Apparent Authority"; "Color of Authority"; "Competent Authority"; "Due Authority"; "Executive Authority"; "Lawful Authority"; "Legally Authorize"; "Legislative Authority"; "Ostensible Authority"; "Parental Authority"; "Specially Authorized"; "Under Authority of Law."

Authority to mortgage, see "Mortgage." Authority to purchase, see "Purchase." Authority to sell, see "Sell." Like authority, see "Like."

"Authority" is (1) legal or rightful power; (5) a precedent, a decision of a court, an official declaration (Webster). Thus where three parties are given joint authority to do an act under the statute providing that words giving joint authority to three or more public officers are considered as giving such an authority to a majority of them, two of such parties are legally and rightfully empowered to do the act. *Blevins v. Morledge*, 47 Pac. 1068, 1069, 5 Okl. 141.

A quitclaim deed conveyed to an incorporated village and its successors, forever, "to be under the authority and control of its proper council and municipal authority," in conformity with the act of the Legislature of Ohio in that behalf, all the grantor's right and title in certain lands used as burial grounds by the citizens of the village. Held, that the deed should be construed as if it read "grant," etc., "to the incorporated village and its successors [the burying ground described in fee], with the same power of control over it as conferred on the village and its council with respect to this land by the Act of April 3, 1867." *Young v. Mahoning County Com'rs* (U. S.) 51 Fed. 585, 587.

Rev. St. § 5336 [U. S. Comp. St. 1901, p. 3624], providing for the punishment of those who conspire to overthrow, put down, or destroy by force the government of the United States, or to levy war against them; or to oppose by force the authority thereof, means the use of force against the government as a government. To constitute an offense, the authority of the government must be opposed; that is to say, force must be

brought to resist some positive assertion of authority by the government. A mere violation of law is not enough, there must be an attempt to prevent the actual exercise of authority. Where force was exerted in opposition to a class of persons who had the right to look to the government for protection against such wrongs, and not in opposition to the government while actually engaged in an attempt to afford that protection, the party did not "oppose by force the authority of the United States." *Baldwin v. Franks*, 7 Sup. Ct. 656, 663, 120 U. S. 678, 82 L. Ed. 766.

"Authorized," in Act May 14, 1874, providing that the parties to a civil suit may submit it to any lawyer authorized to practice in the superior court whenever such case could be submitted to the court for trial, means a person who has been admitted to practice in such court. *Campbell v. Fayette Co.*, 17 Atl. 882, 883, 127 Pa. 86.

The words "authorized, empowered, and directed," as used in an instruction that an agent is one authorized, empowered, and directed by another to transact business which the agent undertakes and agrees to do, do not require express words of authorization or agreement in order to constitute an agency. *Crane Co. v. Columbus State Bank (Neb.)* 91 N. W. 532.

Where a statute declared that a sheriff's deed should be taken as sufficient evidence of the authority under which the sale was made, the description of the land and the price at which it was purchased, the word "authority" means that, if at the moment of sale he has substantially taken all the steps which the statute prescribed as a condition precedent to the making of the sale, his authority is complete; otherwise not. *Bonnell v. Roane*, 20 Ark. 114, 121.

An authority is a clear and definite decision upon a question actually before the court for decision. *Grand Lodge A. O. U. W. v. Furman*, 52 Pac. 832, 935, 6 Okl. 649.

#### Discretion implied.

"Authorize and empower," as used in a will in which the testatrix did authorize and empower the trustee to improve the real estate, implies discretion. *Seeds v. Burk*, 37 Atl. 511, 513, 181 Pa. 281.

New York City Charter, § 1473 et seq., providing that the police department is "authorized and empowered" to grant theatrical licenses, is to be construed as vesting a discretionary power in the department to grant or withhold licenses, which may be controlled by mandamus. The "language is almost identical with that of section 1999 of the consolidation act, under which the authority to grant licenses was vested in the mayor, whereas by the provisions of the charter which we have quoted such power is now

lodged with the police department. This very contention now made as to the intent and meaning of the words 'authorized and empowered,' which are to be found in both statutes, was involved in the case of *People v. Grant*, 58 Hun, 455, 12 N. Y. Supp. 879; and Justice Barrett, who wrote the opinion therein, thus disposes of it (page 457, 58 Hun, and page 880, 12 N. Y. Supp.): 'The relator's contention is that these words "authorized and empowered," should be construed as imperative, and he cites authorities for the proposition that permissive words may sometimes be treated as mandatory. \* \* \* The rule undoubtedly is that where public bodies or officers are empowered to do that which the public interests require to be done, and adequate means are placed at their disposal, the proper execution of the power may be insisted on, though the statute conferring it be only permissive in its terms. *Mayor, etc., v. Furze*, 3 Hill, 612. The word "may" is thus construed at times to mean "must." But why, it may be asked, should this construction be given to the act under consideration? What public interest demands that the mayor should be required, under all circumstances, to accept the fee and grant the license? It seems to me that it is quite the other way. The public good clearly requires that the permissive words in question should be read in their natural and ordinary sense.' " *Armstrong v. Murphy*, 72 N. Y. Supp. 473, 474, 65 App. Div. 123.

#### As mandatory.

"Authorized and empowered," in Acts 1861, c. 63, § 6; providing that cities and towns shall be authorized and empowered to provide for the support of the families of any persons residing in such cities and towns who may enlist in the army, makes it the duty of cities and towns to provide for the support of such persons, and does not authorize them or their officers to inquire how or by whose fault the need for such support may have arisen, or that it was to be within the option of such towns and their officers to provide such relief. *Inhabitants of Veazie v. Inhabitants of China*, 50 Me. 518, 521.

A statute authorizing a board of supervisors at its next annual session to audit and pay as a county charge a certain claim was imperative, and it was the duty of the board to audit and pay such a claim. *People v. Erie County Sup'rs (N. Y.)* 1 Sheld. 517, 521.

Act May 17, 1867, giving relief against illegal taxation, and declaring that the board of supervisors are "authorized" and empowered on the application of any party aggrieved to determine any claim of assessment, is mandatory, and does not mean that they may hear and determine at their discretion. *People v. Herkimer County Sup'rs (N. Y.)* 56 Barb. 452, 454; *People v. Otsego County Sup'rs*, 51 N. Y. 401, 405.

Laws 1890, c. 393, authorizing and empowering the city of Buffalo to audit and adjust the amount of damage done to certain private property by the opening of a street, and that on the appraisal of such damage the city shall raise the same by assessment and pay it over to the owners of the property, is mandatory, and not merely permissive. *People v. Common Council of City of Buffalo*, 21 N. Y. Supp. 601, 603, 2 Misc. Rep. 7.

The words "authorize and empower and request," as used in a will in connection with the management of an estate, are imperative, and impose a duty on the executors. *Landon v. Hultfeldt* (N. J.) 3 Atl. 882, 885.

"When a statute confers upon a corporation a power to be exercised for the public good, the exercise of the power is not discretionary, but imperative, and the words 'power and authority' in such case may be construed 'duty and obligation.'" *Commonwealth v. Marshall*, 3 Wkly. Notes Cas. 182, 185 (quoting *Anne Arundel County Com'rs v. Duckett*, 20 Md. 468, 83 Am. Dec. 557).

A provision in a charter that the mayor and city council shall have full power and authority to enact and pass all laws and ordinances necessary to preserve the health of the city means that it shall be the duty and obligation of the city to enact such laws, and confers a power to be exercised for the public good; and the exercise of it is not merely discretionary, but imperative. *Flynn v. Canton Co.*, 40 Md. 312, 319, 17 Am. Rep. 608.

"It was said in *City of Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326, that it is a well-settled principle that when a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative; and the words 'power and authority' in such case may be construed 'duty and obligation.'" *Magaha v. City of Hagerstown*, 51 Atl. 832, 835, 95 Md. 62, 93 Am. St. Rep. 317.

"Authority," as used in the charter of a municipal corporation giving the board of trustees power and authority to repair streets, is not merely discretionary, but imperative, and the words "power and authority" in such case may be construed "duty and obligation." *Rankin v. Buckman*, 9 Or. 253, 262.

The term "authorized and empowered," as used in an act declaring that a city council "are hereby authorized and empowered to pay a certain amount of money, with interest, to certain persons," is mandatory. *Bowen v. City of Minneapolis*, 47 Minn. 115, 116, 49 N. W. 683, 28 Am. St. Rep. 333.

#### As power.

Rev. St. art. 363, after defining the powers of a marshal as to city matters, provides that in the prevention and suppression of crime and arrest of offenders he shall have, possess, and execute like power, authority, and jurisdiction as the sheriff of a county under the laws of a state. "Authority" as applied to executive officers seems to be a convertible term with "power," for the authority of such officers is their lawful power. *Newburn v. Durham*, 32 S. W. 112, 115, 10 Tex. Civ. App. 655.

#### AUTHORITY EXERCISED UNDER THE UNITED STATES.

Under the federal judiciary act, giving the Supreme Court jurisdiction to review a final judgment or decree of a state court of last resort in any suit where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, it is held that the term "authority exercised under the United States" must be something more than a bare assertion of such an authority, and must be an authority having a real existence derived from competent governmental power, and in this respect the word "authority" stands on the same footing with "treaty" or "statute." Hence, where a party claimed authority under an order of a federal court which, when rightfully viewed, did not purport to confer any authority upon him, a writ of error to the Supreme Court was dismissed. *Millingar v. Hartuppee*, 73 U. S. (6 Wall.) 258, 261, 18 L. Ed. 829.

Where, in a case in a state court, a right or immunity was set up under and by virtue of a judgment in a federal court, and the decision was against such right or immunity, a case for removal to the Supreme Court was presented as the judgment under which the right was claimed was an "authority exercised under the United States," within the meaning of the statute. *Dupasseur v. Rochereau*, 88 U. S. (21 Wall.) 130, 134, 22 L. Ed. 588.

#### AUTHORITY OF LAW.

See "Affirmatively Authorized by Law."

An allegation in a complaint that an arrest made by a policeman was without authority of law states but a legal conclusion. *Connelly v. American Bonding & Trust Co.* (Ky.) 69 S. W. 959, 961.

Rev. St. c. 132, § 1, providing that every person who shall set up or promote any lottery not authorized by law shall be liable to a fine, means any law having force in this commonwealth, either by a statute of its Legislature, or by a law of the United States, and to suppose that the Legislature

intended to allow the sale of tickets in a lottery authorized by another state is such an impeachment of the discernment and foresight of the Legislature that it cannot be admitted. Such a supposition is not consistent with the manifest design of the statute, which was to suppress lotteries not authorized by law. *Commonwealth v. Dana*, 43 Mass. (2 Metc.) 329, 338.

"Authority of law," as used in Pen. Code, § 211, providing that a person who willfully seizes, confines, inveigles, or kidnaps another with the intent to cause him, without authority of law, to be secretly confined or imprisoned within the state, is guilty of kidnapping, has no reference whatever to "due process of law" and where the statute relating to the confinement of a person for insanity has been observed, and all its provisions complied with, the imprisonment or the detention of the person is not without authority of law. *People v. Camp*, 21 N. Y. Supp. 741, 743.

Pen. Code, § 94, provides that a person who willfully and unlawfully removes, mutilates, destroys, conceals, or obliterates a record, map, book, paper, document, or other thing filed or deposited in a public office, or with any public officer, by authority of law, is punishable, etc. Held, that papers filed and deposited in the office of the bureau of labor statistics of the state, at the headquarters thereof, which papers were circulars containing questions asking for information such as the bureau of labor statistics was authorized to collect, and the answers thereto of the persons to whom such circulars were addressed, and the issuance of the circulars by the commissioner was authorized, as he was also authorized to compel answers thereto, were received by the commissioner by "authority of law." *People v. Peck*, 22 N. Y. Supp. 576, 579, 67 Hun, 560.

Const. art. 12, § 2, declares that no city, county, town, or other subdivision of this state shall ever make donations to any railroad or other work or internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof at an election by "authority of law." The phrase quoted is held to mean an act of the Legislature, or law-making power under the Constitution, duly exercised and approved, and does not authorize the people to vote such aid, but necessitates the permission of the Legislature. *Reineman v. Covington, C. & B. H. R. Co.*, 7 Neb. 310, 312.

The phrase "authority of statutes," as used in the bonds of a municipal corporation, reciting that such bonds were issued by authority of statutes, imports in favor of bona fide purchasers for value a full compliance with the statute, and precludes inquiry as to whether the precedent conditions were performed before the bonds were issued. *Independent School Dist. of Steamboat Rock*

*v. Stone*, 1 Sup. Ct. 84, 87, 106 U. S. 183, 27 L. Ed. 90.

The expression "authorized by law," as used in Gen. St. p. 71, § 72, providing that the state auditor shall give notice annually of the rates of taxes authorized by law to be levied for state purposes, includes rates fixed where the Legislature has furnished the data for making the computation, but has not itself fixed the rates. *Morton v. Comptroller General*, 4 S. C. (4 Rich.) 430, 477.

## AUTHORITIES.

See "Corporate Authorities"; "County Authorities"; "Local Authorities"; "Municipal Authorities"; "Proper Authorities."

The word "authorities," in the constitutional provision that local officers shall be elected by the electors or appointed by such authorities thereof, means those upon whom the people have conferred authority, not their agents' agents. The words employed in the Constitution are taken in their natural and popular sense, unless they are terms of art, in which case they are to be taken in their technical signification. *Black, Const. Law*, 66. An "authority" means a person or persons or a body exercising power or command. *Imperial Dict.; Cent. Dict.* The body of persons exercising power or command. *Rathbone v. Wirth*, 40 N. Y. Supp. 535, 555, 6 App. Div. 277 (citing *Murray's Eng. Dict.*).

As used in the treaty between the United States and Spain, ceding Florida, article 8, stipulating that all the grants of land made before the 24th of January, 1818, by his Catholic majesty, or by his "lawful authorities" in the territories ceded to the United States, should be ratified and confirmed to persons in possession, means those persons who exercise the granting power by authority of the crown, and is equivalent to the words "competent authorities," used in their place by the King of Spain in his ratification of the treaty. *United States v. Clarke*, 83 U. S. (8 Pet.) 436, 449, 8 L. Ed. 1001.

"Authorities thereof," as used in Const. art. 13, § 9, providing that all city, town, and village officers, whose election or appointment is not provided for by the Constitution, shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof as the Legislature shall designate for that purpose, means some officers or board of officers of the village. *Cole v. Village of Black River Falls*, 14 N. W. 906, 908, 57 Wis. 110.

## AUTOMATIC—AUTOMATICALLY.

In common parlance, "automatic" means self-acting. *Cleveland Target Co. v. Empire*



Target Co. (U. S.) 97 Fed. 44, 74; Tripp Giant Leveler Co. v. Rogers (U. S.) 61 Fed. 289, 290.

By "automatic" is meant self-acting, or the elimination of human agency or volition which results in the saving of labor and increased certainty and uniformity of operation. This is the sense in which the term is used in the mechanic arts and in the patent law, and does not include all contrivances, such as a wheelbarrow, which are operative for the purposes designed under any applied force, whether muscular or otherwise. Tripp Giant Leveler Co. v. Rogers (U. S.) 61 Fed. 289, 290.

The word "automatically" cannot be properly applied to describe a method of throwing out the hooks of a car coupler by means of a rod connecting therewith and running to the side of the car, and there turned by the application of physical force by a brakeman. Gould Coupler Co. v. Trojan Car Coupler Co. (U. S.) 74 Fed. 794, 796, 21 C. C. A. 97.

## AUTOPSY.

"Autopsy" is defined to be an examination of a dead body by dissection, but is not synonymous with "examine," in an insurance policy authorizing the insurer to examine the body of assured to determine cause of death. *Sudduth v. Travelers' Ins. Co.* (U. S.) 106 Fed. 822, 823.

## AUTREFOIS ACQUIT.

"The plea of autrefois acquit is based on the maxim that a man shall not be brought into danger of his life for one and the same offense more than once. Therefore, when a man is once found not guilty on an indictment before a court which hath jurisdiction of the cause, he may plead such acquittal in bar of any subsequent indictment for the same crime." *United States v. Gilbert* (U. S.) 25 Fed. Cas. 1287, 1294.

"Autrefois acquit" is the name of a plea in bar in a criminal action that the defendant has been already indicted, tried, and acquitted. It is only available in cases where the transaction is the same, and the two indictments are susceptible of and must be sustained by the same proof. *Simco v. State*, 9 Tex. App. 338, 348.

The plea of autrefois acquit must be upon a prosecution for the same identical act and crime, and it must appear that the indictment depends upon facts so combined and charged as to constitute the same legal effect and crime. It is obvious that there may be a great similarity in the facts where there is a substantial legal difference in the nature of the crime, and, on the contrary, there may be a considerable diversity of cir-

cumstances where the legal character of the offense is the same. *Commonwealth v. Vaughn*, 42 S. W. 117, 101 Ky. 603, 45 L. R. A. 858.

## AUTREFOIS CONVICT.

The plea of autrefois convict is a plea of a mixed nature, and consists partly of matter of record and partly of matter of fact, and it must set forth the record of the former acquittal and that the judgment is unreversed and in full force. *United States v. Olsen* (U. S.) 57 Fed. 579, 582.

"Autrefois convict" is the name given to designate a plea in criminal law that the defendant has formerly had a regular trial for the same offense and a verdict of guilty has been returned against him, or has confessed his guilt upon a sufficient indictment. *Shepherd v. People*, 25 N. Y. 406, 420.

The plea of autrefois convict is a plea in bar that the defendant has been formerly convicted of the same identical crime. It only requires that the transaction or the facts constituting it be the same. It does not require a similarity in the indictments under which he was convicted and under which he is again charged. *Simco v. State*, 9 Tex. App. 338, 348.

## AUXILIARY RECEIVER.

An auxiliary receiver is merely the custodian of the property within the state wherein he is appointed for the purpose of preserving the assets belonging to the party or corporation proceeded against within the state in order that creditors may reach them without being compelled to go to a foreign jurisdiction to prove their claims. Therefore, as a general rule, the person so appointed is a mere common-law receiver to protect the property, and has only the powers conferred by the order appointing him. *Buckley v. Harrison*, 31 N. Y. Supp. 999, 1001, 10 Misc. Rep. 683.

## AVAILABLE.

"Available," as used in a contract by which a party agreed to manufacture available phosphoric acid, means salable whether it be of inferior or superior quality. *Clark v. Adams*, 3 N. Y. Supp. 819, 820, 55 N. Y. Super. Ct. 560.

## AVAILABLE ASSETS AND RESOURCES.

An account that depends for collection upon the will of the debtor and his hope of future advantage cannot be counted as an available asset in determining the solvency of a firm. *Bally v. Hornthal*, 49 N. E. 56, 60, 154 N. Y. 648, 61 Am. St. Rep. 645.

"Available assets and resources," as used in reference to a city, means tangible property in the treasury, legally available, properly applicable to the payment of debts, and readily convertible into money for that purpose. It does not include a street railway tax, or license of uncertain amount, depending on its earnings, and not then due. *Rice v. City of Milwaukee*, 76 N. W. 341, 342, 100 Wis. 518.

In considering a finding of the trial court, that at the time a transfer of property was made by a corporation the liabilities of the corporation, including its liabilities upon the stock of its stockholders, exceeded its available assets, the court said: "What does available assets mean? The phrase 'available assets' must have been inserted for some limiting or qualifying purpose. It must have been intended as including certain assets and excluding others; hence there was no reason for its use. The ordinary meaning of 'available' is 'usable, capable of being used to advantage.' And we suppose when the word qualifies assets, as here, it must mean property that can be sold or turned into cash with which to pay debts within a reasonable time. So the inevitable inference from the finding is that, if a corporation has not enough assets which can be used within a reasonable time to pay its creditors and its stockholders in full, it is insolvent. We find ourselves unable to subscribe to this idea." *Hamilton v. Menominee Falls Quarry Co.*, 81 N. W. 876, 878, 106 Wis. 852.

#### AVAILABLE CAPITAL.

"'Available capital,' like 'available means,' is a term well understood to be any assets that can be readily converted into money." *McFadden v. Leeka*, 28 N. E. 874, 878, 48 Ohio St. 513.

#### AVAILABLE MEANS.

"'Available means' is a term well understood to be any assets that can be readily converted into money." *McFadden v. Leeka*, 28 N. E. 874, 878, 48 Ohio St. 513.

"Available means" cannot in law be regarded as money or its equivalent. Creditors are not bound to accept available means in payment. *Benedict v. Huntington*, 32 N. Y. 219, 224.

"Available means," in its broadest signification, includes money as well as notes, bills of exchange, etc., but in its ordinary sense, especially when used as contradistinguished from money, it must be understood as meaning notes, bills of exchange, drafts, stocks, and other choses in action. Webster defines the noun "means" as "income, resources, or estate." Qualified by the adjective "available" it must be held to include all that numerous class of securities which are

known in the mercantile world as representatives of value easily convertible into money, but not money. "Available means," among mercantile men, is a term well understood to be anything which can readily be converted into money, but it is not necessarily nor primarily money itself. *Brigham v. Tillinghast*, 13 N. Y. (3 Kern.) 215, 218.

#### AVAILABLE STOCKS.

"Available stocks," as used in a will by which testatrix bequeathed one-tenth of all she possessed to charitable objects, and "the rest, or nine-tenths of my available stocks," to another person, means all of the testatrix's personal estate not otherwise specifically disposed of, to the extent of nine-tenths of the whole, excluding worthless mining stocks possessed by the testatrix. The words "the rest" have reference to what remains of the property in part previously given away, and the article "or," immediately following, is not the equivalent to "consisting of," but the sentence if written out in full would be "the rest of all I possess, or nine-tenths of my available stocks." The latter part of this sentence does not specify what articles of property are to be alone understood as embraced in the preceding words, and was not so intended. Its object was first to express the quantum or extent of the property given, and secondly to exclude mining stocks which were worthless; that is, producing no dividend. In *re Sweetzer's Estate*, 21 Atl. 885, 886, 142 Pa. 541.

#### AVAILS.

In a will by which the testator gave his real estate to his wife during life and ordered that at her decease the real estate should be sold, and after paying all debts the balance of the avails to be divided among certain persons named, "avails" meant only the proceeds of real estate which the widow took on the testator's death, and did not include proceeds of lands previously sold by the testator. *McNaughton v. McNaughton*, 34 N. Y. 201, 205.

#### As money or security.

"Avails," as used in a will providing that after the debts of a testator should have been paid the avails of the property should be equally divided, meant cash, or security, the representatives of money. *Allen v. De Witt*, 3 N. Y. (1 Comst.) 276, 279.

In an agreement between a mortgagee and the mortgagor, by which the mortgagor was given permission to cut timber from the mortgaged premises for sale, provided the avails of the timber were turned over to be applied on the mortgage note, "avails" means the money derived from such sales. *Hall v. Appel*, 35 Atl. 524, 526, 67 Conn. 585.

**As net proceeds.**

The "avails" of cotton seized and confiscated by the government are the amount received for the cotton after deducting the charges and expenses of their recovery. *McCay v. Lamar* (U. S.) 12 Fed. 367, 371.

**Rents.**

In an agreement whereby parties were stated to be equally interested in the avails in sales thereafter made of certain lands, the expression "avails" of any sale included all the proceeds of the property, including rents received. *Watson v. King*, 28 N. Y. Supp. 177, 179, 73 Hun, 340.

**AVENUE.**

The word "avenue," as used in deeds and upon the map of a city, will be construed to imply a public street. *People v. Underhill*, 39 N. E. 333, 335, 144 N. Y. 316.

**AVER.**

The word "aver," as used in Act Feb. 7, 1850, providing that, hereafter, on the trial of any person indicted for trading with a slave, it shall not be necessary, in order to convict, for the state to aver or prove who was the master, owner, or overseer of such slave, is not synonymous with the word "prove." The term "aver" must be understood to signify what it usually means in the connection in which it is here found, and as thus understood, it is clear that the Legislature endeavored to cut off the chance of escape of those violating the law against trading with slaves by rendering certain averments in the indictment, otherwise essential, unnecessary; and not being necessary to be averred, they need not be proved. *Hirschfelder v. State*, 19 Ala. 534, 539.

**AVERMENT.**

See "Immaterial Allegation or Averment."

An averment is a positive statement of facts in opposition to argument or inference. *Starnes v. Erwin*, 32 N. O. 226, 228 (citing 1 Arch. N. P. 320); *Prigmore v. Thompson* (Ala.) Minor, 420.

"The use, in pleading, of an averment, is to ascertain that to the court which is generally or doubtfully expressed, so that the court may not be perplexed of whom or of what it ought to be understood, and to add matter to the plea to make doubtful things clear." *Van Vechten v. Hopkins* (N. Y.) 5 Johns. 211, 220, 4 Am. Dec. 339; *Bradley v. Cramer*, 18 N. W. 268, 270, 59 Wis. 309, 48 Am. Rep. 511; *Milligan v. Thorn* (N. Y.) 6 Wend. 412, 413; *Cooper v. Greeley* (N. Y.) 1 Denio, 347, 359.

"Averment," as applied to the declaration, is a technical term, and means a direct and positive allegation of the fact, made in a manner capable of being traversed, and excludes the idea of an affirmation to be made out only by inference. *Laughlin v. Flood* (Va.) 3 Munf. 255, 262.

"Averments of facts," in a bill or answer, are such matters as a witness may be called on to prove, or the truth of which must be established by evidence, to enable the court to act. *Chesapeake & O. Canal Co. v. Baltimore & Ohio R. Co.* (Md.) 4 Gill & J. 1, 7.

**AVERAGE.**

See "Extraordinary Average"; "Fair Average Crop"; "Free From Average Unless General"; "General Average"; "Gross Average"; "Partial Average"; "Particular Average."

The words "good, fair, and average," when used as description of cotton, are not precisely the same in their primary signification, as the quality indicated by the former is a shade above what the latter describes. Thus, changing a contract requiring the delivery of average cotton by inserting the words "good, fair," instead of the word "average," is a material change in the contract. *Waddell v. Glassell*, 18 Ala. 561, 565, 54 Am. Dec. 170.

A memorandum of sale that the bales were to average by invoice 440 pounds gross per bale, or no sale, did not constitute a warranty that the average weight was to be strictly and literally complied with, but was merely a warranty against deficiency in weight, and means that the bales shall at least average 440 pounds without any reasonable excess of that amount, and the average weight of 450 pounds was not a sufficient excess to avoid the contract. *Whitney v. Thacher*, 117 Mass. 523, 526.

Where a contract binds a gas company to furnish to a city such quantity of gas as may be required by the city council for public lamps at two-thirds of the "lowest averaged price" at which gas shall or may be furnished to private individuals in five certain specified cities named, averaged by adding together such lowest cash prices and dividing the amount by five, the words "lowest averaged price" entitle the city to the benefit of such discounts as are or may be allowed to individuals by the company in each city furnished gas at the lowest price. *City of Cincinnati v. Cincinnati Gaslight & Coke Co.*, 41 N. E. 239, 242, 53 Ohio St. 278.

**In marine insurance.**

"Average" originally meant a contribution by the owners of the ship, cargo and freight, toward a loss sustained for the gen-

eral benefit of all; but when understood in this sense it is now always called "general," to distinguish it from "particular" average, which means nothing more than a partial loss. So that from the time that the term "average" was used to express a partial loss, the word "average" has, in the common understanding with commercial men, so far altered its original meaning, when applied to original cases, as to import as well a general contribution as a particular loss, and is intended to be used in either of these ways; the adjuncts "general," "partial," or "particular" being affixed. *Coster v. Phoenix Ins. Co.* (U. S.) 6 Fed. Cas. 611.

In policies of insurance "average" has a technical meaning, and signifies in substance the partial loss accruing to or on account of the insured goods by reason of some of the perils insured against, and denotes a loss less than total arising from an actual injury to the insured goods. *Louisville Marine & Fire Ins. Co. v. Bland*, 39 Ky (9 Dana) 143, 147.

Where the parties to a marine policy agree that the goods insured shall be free from average, it means that the liability of the insurer shall only rise when a total loss occurs. *Bargett v. Orient Mut. Ins. Co.*, 16 N. Y. Super. Ct. (3 Bosw.) 385, 395.

Where a loss or damage occurs to a vessel or its cargo at sea, average is the adjustment and apportionment of such loss between the owners of the vessel, the freight, and the cargo, in proportion to their respective interests and losses, in order that one may not suffer the whole loss, but that each shall contribute ratably. In order to constitute a case of contribution or average, there must concur a contract by which distinct properties of several persons become exposed to a common peril, and a relief from that peril at the expense of one or more of the concerned parties, and such release must be intended as well as obtained at the hazard or by the destruction of the property lost, for which the contribution is claimed. *Whittridge v. Norris*, 6 Mass. 125, 126.

"Average" is a contribution made by the owners of a ship, freight, and goods on board toward any particular loss or expense incurred for the general safety of the ship and cargo, and includes expenses incurred for seamen's wages, and for provisions during an embargo. *Insurance Co. of North America v. Jones* (Pa.) 2 Bin. 547, 552.

"Average," in marine insurance, only obtains where a deliberate act of loss is done for the preservation of the whole in a peril common, which alike affects not only the ship, but also the cargo; and hence, where the only deliberate act done was the separation of the mast and rigging from the hull, after they were carried overboard by the violence of the weather, no claim for average arose. *Nickerson v. Tyson*, 8 Mass. 467, 468.

#### AVERAGE CHARGES.

An act of the Assembly provided that rates for toll and transportation may be regulated in such manner as the company may deem most advisable, provided that the maximum charges for toll and transportation shall not exceed four cents per ton per mile for freight. A subsequent act amended the proviso so as to read, "and average charges for toll and transportation." Held, that the words "average charges," as so used, meant a mean rate, ascertained by dividing the entire receipts by the whole quantity of tonnage reduced to a common standard of tons moved one mile. *Hersh v. Northern Cent. Ry. Co.*, 74 Pa. (24 P. F. Smith) 181, 189.

P. L. 1850, 298, provided that the D. & F. R. R. Co. might charge such rates for transportation as it should deem most advisable, provided that the average charges for toll and transportation should not exceed four cents per ton per mile. Held, that the phrase "average charges" meant that the company might impose more than four cents per mile on some charges so long as by making others less the general average should not exceed four cents per ton per mile. *Hersh v. Northern Cent. Ry. Co.*, 74 Pa. (24 P. F. Smith) 181, 189.

#### AVERAGE MAN.

"Average man," as used in reference to whether the term "manufacturing industries" would strike the mind of the average man as including an electric light plant, means one of fair and ordinary intelligence, such as a legislature or town council might be composed of, but not one who looks at everything from a technical or scientific standpoint. *Frederick Electric Light & Power Co. v. Frederick City*, 36 Atl. 362, 363, 84 Md. 599, 36 L. R. A. 130.

#### AVERAGE NUMBER OF SCHOLARS.

The average number of scholars in the public schools means the average membership of the public schools as shown by the school register, and scholars whose names are on the register, and who are recognized as members of the school, are to be computed in ascertaining such number, though they may be occasionally absent from school. *Needham v. Inhabitants of Wellesley*, 31 N. H. 732, 139 Mass. 372.

#### AVERAGE OF PRICE.

The law, in regulating the measure of damages, contemplates a range of the entire market, and "the average of prices" thus found, running through a reasonable period

of time. Neither a sudden and transient inflation nor depression should control the question or determine such average. *Smith v. Griffith* (N. Y.) 3 Hill, 333, 338, 38 Am. Dec. 639.

"Average of price" is intended as a rule to ascertain what the market price is, and exclude exceptional sales at extraordinary prices. In the case of *Romaine v. Van Allen*, 26 N. Y. 309, the cases upon the subject are said to be to the effect that, if the plaintiff, without unnecessary delay, prosecutes his suit, the fluctuation in the price should be exclusively at the hazard of the defendant, and the plaintiff was entitled to the highest price between the day when the delivery should have been made and the day of trial. *Page v. Fowler*, 39 Cal. 412, 423, 2 Am. Rep. 462.

#### AVERAGE QUALITY WITH.

A contract by which a firm of lumber dealers contracted to sell 1,000,000 feet of strips now in their yard, to be of "average quality" with six cars theretofore shipped, meant that the strips should be so sorted or collected that those delivered should equal in quality those contained in the six carloads, without any reference to the proportionate quantity of each grade. *Butterfield v. Herren*, 49 N. W. 826, 828, 80 Wis. 240.

#### AVERT.

In an instruction that, if the jury believed from the evidence that at the time a defendant, on trial for murder, shot and killed the deceased, he believed, and had reasonable ground to believe, that the deceased was about to take his life or inflict on him great bodily harm, and there appeared to him in the exercise of a reasonable judgment no other safe means to avert a then real, or to him apparent, danger, if any, he was entitled to acquittal on the ground of self-defense, the word "avert" cannot be construed as equivalent to the word "escape," which has been frequently condemned in instructions. *Utterback v. Commonwealth* (Ky.) 59 S. W. 515, 516.

#### AVOCATION.

All other avocations, see "All Other."  
Other avocation, see "Other."

The primary meaning of the word "avocation" is a calling away, a diversion. It is the opposite of "vocation" or "occupation"; and hence, as used in *Rev. St. 1881*, forbidding any person over 14 years of age to engage in his usual avocation on Sunday, will be construed to mean "usual vocation." *Ross v. State*, 36 N. E. 167, 168, 9 Ind. App. 35.

"Avocation" is not synonymous with 'vocation,' but the use of the word 'avoca-

tion' for 'vocation' in an indictment will not invalidate the indictment, for the misuse of the terms as interchangeable is by no means infrequent, and leaves no question as to the meaning of the pleader in using such word." *Peters v. State* (Tex.) 23 S. W. 683.

Acts 1855, p. 159, making it criminal to be engaged in one's usual avocation on Sunday, is to be construed as meaning "such acts of labor or business as may be performed, on days of the week usually devoted to secular business, in the pursuit of a lawful employment." *State v. Conger*, 14 Ind. 396, 397.

#### AVOID.

"Avoid," as used in Code, § 2065, providing that a reply is not permitted except when a counterclaim is set up, or some matter is pleaded in the answer to which plaintiff claims a defense by reason of facts which avoid the matter alleged in the answer, implies the admission of the defense sought to be avoided. "There cannot be an avoidance without a confession of the defense sought to be avoided." *Meadows v. Hawkeye Ins. Co.*, 17 N. W. 600, 601, 62 Iowa, 387.

#### AVOIDABLE ACCIDENT.

*Anderson*, in his law dictionary (page 13), defines "avoidable accident" as an act which was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such a lawful act, or because the accident was the result of actual negligence or folly, and might, with reasonable care adapted to the emergency, have been avoided. *Dreyer v. People*, 58 N. E. 620, 623, 188 Ill. 40, 58 L. R. A. 869.

#### AVOIDANCE.

See "Confession and Avoidance."

The term "avoidance," in pleading, implies some admission in effect of the existence, prima facie, of a cause of action in the complainant at some time, and some fact supervenient which avoids it in favor of the defendant. *Uri v. Hirsch* (U. S.) 123 Fed. 568, 570.

Const. 1854, p. 80, § 90, providing that under the plea of the general issue defendant may give his title in evidence or any matter of defense and justification, according to the nature of the action, excepting matter in avoidance or a defense inconsistent with the truth of the material allegations of the declaration, means the introduction of new matter which, admitting promises of the opposite party, avoids or repels his conclusions. "Matter of avoidance" is new matter which admits the declaration

to be true, but shows, nevertheless, either that the defendant was never liable to the recovery claimed against him, or that he has been discharged from his original liability, or something supervenient; hence, in an action on a promissory note, charging that defendant indorsed a promissory note, and that he indorsed a paper which was a promissory note if anything, and that he indorsed a bill of exchange, an admission that the defendant indorsed an inchoate bill of exchange is not matter in avoidance, within the meaning of the statute. *Mahaiwe Bank v. Douglass*, 31 Conn. 170, 175.

Where the answer admits facts which charge the defendant, and sets up also matter which discharges him, the latter is not evidence for him unless the charge and discharge arise out of one transaction, in which case the defendant may state the whole transaction, and it is all held responsive and evidence in his favor, and perhaps the phrase "matter in avoidance," as applied to an answer, relates only to such matter as avoids a conceded liability, and not to such as avoids the effect of facts admitted, which if unexplained might show that the liability never existed at all. So that a defendant, when answering a bill charging a transaction to have been of a certain character, although compelled to admit facts which would alone go to show the charge true, may nevertheless state other facts which go to show that it really was of a different character, and be entitled to have the whole statement considered evidence for him. *Cooper v. Tappan*, 9 Wis. 361, 366.

## AVOW.

At common law, when the defendant to an action of replevin admitted and justified the taking, he was said to "avow." *Newell Universal Mill Co. v. Muxlow*, 21 N. E. 1048, 1049, 115 N. Y. 170.

## AVOWRY.

An avowry is the setting forth, as in a declaration, the nature and the merits of the defendant's case, showing that the distress taken by him was lawful; which must be done with such sufficient authority as will entitle him to a *retorno habendo*. *Hill v. Stocking* (N. Y.) 6 Hill, 277, 284 (citing *Wood. Land. & Ten.* 592; *Hill v. Miller* [Pa.] 5 Serg. & R. 355, 357); *Newell Universal Mill Co. v. Muxlow*, 21 N. E. 1048, 1049, 115 N. Y. 170. But the action is not now confined to a case of distress, but lies at common law whenever there has been a tortious taking, either originally, or, by construction of law, by some act which makes the party a trespasser *ab initio*. *Brown v. Bissett*, 21 N. J. Law (1 Zab.) 267, 274.

"An avowry in a court of record," says Coke, "which is in the nature of an action, is

a determination of an election before any judgment given." *Equitable Co-operative Foundry Co. v. Hersee* (N. Y.) 33 Hun, 109, 177.

An avowry was in the nature of a declaration which required a reply from plaintiff, and in default of one defendant was entitled to judgment. *Newell Universal Mill Co. v. Muxlow*, 24 N. Y. St. Rep. 545, 547.

### Cognizance distinguished.

An "avowry," as distinguished from a "cognizance," imports a taking in one's own right, while a cognizance imports a justification under the authority of another. *Brown v. Bissett*, 21 N. J. Law (1 Zab.) 46, 49.

## AVULSION.

Alluvion distinguished, see "Alluvion."

"Avulsion" is the sudden change of the banks of a stream, such as occurs when a river forms a new course by going through a bend; and where the stream forms the boundary of land, the avulsion has no effect upon such boundary, but it still remains the center of the old channel, whether water flows in it or not. *Rees v. McDaniel*, 21 S. W. 913, 914, 115 Mo. 145.

"Avulsion" is the sudden and rapid change of a channel of a stream which is the boundary, whereby it abandons its old and seeks a new bed. Such change of channel works no change of boundary, and the boundary remains as it was, in the center of the old channel, although no water may flow therein. *Nebraska v. Iowa*, 12 Sup. Ct. 396, 397, 143 U. S. 559, 36 L. Ed. 186.

The term "avulsion" is used to express the sudden and rapid change of the channel of a boundary line stream. Thus, where a stream which is a boundary between land of different persons, or between states, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary, and the boundary remains as it was, in the center of the old channel, though no water may be flowing therein. This sudden and rapid change is termed in the law "avulsion." Such a change is rather uncommon, and when the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such a manner that it can still be identified, the property in the soil so removed naturally continues vested in its former owner. *Bouvier v. Stricklett*, 59 N. W. 550, 552, 40 Neb. 792.

Where considerable quantities of soil are, by a sudden action of the water, taken from the land of one, this is called "avulsion"; but the ownership is not lost, though the surface earth is transported elsewhere, and it may be reclaimed and the ownership reasserted.

Thus, lands dedicated and accepted, subject to the trust impressed on them of remaining forever unoccupied by buildings, included all the land between the west line of Michigan avenue and the shore of Lake Michigan as it was when such lands were platted; and the title to such portion thereof as was subsequently carried away and submerged by the waters of the lake, and thereafter reclaimed by artificial means, was not lost, but by such reclamation thereof the city completely reasserted its title thereto as such title stood at the time of such dedication. *City of Chicago v. Ward*, 48 N. E. 927, 932, 169 Ill. 392, 38 L. R. A. 849, 61 Am. St. Rep. 185.

## AWAIT.

A statute authorizing an appeal in a criminal cause required accused to execute a recognizance conditioned that he would abide the judgment of the court of appeals of the state of Texas. Held, that a recognizance in which the condition was that accused would "await the action of the court of appeals," etc., was not the same nor substantially synonymous with the phrase used by the statute, and was, therefore, insufficient. *Wilson v. State*, 7 Tex. App. 88, 39.

## AWAITING DELIVERY.

The term "awaiting delivery," as used in a charter of a railroad company providing that the company should not be responsible for goods on deposit in any of their depots awaiting delivery, meant such goods as have reached their final destination and are waiting to be delivered over to the consignee on demand, and not property on its way to a distant point to be taken thence by a connecting carrier. In the former case it is "awaiting delivery," in the latter "awaiting transportation." *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 83 U. S. (16 Wall.) 318, 327, 21 L. Ed. 297.

"Awaiting delivery," as used in a bill of lading providing that the carrier would not be responsible for the goods while at any station awaiting delivery, does not include goods which were switched off on a side track, and which the plaintiffs, on inquiring for them, could not learn that they had arrived, and of the arrival of which the carrier had not given the customary notice. *McKinney v. Jewett*, 24 Hun, 19, 22 (affirmed 90 N. Y. 267, 271).

"Awaiting delivery," as used in a charter of a carrier providing that it shall be responsible for goods in its depots awaiting delivery as warehousemen, "presupposes the consummation of every preliminary requisition to delivery; therefore it presupposes notice to the consignee, and the elapsing of sufficient time preparatory to its reception. That time, at common law, is a reasonable time, \* \* \* and during that time it may be said with

great reason, we think, that the property is awaiting delivery." *Michigan Cent. R. Co. v. Ward*, 2 Mich. 538, 544.

## AWAITING FURTHER CONVEYANCE.

Within a bill of lading relieving a carrier from liability other than as a warehouseman, while the said property awaits further conveyance, the term "awaits further conveyance" literally means awaiting the time when the next carrier shall take the property in hand. But cotton unloaded by a connecting carrier at its pier, without giving any notice of its arrival to the succeeding carrier, does not await further conveyance. *Texas & P. Ry. Co. v. Reiss*, 22 Sup. Ct. 253, 256, 183 U. S. 621, 46 L. Ed. 858.

## AWARD.

"To award is to judge, to give, or assign by sentence or judicial determination." *Starkey v. City of Minneapolis*, 19 Minn. 203, 206 (Gil. 166, 169).

An award is a judgment formed and pronounced. *Hoff v. Taylor*, 5 N. J. Law (2 Southard) 829, 833.

An award is the judgment or decision of arbitrators or referees on the matter submitted to them. *Henderson v. Beaton*, 52 Tex. 29, 43; *Halnion v. Halnion*, 55 Vt. 321, 322.

An award is the decision or determination of arbitrators, commissioners, referees, or persons to whom a dispute or controversy between two or more persons has been submitted for a decision and determination out of court. It is also the written document embodying such decision. *Peters v. Peirce*, 8 Mass. 398.

"An award is an act of the parties performed through their agents and assented to in advance, and there is no reason why they may not as well establish by means of it what is called in common parlance a 'consentable line' as by their immediate act. A question of boundary is a subject of arbitration." *Babb v. Stromberg*, 14 Pa. (2 Harris) 397, 399.

An award is sometimes considered as a contract and sometimes as a judgment. The submission implies mutual promises to perform the award. The award is a contract, and is considered as similar to an accord and satisfaction, and equal to a judgment of the court. *Dixon's Lessee v. Morehead* (Pa.) Add. 216, 222.

An award is an adjudication or determination between parties. Its character is more that of a judgment than of a contract. It is equally conclusive between the parties, but it requires to be enforced by action by reason of the lack of such domestic tribunals to enforce it by process of execution. *Celley v. Gray*, 37 Vt. 136, 138.

An award is the judgment of arbitrators chosen by the parties interested to settle a controversy. The arbitrators become the agents of both parties, and when the power to arbitrate is not derived from statute it is derived from the submission of the controversy by the mutual consent of the parties interested. A secretary of the treasury is not authorized to award the payment of an attorney's fees out of moneys remaining in the treasury due to the client of the attorney. *Benjamin v. United States*, 29 Ct. Cl. 417, 419.

There is no peculiar significance in the use of the word "award" instead of the word "recovered," in Code Civ. Proc. §§ 1699, 1704, providing for a bond in replevin for the payment "of any sum which the judgment awards," and it is as effective in covering the costs of the action as the words used in the old Code, viz., "for the payment of such sum as may for any cause be recovered." *John Church Co. v. Dorsey*, 77 N. Y. Supp. 1065, 1067, 38 Misc. Rep. 542.

The term "award" is used to designate the decision of arbitrators in deciding a controversy submitted to them whereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of the court of justice. Thus, where plaintiff and defendant agree that defendant should assign his interest in a certain land contract, the value of the interest to be determined by arbitrators, and the arbitrators first determine the value of the land, and afterwards meet again and determine the value of the interest, the latter determination, and not the former, is their award. *Fargo v. Reighard*, 89 N. E. 888, 890, 13 Ind. App. 39.

#### Agreement required.

When there is a matter of difference between parties which they agree to refer, and thereupon an award is made, the award derives its force from, and really is to be considered, the agreement of the parties. A court called upon to enforce such an award is enforcing and carrying into effect the agreement of the parties, and for the reason that it is their agreement. If there was no agreement, there can be no award; and the same rule must apply if what purports to be an agreement is illegal and void. *Jenifer v. Hamilton County Com'rs*, 13 Ohio Dec. 116, 119, 2 Disn. 189.

#### Appraisement distinguished.

An award is the judgment of a tribunal selected by the parties to determine matters actually in variance between them, not merely to appraise and settle the price of property contracted for after the stipulation that this term of the contract was to be so ascertained. Had the parties made the contract, and afterwards, on a dispute arising, chosen arbitrators to determine what was due upon it, that

might have been an award. The case is entirely different where the parties originally agreed to buy and sell at a sum to be fixed by an appraisement to be made by a third person or persons. When the original contract is established by competent and sufficient evidence, then indeed the assessment thus made by the authority of the parties, or by authority of law, as in the case of the justice of the peace, may be conclusive as to the price, but there is nothing in the transaction to conclude the parties as to anything else. They may call back—dispute the existence of any contract at all—or prove that it was attended with fraud or illegality. Here is the clear and palpable distinction between such an appraisement and an award. *Green & C. St. Pass. R. Co. v. Moore*, 64 Pa. (14 P. F. Smith) 79, 91.

#### Certainty and finality.

An award is in the nature of a judgment, and to be valid must be certain and decisive as to the matter submitted, so that it shall not be a cause of a new controversy. *Colcord v. Fletcher*, 50 Me. 398, 402 (citing *Lincoln v. Whittenton Mills*, 53 Mass. [12 Metc.] 31).

"Awards," though construed more favorably than formerly, must yet possess the fundamental properties of an award. Among other things they are required to be within the submission, certain—that is, certain to a common intent—and final. *Archer v. Williams*, (Md.) 2 Har. & G. 62, 67.

An award agreed upon by arbitrators, to be valid, must be consonant to the submission, must be certain, must be of things possible to be performed, and must be final. An award providing that defendant shall pay plaintiff \$242.23 is sufficient and valid; but an award providing that defendant shall pay to plaintiff the value of certain potatoes, without pointing out upon the face of the award, or by reference to any rule or standard, any method of ascertaining such value, is bad; it being neither certain nor final. *Whitcher v. Whitcher*, 49 N. H. 176, 181, 6 Am. Rep. 486.

An award of arbitrators is in the nature of a judgment, and must be certain and intelligible. It should be in pursuance of the submission, and ought to be wholly decisive, inasmuch as if it does not determine the whole matter it becomes the cause of a new controversy. *Alexander v. McNear* (U. S.) 28 Fed. 403, 405.

#### Conformity to submission.

An award must embrace all the matters specifically included in the submission. *Tudor v. Scovell*, 20 N. H. 171, 173.

An award must be according to the submission, and must comprehend all matters therein contained. *Richards v. Drinker*, 6 N. J. Law (1 Halst.) 807, 819.



**Judgment distinguished.**

An award is regarded with great respect by the courts, but it can hardly be considered of equal dignity to a judgment rendered by a court. A court speaks by the force and power of the law, while an award speaks by consent and contract of the parties. A judgment that is a nullity may be assailed by the party whenever and wherever it confronts him, but he cannot assail it for mere errors or irregularities except by a direct attack. An award is no better than a judgment, and to be valid must be rendered after notice given to the parties who have submitted their rights to arbitration. Without notice the award is a nullity. *Shively v. Knoblock*, 35 N. E. 1028, 1029. 8 Ind. App. 433.

The words "adjudge, determine and award," as used by arbitrators in their award, do not necessarily carry with them the idea of a judgment according to law, so as to enable one of the parties to have the award set aside for errors of law. *Patton v. Garrett*, 21 S. E. 679, 682, 116 N. O. 847.

An award of arbitrators in the common pleas is to be considered as a judgment of that court from the time of its entry upon the docket, and as such subject to a writ of error. The statute expressly provides that from the time of the entry of the award in the docket it shall take rank as a judgment, and that execution may issue thereon provided that when judgment has been rendered for any sum or sums of money the like stay of execution shall be due, and under like regulations as in the case of other judgments. When the Legislature expressly and repeatedly says that the "award" is a "judgment," the court should do so. *Ebersoll v. Krug*, 3 Bin. (Pa.) 528, 529.

A board of arbitrators is not a "court" or "judicial tribunal" in any proper sense of those terms. It has none of the powers that appertain to courts to regulate their proceedings or enforce their decisions. An "award," when made, is more in the nature of a contract than of a "judgment." It is but the consummation of the contract of submission; its appropriate and legitimate result. Hence it is held that the fact that a judgment rendered on Sunday is void does not render an award made on Sunday illegal. *Blood v. Bates*, 31 Vt. 147, 150.

**Writing required.**

While a verbal submission to arbitration is valid at common law, yet where the law, as for instance, a suit of fraud, requires a contract in writing, both the submission and the award must be in writing. *Donnell v. Lee*, 58 Mo. App. 288, 295.

Parties may agree to settle by arbitration the division line between their lots of land, and an award made in pursuance of a submission for that purpose will bind the parties.

The arbitrators may make a parol award if the submission does not require the award to be in writing, and this will not be vitiated by a subsequent ineffectual attempt to reduce the same to writing. *Jones v. Dewey*, 17 N. H. 596, 599.

**AWARDED.**

A canon, promulgated by the Saxon kings A. D. 517, which became a part of the common law, declared that "process awarded" or a judgment rendered by a court on Sunday was void. Held, that process issued by a ministerial officer in the ordinary course of his official duty was not process awarded by a court, within the meaning of the above phrase. *Clough v. Shepherd*, 31 N. H. (11 Fost.) 490, 495; *Hastings v. Columbus*, 42 Ohio St. 585, 589.

**AWARE.**

See "Become Aware."

**AWAY.**

See, also, "Carry Away."

A statute prohibiting larceny provided that, if the defendant should take, steal, and carry away as aforesaid any property of another, he should be punished. Held, that an indictment omitting from the phrase "take, steal, and carry away" the word "away" did not state an offense under the statute, since without an allegation that the goods were carried "away" there was no allegation that the goods had been asported wrongfully beyond the premises of the possessor. *Commonwealth v. Adam*, 73 Mass. (7 Gray) 43, 45.

**AWNING.**

In Webster's International Dictionary, the word "awning" is defined as follows: "A roof-like cover, usually of canvas, extended over or before any place as a shelter from the sun, rain, or wind." In the Century Dictionary, as follows: "A movable, roof-like covering of canvas or other cloth spread over in any place, or in front of a window, door, etc., as a protection from the sun's rays." As thus defined, "awning" means the covering which shelters or protects, as distinct from its frame or support, and this covering may extend over or hang in front of the protected place. It is in the sense of the covering, as distinct from its frame, that the word "awning" is used in a city ordinance prohibiting the erection or use of any awning, except the same be upon a suitable frame and attached entirely to the building. *State v. Clarke*, 37 Atl. 975, 976 69 Conn. 371, 39 L. R. A. 670, 67 4th St. Rep. 30.

**AX.**

An ax is a mechanical tool, rather than a weapon to be used in combat, and the mere fact that one of three men carries an ax to a sawmill, which they enter, cannot be supposed to excite terror. *Pike v. Witt*, 104 Mass. 595, 597.

**AXLE BOX.**

"Axle boxes" are "bushings for hubs." Their duty is to take the wear incident to revolving on the spindle of the axle. *Ives v. Hartford Spring & Axle Co.* (U. S.) 11 Fed. 510, 511.

**AYUNTAMIENTO.**

"Ayuntamiento" was the name used in the Mexican law to designate a town or city

council. *Friedman v. Goodwin* (U. S.) 9 Fed. Cas. 818.

**AZO.**

Certain aniline colors derived from coal tar are known as "azo compounds." The word "azo" is derived from azote or nitrogen, being used to show that these compounds contain nitrogen in the form of nitrous acid. *Matheson v. Campbell* (U. S.) 69 Fed. 597, 600; *Id.*, 78 Fed. 910, 912, 24 C. C. A. 384.

**AZOTIZE.**

Among the chemical processes used in the creation or development of coal tar colors is that of azotization. To "azotize" such a color is to treat it with nitrogen. *Matheson v. Campbell* (U. S.) 69 Fed. 597, 600; *Id.*, 78 Fed. 910, 912, 24 C. C. A. 384.

## B

**B. & O.**

In a case involving the ownership of a steam engine bearing the letters "B. & O.," it was said that the initials of railroad companies come to be as well known to the general public as the abbreviations which indicate the location of land under congressional surveys, and that from Lake Michigan to the Atlantic Ocean the letters "B. & O." on an engine mean "Baltimore & Ohio Railroad Company," without regard to the track it is upon or the yard it is in. *Ryan v. Baltimore & O. R. Co.*, 60 Ill. App. 612, 615.

**BABY BONDS.**

Bonds issued by the state of Louisiana to fund certain auditors' warrants issued and outstanding at the date of the adoption of the Constitution of 1884 were called "baby bonds." *State ex rel. Luminais v. Houston*, 38 La. Ann. 533, 534.

**BACK.**

"Back" is defined to be, in human beings, the hinder part of the body, extending from the neck to the end of the spine. Thus it is held that, although an allegation of injuries to the chest made evidence of the spitting of blood relevant as a possible natural result of a severe injury to the chest, a general allegation of an injury to the back was not sufficient to render evidence of injuries to the kidney and bladder admissible; that region, apparently, not being regarded as included in the term "back." *Ft. Worth & D. C. Ry. Co. v. Rogers*, 53 S. W. 366, 21 Tex. Civ. App. 605.

A statute requiring the certificate of the oath administered to appraisers chosen to make a levy to be written on the "back" of the execution means on the execution itself, and there is no compliance with the statute where the certificate is on a separate piece of paper, one corner of which is affixed to the instrument. *Hall v. Staples*, 74 Me. 178, 180.

**As advance money.**

A statement to the employes of a fisherman that a canning company would "back" him and see him through is evidently nothing more than an agreement, in consideration of securing the salmon to be caught, to advance on account thereof a reasonable sum of money, and not as indicating employment of the fisherman by the company. *Miles v. Columbia Packers' Ass'n*, 69 Pac. 827, 829, 41 Or. 617.

**BACK FROM.**

In Jersey City Charter, § 41, authorizing commissioners, where the line of the improvement would bisect a building, to require the owner or owners thereof to remove it "back from" the line of improvement in case the owner or owners thereof have land enough left for that purpose, "back from" is equivalent to "off" and "away from," so that the protection of the act can be invoked by the city whenever the landowner has adjacent lands not built upon of sufficient area to move the building upon. *Wirth v. Jersey City*, 27 Atl. 1065, 1066, 56 N. J. Law (27 Vroom) 216.

**BACK LAND.**

"Back land," as used in a will providing that all of testator's back land should go to certain devisees, was insufficient of itself to designate any particular class of land owned by the testator, and might refer to different objects, or to none upon which any distinctive character could be fastened by extrinsic proof; but where the premises in question and other lands in the same vicinity were known as and called, by the testator during his lifetime and by his family and neighbors, "back lands," the term was sufficient to designate the devise. *Ryers v. Wheeler* (N. Y.) 22 Wend. 148, 150.

**BACK TAXES.**

Taxes for the current year are not included in the term "back taxes," as used in Laws 1898, art. 170, § 12, providing that no "back taxes" for more than three years shall be assessed. *Methodist Episcopal Church South v. City of New Orleans*, 82 South. 101, 102, 107 La. 611.

"Back taxes," as used under Act March 29, 1883, authorizing the payment of back taxes in state certificates of indebtedness, is to be construed as not including taxes which a collector has collected and failed to pay over to the state, but only includes taxes due from the original taxpayer. *Gaines v. Galbraeth*, 82 Tenn. (14 Lea) 359, 363.

**BACKER.**

Though the nature of the obligation which an indorser of a note intended to contract was sufficiently manifested by putting his name on the back of the note, the addition of the word "backer" seems to have been for the purpose of declaring still more explicitly that he was to be regarded as an indorser. *Seabury v. Hungerford* (N. Y.) 2 Hill, 80, 81.

**BACKGAMMON.**

"Backgammon," which is defined as a game played with dice and 30 pieces, called "men," on a board or table peculiarly marked, is a game not dependent on chance, but largely on the skill of the player. The dice are employed as a convenient mode of determining who shall move first, and afterwards of designating the number of points in the table each player shall be entitled to move his men on their journey to the home table. The table and the pieces or men are indispensable agencies. The dice may be dispensed with. In backgammon the dice do not determine the result of the game. That is determined by the moves of the men by the opposing players. It is not, therefore, a "game played with dice," within the prohibition of Rev. Code, § 3620, against gaming. *Wetmore v. State*, 55 Ala. 198, 201.

**BACK-UP SIGNAL.**

There is a difference between a "back-up signal" and a "kick signal." A back-up signal means that the engineer shall back up the train. A kick signal means that the speed shall be sufficiently increased to throw the cut-off car into the side track by the force of the increased momentum, without following the car into the switch with the rest of the train. *Gulf, C. & S. F. R. Co. v. Hill*, 70 S. W. 108, 105, 29 Tex. Civ. App. 12.

**BACKWATER.**

Backwater is the flow of a stream which is retarded and returned in an opposite direction from that in which the stream flows, caused by some natural or artificial obstruction from the channel, as a dam, etc. *Hodges v. Raymond*, 8 Mass. 316.

Backwater is, in the ordinary sense, water prevented from flowing by reason of an obstruction in its course. *Chambers v. Kyle*, 87 Ind. 82, 85.

**BAD.**

"Good" and "bad" are terms of comparison. The same article may be called, not inaccurately, good when compared with one of the same kind of a much inferior quality, and it may with equal correctness be characterized as bad when spoken of with reference to the most perfect article of the kind. *Tobias v. Harland* (N. Y.) 4 Wend. 537, 541, 8 Wheeler, Am. Com. Law, 115.

**BAD BEHAVIOR.**

"Bad behavior" is defined to be such conduct as the law punishes. A person who has committed perjury has been guilty of bad behavior, which will preclude his being naturalized as a citizen under the statute re-

quiring such applicants to have behaved as men of good moral character. In *re Spencer* (U. S.) 22 Fed. Cas. 921.

**BAD CHARACTER.**

"Bad character," as applied to man or woman, is used by very common acceptation to designate loose, immoral, or lascivious deportment. *Carter v. Cavanaugh* (Iowa) 1 G. Greene, 171, 175.

"Bad or loose character," when spoken of a woman, constitutes an assault on her character as a virtuous woman, though the words do not expressly charge fornication. *Kedrolivansky v. Niebaum*, 11 Pac. 641, 642, 70 Cal. 216.

The expressions "bad character" and "general reputation" are constantly used to signify character and reputation with regard to morals. *O'Brien v. Frasier*, 1 Atl. 465, 470, 47 N. J. Law (18 Vroom) 349, 54 Am. Rep. 170.

**BAD DEBTS.**

"Bad debts," as used in the provision that the security to be given by every administrator shall be one-fourth beyond the estimated value of the movables and immovables, and of the credits comprised in the inventory, exclusive of the bad debts, means those debts which have been prescribed against and those due by bankrupts who have surrendered no property to be divided among their creditors. Civ. Code La. 1900, art. 1048.

"Bad debts," as used in the chapter on banking corporations, prohibiting the making of dividends to an amount greater than the net profits on hand, deducting therefrom losses or bad debts, includes all debts due to the association, on which the interest is past due and unpaid for a period of six months, unless the same are well secured and in process of collection. Rev. Codes N. D. 1899, § 3240.

**BAD DISEASE.**

Whether to say of a married woman that she has a "bad disease" is equivalent to charging her with having a venereal disease is uncertain, and would appear to be a question for the jury. *Upton v. Upton*, 4 N. Y. Supp. 930, 938, 51 Hun, 184.

**BAD EGG.**

"Bad egg" is a well known and commonly understood colloquium in this country for a bad or worthless person, and is so defined in Cent. Dict. p. 1853. To call another person a "bad egg" is grossly libelous *per se*, even without innuendo to explain the meaning of such words, and no allegation

of special damage is necessary. *Pfützing v. Dubs* (U. S.) 64 Fed. 696, 702, 12 C. C. A. 399.

### BAD FAITH.

Gross negligence *aa*, see "Gross Negligence."

The term "in bad faith" is not a technical term, used only in actions for deceit. It is an ordinary expression, the meaning of which is not doubtful. It means "with actual intent to mislead or deceive another." It refers to a real and actual state of mind, capable of both direction and circumstantial proof. A statutory provision that no immaterial misrepresentation in the application shall avoid a policy of insurance, unless it is made in bad faith, means with an actual intent to mislead or deceive, and does not include a misstatement honestly made through inadvertence, or even gross forgetfulness or carelessness. *Pen Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co.* (U. S.) 73 Fed. 653, 654, 19 C. C. A. 316, 38 L. R. A. 83, 70.

In an instruction in an action for damages for breach of a contract to convey land, that if the defendant had it in his power to comply with his contract, and did not do so, and if he acted in bad faith toward the plaintiff, the measure of damages would be the value of the land at the time he was evicted, "bad faith" is an indefinite term, and does not necessarily imply fraud, and does not indicate fraud in the contract. *Harris v. Harris*, 70 Pa. (20 P. F. Smith) 170, 174 (cited in *Rineer v. Collins*, 27 Atl. 28, 29, 156 Pa. 342).

"Bad faith" and "fraud" are synonymous. *Hilgenberg v. Northup*, 83 N. E. 786, 787, 184 Ind. 92.

Code, § 2850, provides that, where an insurance company refuses to pay a loss on a life policy after having received notice thereof, it shall be liable for the amount in addition to the face of the policy and attorney's fees, unless it is made to appear that such refusal to pay was not in bad faith. Held, that "bad faith" is not synonymous with the term "actual fraud," but is merely descriptive "of some device or excuse resorted to by insurance companies to hinder and delay the insured in the collection of the loss." *Cotton States Life Ins. Co. v. Edwards*, 74 Ga. 220, 230.

Bad faith will not be imputed, unless there is something in the particular transaction which is equivalent to fraud, actual or constructive. *Morton v. New Orleans & S. Ry. Co. & Immigration Ass'n*, 79 Ala. 590, 617.

"The doctrine is that bad faith, as contradistinguished from good faith, in the limitation act, is not established by showing ac-

tual notice of existing claims or liens of other persons to the property, or by showing a knowledge on the part of the holder of the color of title of legal defects which prevent the color of title from being an absolute one. Where there is no actual fraud, and no proof showing that the color of title was acquired in bad faith, which means in or by fraud, this court will hold that it was acquired in good faith." *Coleman v. Billings*, 89 Ill. 183, 191.

Civ. Code, art. 1934, provides that, when a debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract, and further provides that by bad faith is not meant the mere breach of faith in not complying with the contract, but a designed breach of it for some motive of interest or ill will. *Lewis v. Holmes*, 34 South. 66, 67, 109 La. 1030, 61 L. R. A. 274.

### BAD FEELING.

On trial for homicide, testimony of bad feeling between defendant and deceased is competent to show malice; bad feeling being a fact to which a witness may testify, and standing in the same category as health, sickness, good humor, anger, jest. *Holmes v. State*, 14 South. 864, 865, 100 Ala. 80.

### BAD GIRL OR WOMAN.

The words, "She is a bad girl, a very bad girl, and unworthy to be employed by any company in L.," do not import that such person was a prostitute and had been guilty of fornication, unchaste conduct, lewdness, etc. *Snell v. Snow*, 54 Mass. (13 Metc.) 278, 282, 46 Am. Dec. 730.

"Bad woman," as used in an allegation of slander, was not of itself slanderous. The word "bad" imports no crime, and is not actionable; but the word "bad" may be made clear by its context and the connection in which it is used. Thus, if one speaks of a prostitute, and calls her such, and thereafter pronounces her a bad woman, or if he says she is a bad woman because she is a prostitute, there can be no doubt of the sense in which the word "bad" is used, any more than there can be a doubt of the sense in which it is used if a party says of another, "She is a bad woman; she does not go to church," or "She is a bad woman because she does not go to church." Therefore the meaning of the word "bad" under such circumstances is a question for the jury, and its meaning is to be determined from its context. *Riddell v. Thayer*, 127 Mass. 487, 490.

### BAD HOUSE.

The words "bad house" do not necessarily imply a bawdy house, but may mean a

disorderly house, or one that is dirty or comfortless, and therefore a charge that another keeps a bad house is not actionable per se. *Peterson v. Sentman*, 37 Md. 140, 153, 11 Am. Rep. 534.

To charge a woman with being a woman of bad character, keeping a bad house where men go at all times, is substantially equivalent to charging her with keeping a house of ill fame, resorted to for prostitution and lewdness, which is an indictable offense. In other words, the language, taken in its ordinary and obvious sense, imputes the keeping of a place where disreputable persons resort for illicit intercourse, and is actionable per se. *Blake v. Smith*, 84 Atl. 995, 996, 19 R. L. 476.

#### **BAD ON THE FACE OF IT.**

The term "bad on the face of it," when used to characterize a conviction, means one which shows a want of jurisdiction or directs the imprisonment of a party which the magistrate is not entitled to award. *Griffith v. Harries*, 2 Mees & W. 835, 844.

#### **BAD TITLE.**

A bad title is defined to be one which conveys no property to the purchaser of the estate. *Heller v. Cohen*, 36 N. Y. Supp. 668, 671, 15 Misc. Rep. 378.

#### **BAD WEATHER.**

In a charter party, excepting loss from act of God, restraint of princes and rulers, strikes of miners and workmen, bad weather, quarantine, riots, etc., "bad weather" must be held to include and mean weather not reasonably fit for safe loading, by reason of the state of the sea, as well as of the atmosphere. It means not merely weather during which cargo could not by any possibility have been loaded, but such weather as was not reasonably fit or proper. This would include days when it was not reasonably safe to attempt loading with appliances at hand, and when, under the practice of the port, loading was customarily suspended for that reason by competent men intrusted with the work, and acting on their judgment of the fitness and safety of loading. *The Ocean Prince* (U. S.) 50 Fed. 115.

#### **BADGES OF FRAUD.**

Badges of fraud are such circumstances as cast suspicion on a transaction. *Gould v. Sanders*, 37 N. W. 37, 39, 69 Mich. 5.

Badges of fraud are facts that are signs or marks of fraud, and which are not sufficient to constitute fraud in themselves. *Bryant v. Kelton*, 1 Tex. 415, 420.

A badge of fraud does not constitute fraud itself, but is simply evidence of fraud—a means of establishing a fraudulent intent. *Goshorn's Ex'r v. Snodgrass*, 17 W. Va. 717, 768 (citing *Bump*, *Fraud. Conv.* 78).

"Badges of fraud," as used in reference to a conveyance of land from a father to a son, means such circumstances as would induce the belief that the land had been conveyed to the son, not for his exclusive benefit, but for the benefit altogether or in part of the father, and that therefore the true motive in making the conveyance was fraud on the father's creditors, and not a bona fide advancement to the son. *Doyle v. Sleeper*, 31 Ky. (1 Dana) 531, 539.

A "badge of fraud," as relating to evidence of a fraudulent sale, does not mean that the evidence must be conclusive, nor that it must require the jury to find fraud, but that it is only one of the marks of fraud and has a tendency to show it. There may be great difference in the weight to which different facts constituting badges of fraud are entitled as evidence. One may be almost conclusive, and another furnish merely a reasonable inference, of fraud. Yet both would be badges of fraud, and either might be so explained by other evidence as to destroy this fact. *Pilling v. Otis*, 13 Wis. 495, 496.

The term "badges of fraud" is used by the courts to designate the acts or conduct from which fraud may be inferred. It is for the court and judge to decide what is such a badge. *Kirkley v. Lacey* (Del.) 30 Atl. 994-996, 7 Houst. 213.

Matters which, if shown, are usually considered as tending to show fraud in relation to the purchase of goods, are sometimes termed "badges of fraud." Among these are unusual or extraordinary methods in conducting business. Any secrecy or concealment in the business, and any unusual methods or acts connected with the transaction in question, are proper to be considered in determining whether fraud in fact exists in connection with the transaction. *Phelps, Dodge & Palmer Co. v. Samson*, 84 N. W. 1051, 1052, 113 Iowa, 145.

The usual badges of fraud which will render void an assignment to a creditor are continuation of possession, or a secret trust, or some provision for the ease and comfort or benefit of the assignor, or the insertion of some feigned debt not due by the assignor. *Royster v. Stallings*, 32 S. E. 384, 886, 124 N. C. 55.

#### **BAGGAGE.**

See, also, "Luggage"; "Personal Luggage."

Baggage is property carried by the person, and stands on a different footing from

the carriage of other property, so that a statute authorizing street surface railroads to carry persons and property in their cars could not be presumed to limit the term "property" to baggage merely. *Degrauw v. Long Island Electric Ry. Co.*, 60 N. Y. Supp. 163, 166; 43 App. Div. 502.

Baggage may consist of any articles intended for the use of a passenger while traveling, or for his personal equipment. *Civ. Code Mont.* 1895, § 2891.

"By baggage we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not destined for any such use, but for other purposes, such as sale or the like." *Bomar v. Maxwell*, 28 Tenn. (9 Humph.) 621, 624, 51 Am. Dec. 682; *Kansas City, Ft. S. & G. R. Co. v. Morrison*, 9 Pac. 225, 228, 34 Kan. 502, 55 Am. Rep. 252; *Dibble v. Brown*, 12 Ga. 217, 225, 56 Am. Dec. 460 (quoting *Story, Bailm.* § 499); *Hutchings v. Western & A. R. Co.*, 25 Ga. 61, 64, 71 Am. Dec. 156.

It is impossible to draw any very well-defined line as to what is and what is not necessary or ordinary baggage for a traveler. That which one traveler would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be deemed to be in the mind of the carrier when he receives a passenger for conveyance. *Choctaw, O. & G. R. Co. v. Zwirtz*, 73 Pac. 941, 942, 13 Okl. 411.

Common carriers are only responsible to a passenger for the loss of a reasonable amount of baggage, which includes such articles as are necessary and convenient for the passenger and usual for persons traveling to take with them. *New Orleans, J. & G. N. R. Co. v. Moore*, 40 Miss. 39, 43; *Texas & P. Ry. Co. v. Capps* (Tex.) 2 Willson, Civ. Cas. Ct. App. §§ 33, 35; *Smith v. Cincinnati, H. & D. Ry. Co.*, 3 Ohio S. & C. P. Dec. 192, 196; *Nordemeyer v. Loescher* (N. Y.) 1 Hilt. 499, 502; *Walsh v. The H. M. Wright* (U. S.) 29 Fed. Cas. 106; *Jordon v. Fall River R. Co.*, 59 Mass. (5 Cush.) 69, 72, 51 Am. Dec. 44; *Collins v. Boston & M. R. Co.*, 64 Mass. (10 Cush.) 506, 507; *Connolly v. Warren*, 106 Mass. 146, 148, 8 Am. Rep. 300; *Johnson v. Stone*, 30 Tenn. (11 Humph.) 419, 420.

"Baggage," as defined by Lord Chief Justice Cockburn in *Macrow v. Railway Co.*, L. R. 6 Q. B. 612, is "whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey." *Kansas City, Ft. S. & M. Ry. Co. v. McGahey*, 38 S. W. 659, 660, 63 Ark. 344, 36

L. R. A. 781, 58 Am. St. Rep. 111; *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 29, 25 L. Ed. 531; *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. (12 Wall.) 262, 274, 20 L. Ed. 423; *Kansas City, P. & G. R. Co. v. State*, 46 S. W. 421, 422, 65 Ark. 363, 41 L. R. A. 333, 67 Am. St. Rep. 933. "The articles carried by a passenger for his personal use, exceeding in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, are not baggage. Articles adapted to personal use, as his necessities, comfort, convenience, or even gratification may suggest, whatever may be the quantity or value of such articles, are not necessarily baggage." *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 29, 25 L. Ed. 531; *Missouri, K. & T. R. Co. of Texas v. Meek* (Tex.) 75 S. W. 317, 318.

What is baggage, within the rule of a carrier's liability, is often difficult to determine. It depends in a great measure upon the condition in life of the passenger, and the length, nature, and object of his journey. According to this criterion, the following articles have been held to constitute baggage: The wearing apparel of the passenger in all cases; the easel of an artist on a sketching tour; the gun or fishing tackle of the sportsman when on a hunting or fishing excursion; the costly laces of a lady of wealth, high rank, and social standing, traveling on a railway; "a manuscript price book, which a commercial agent took in his valise and used in making sales;" the surgical instruments of a surgeon in the army, traveling with troops; a few books carried for amusement or entertainment; and the manuscript books of the passenger used in the prosecution of his studies. *Kansas City, Ft. S. & M. Ry. Co. v. McGahey*, 38 S. W. 659, 660, 63 Ark. 344, 36 L. R. A. 781, 58 Am. St. Rep. 111.

Whether or not certain articles are within the term "baggage" is to be determined from the character and length of the journey, its purpose and objects, the owner's station in life, and the habits and uses of the class of travelers to which he belongs. *Missouri, K. & T. R. Co. of Texas v. Meek* (Tex.) 75 S. W. 317, 318.

Baggage only includes a limited quantity of articles such as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations. *Kansas City, P. & G. R. Co. v. State*, 46 S. W. 421, 422, 65 Ark. 363, 41 L. R. A. 333, 67 Am. St. Rep. 933.

Baggage includes such articles of necessity and convenience as are usually carried by passengers for their personal use, comfort, instruction, amusement, or protection; and, in considering what constitutes baggage, regard must be had to the habits and condi-

tion in life of the passenger. *Chicago, R. I. & P. R. Co. v. Collins*, 56 Ill. 212, 217.

Baggage means articles of necessity and personal convenience, usually carried by passengers for their personal use, and what they are depends upon the habits, taste, and resources of the passenger. *Johnson v. Stone*, 30 Tenn. (11 Humph.) 419, 420.

The word "baggage," as used in Ky. St. § 783, providing that every company shall check every article of "baggage" taken for transportation, refers only to what the passenger takes with him for his own personal use and convenience, and which he has committed to the care of the carrier. Generally the articles allowed as baggage are the personal apparel of the passenger, but may include a number of other articles, which may not unreasonably be designed for his pleasure, business, or convenience on his journey. In a general sense, it may be said to include such articles as it is usual for persons traveling to take with them for their pleasure, convenience, and comfort according to the habits and wants of the class to which they belong. *Illinois Cent. R. Co. v. Matthews*, 72 S. W. 302, 303, 24 Ky. Law Rep. 1766, 60 L. R. A. 846 (citing *Oakes v. Northern Pac. R. Co.*, 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126).

Baggage means not only the personal wearing apparel of the passenger, but other conveniences for his personal accommodation. *Smith v. Boston & M. R. R.*, 44 N. H. 325, 331.

The carrier's liability only extends to such reasonable articles as may be necessary for the traveler's convenience, no matter what or how valuable other articles may be which are introduced into the conveyance under the guise of "baggage." The articles of property treated as baggage may be clothing, traveling expenses, a few books for the amusement of reading, a watch, a lady's jewelry, etc. *Doyle v. Kiser*, 6 Ind. 242, 247.

"Baggage" is synonymous with the term "luggage"; the former term being in general use in the United States, while the latter prevails in England. *Pfister v. Central Pac. R. Co.*, 11 Pac. 686, 688, 70 Cal. 169, 59 Am. Rep. 404; *Choctaw, O. & G. R. Co. v. Zwirtz*, 73 Pac. 941, 942, 13 Okl. 411.

#### Bedding.

A feather bed is not baggage. *Connolly v. Warren*, 106 Mass. 146, 148, 8 Am. Rep. 300.

Baggage includes bedding, when applied to steering passengers required to supply their own bedding. *Hirschsohn v. Hamburg-American Packet Co.*, 34 N. Y. Super. Ct. (2 Jones & S.) 521, 523.

A bed, pillow, bolster, and quilt belonging to a poor man, who is moving with his

wife and family, will be held to be baggage. It is very common for such persons to take such articles with them as their "baggage." They are not merchandise, are of small value, may be put in a box or trunk like apparel, are frequently of immediate, necessary, and personal use to the owner, and both in custom and in regard to the property of such travelers, are often and properly treated as "baggage." *Oulmit v. Henshaw*, 35 Vt. 605, 622, 84 Am. Dec. 646.

#### Bicycles.

The words "ordinary baggage" and "baggage," whenever used in the act relating to the incorporation of railroad companies, shall be deemed to include bicycles. *Comp. Laws Mich. 1897*, § 6316.

#### Books.

Manuscript books, the property of a student, the papers and books of a lawyer, in a trunk, are baggage. *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. (12 Wall.) 262, 269, 20 L. Ed. 423.

In *Phelps v. London, etc., Ry. Co.*, 19 J. Scott, N. S. (115 E. C. L.) 321, the question for the court was whether an attorney, traveling as a passenger on a railway, was entitled to carry with him his portmanteau, as ordinary luggage, and the deeds and documents which were required as evidence on a trial which he was going to attend, and it was held that he was not. On the other hand, in *Hopkins v. Westcott*, 12 Fed. Cas. 496, it was held that manuscript books, the property of a student and necessary to the prosecution of his studies, are to be regarded as baggage. In that case *Shipman, J.*, says: "Now it may safely be said that books constitute to some extent a part of the baggage of every intelligent traveler. Especially is this the case with scholars, students, and members of the learned professions. There is no reason why they should not be under the protection of the law, as against the negligence of carriers, as well as any other portions of their baggage. But it is said that no case can be shown where the carrier has been held liable for manuscripts. No such case has been cited, and, in my researches, I have found none. But I see no reason for adopting a rule by which they should be excluded, under all circumstances, from the list of articles termed 'baggage.' With a lawyer going to a distant place to attend court, with the author proceeding to his publisher's, with the lecturer traveling to the place where his engagement is to be fulfilled, manuscripts often form, though a small, yet an indispensable, part of his baggage. They are carried, as such, in his trunk or portmanteau, among his other necessary effects. They are indispensable to the object of his journey; and, as they are carried with his baggage in accordance with custom, I see no reason why they should not



be deemed as necessary a part of his baggage as his novel or his fishing tackle. In the present case the manuscript books lost are admitted to have been necessary articles for the student at the institution to which he was proceeding. They must, under all the circumstances, be deemed to have been a part of his baggage, for which the defendants are liable." It must, on the whole, be held that the book in question was an article of personal baggage, within the definition above given and the decisions upon the subject. It was a thing of personal use and convenience to the plaintiff, according to the wants of the particular class of travelers to which he belonged, and was taken with him as well with reference to the immediate necessities of his journey as to the ultimate purposes of it. It was not an article of merchandise or the like, or anything designed for use ulterior the purposes of his journey, but a book of memoranda, convenient and necessary for him personally in accomplishing the object of his travel. It was personal baggage, within the definition and rule of law upon that subject. *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 99, 14 Am. Rep. 716.

Record books, used by a passenger in her vocation as nurse, are properly included in the term "baggage." *Werner v. Evans*, 94 Ill. App. 323, 330.

#### Guns, etc.

A passenger making a voyage from a foreign country can with propriety take with him as baggage whatever is suitable for his personal convenience on the journey, or his amusement or use in the country to which he is bound. Guns for sporting and a small quantity of clothing materials are baggage. *Van Horn v. Kermit* (N. Y.) 4 E. D. Smith, 453, 457.

Baggage does not include a Colt's revolver and silver tea spoons, nor surgical instruments, unless the guest is a physician or surgeon, or student of medicine. *Giles v. Fauntleroy*, 13 Md. 126, 139.

#### Household furniture.

The term "baggage" is not to be construed as including household furniture. *Vasse v. Ball* (Pa.) 2 Dall. 270, 276, 1 L. Ed. 377.

"Furniture or household goods would not come within the description of ordinary luggage, unless accepted as such by the carrier." *Kansas City, Ft. S. & G. R. Co. v. Morrison*, 9 Pac. 225, 228, 34 Kan. 502, 55 Am. Rep. 252.

#### Jewelry, etc.

Articles taken with a traveler for use while on his journey are "baggage." The term includes articles intended to be used at

the end of the journey, or during a temporary stay at a particular place, as well as those actually used in the transit. The term also includes such articles of apparel, ornaments, etc., as are in daily use by travelers for convenience, comfort, or recreation, and may include, not only clothing, but traveling expense money, books for amusement, a watch and ladies' jewelry for dressing, etc., and an almost indefinite number and variety of articles proper for use on the journey, and will include an opera glass though the trip is made by night. *Toledo, W. & W. Ry. Co. v. Hammond*, 33 Ind. 379, 382, 5 Am. Rep. 221.

Such jewelry and personal ornaments as are appropriate to the wardrobe, rank, and social position of the passenger will be held to be baggage, but no further. *Mauritz v. New York, L. E. & W. R. Co.* (U. S.) 23 Fed. 765, 771.

Jewelry of little value and such as is ordinarily worn about the person comes within the definition of baggage. *Torpey v. Williams* (N. Y.) 3 Daly, 162, 165.

A diamond pin will be held to come within the term baggage. *Coward v. East Tennessee, V. & G. R. Co.*, 84 Tenn. (16 Lea) 225, 233, 57 Am. Rep. 227; *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. (12 Wall.) 262, 269, 20 L. Ed. 423.

It is not very obvious in what manner the court can restrict the quantity or value of articles that may be deemed either proper or useful for the ordinary purposes of travelers. In the nature of things it is susceptible of no precise or definite rule, and includes the jewelry of the passenger's wife and every other article pertaining to her wardrobe that may be necessary or convenient in traveling. *McGill v. Rowand*, 3 Pa. (8 Barr) 451, 453, 45 Am. Dec. 654.

Baggage includes only such things as may be necessary to the convenience and comfort of the traveler, and perhaps sufficient money to defray the expenses of the journey, and will not include \$30,000 worth of jewelry. *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348, 352, 24 Am. Rep. 248.

We understand the rule to be that the jury, in determining what penalty a traveler is entitled to recover from the carrier in case of loss, may consider what he has been in the habit of carrying for his personal convenience or use within a reasonable limit, or what a person so circumstanced is ordinarily in the habit of carrying. It would be difficult to include, within the definition of "baggage" contained in the books, presents intended for others, or a silver match box, unless the jury believed it to be reasonable personal baggage, or Masonic regalia, or presents received from friends. *Nevins v. Bay Steamboat Co.*, 17 N. Y. Super. Ct. (4 Bosw.) 225, 235.

Baggage includes whatever is reasonably necessary for the personal use or convenience of a passenger. Gold chains, gold rings, a silver pencil case, and money sufficient to pay necessary expenses, have been held to be embraced under the term "baggage." A railroad company cannot restrict the right of a passenger to carry baggage necessary for his comfort or convenience by calling it "wearing apparel." *Mexican Nat. R. Co. v. Ware (Tex.)* 60 S. W. 343, 344.

The "baggage" of a passenger, which a common carrier by sea is required by law to carry safely as a part of his contract with the passenger, means wearing apparel of the passenger, and does not include gold ornaments for presents and coin. *The Ionic (U. S.)* 13 Fed. Cas. 88.

It is only apparel and other articles necessary for a person's comfort and convenience while away from home, with the necessary sum of money for his expenses, and does not include merchandise, jewelry, and other valuables, which a person, under the pretense of having his "baggage" transported, places in the hands of the carriers. *Cincinnati & C. Air Line R. Co. v. Marcus*, 38 Ill. 219, 223.

The baggage of a man cannot with any accuracy be said to include one sack, a muff, and two silver napkin rings. *Chicago, R. I. & P. R. Co. v. Boyce*, 73 Ill. 510, 512, 24 Am. Rep. 268.

#### Merchandise.

"The baggage which a passenger is entitled to take with him, and for the safe carriage of which the carrier is liable, means ordinary baggage, or such baggage as a traveler usually carries with him for his personal convenience, and does not include merchandise as such." *Grant v. Newton (N. Y.)* 1 E. D. Smith, 95, 98; *Pardee v. Drew (N. Y.)* 25 Wend. 459, 460; *Nordemeyer v. Loescher (N. Y.)* 1 Hill. 499, 502; *Stimson v. Connecticut River R. Co.*, 98 Mass. 83, 84, 93 Am. Dec. 140; *Collins v. Boston & M. R. Co.*, 64 Mass. (10 Cush.) 506, 508; *Kansas City, Ft. S. & G. R. Co. v. Morrison*, 9 Pac. 225, 228, 34 Kan. 502, 55 Am. Rep. 252.

By "baggage" is understood such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise or other valuables, though carried in the trunk of a passenger, but which are not, however, designed for such use, but for other purposes, such as sale and the like. Articles consisting of a sample liquor cooler, one beer faucet, one wrench, and one lemon squeezer, which were samples carried by a passenger in his trunk for the purpose of effecting sales, do not constitute baggage. *Texas, etc., R. Co. v. Capps*, 2 Willson, Civ. Cas. Ct. App. § 33.

The "baggage" of a passenger, which a common carrier is required to carry safely as a part of his contract with the passenger, is the passenger's personal baggage, and does not include goods, wares, and merchandise, commonly called "notions," carried in a valise belonging to the passenger. *Haines v. Chicago, St. P., M. & O. Ry. Co.*, 12 N. W. 447, 448, 29 Minn. 160, 43 Am. Rep. 199.

Mere articles of trade and business, and not for personal use, are not included in the term "baggage." *Collins v. Boston & M. R. Co.*, 64 Mass. (10 Cush.) 506, 507.

Merchandise, or other articles intended for business purposes, are not included in the term "baggage." *Choctaw, O. & G. R. Co. v. Zwirtz*, 73 Pac. 941, 942, 13 Okl. 411.

The term "baggage" will not include a package containing articles of merchandise only, even though marked "glass" in such a manner as would have given the carrier notice that it contained other than personal baggage. *Cahill v. London & N. W. Ry. Co.*, 10 C. B. (N. S.) 154, 170.

The term does not embrace samples of merchandise carried by a passenger in his trunk to enable him to make bargains for the sale of goods. *Hawkins v. Hoffman (N. Y.)* 6 Hill, 588, 590, 41 Am. Dec. 767.

Baggage does not include articles of merchandise for sale or for use as samples, and not designed for the use of the passenger. *Humphreys v. Perry*, 148 U. S. 627, 628, 13 Sup. Ct. 711, 37 L. Ed. 587.

Baggage, or luggage, as applied to a traveler, implies something which he bags up or lugs along with him for his daily comfort and convenience on his journey, but does not include window curtains, blankets, cutlery, books, ornaments, etc., even when packed with what is baggage. *McCaffrey v. Canadian Pac. Ry. Co.*, 24 Am. Law Reg. 175, 178.

In an advertisement by a common carrier, declaring that "all baggage was at the owner's risk," the word "baggage" meant the luggage or belongings of passengers, and hence did not protect the carrier from responsibility for a loss of a parcel of merchandise shipped by merchants. *Beckman v. Shouse (Pa.)* 5 Rawle, 179, 188, 28 Am. Dec. 653.

Baggage means clothing and other conveniences which a traveler carries with him on a journey, and will not include merchandise. Hence a law exempting a carrier from liability for loss of goods and merchandise will not exempt it from liability for loss of baggage. *Chamberlain v. Western Transp. Co.*, 45 Barb. 218, 223.

#### Money.

Money carried by a passenger in a railway train for use in purchasing a business

is not "baggage," within the legal meaning of that term as used in determining the liability of a railroad company for its loss. *Levins v. New York, N. H. & H. R. Co.*, 66 N. E. 803, 183 Mass. 175.

Money bona fide included in the baggage for traveling expenses and personal use, but not beyond a reasonable amount. *Jordan v. Fall River R. Co.*, 59 Mass. (5 Cush.) 69, 72, 51 Am. Dec. 44; *Walsh v. The H. M. Wright (U. S.)* 29 Fed. Cas. 106; *Torpey v. Williams (N. Y.)* 3 Daly, 162, 185; *Hollister v. Nowlen*, 19 Wend. 234, 244, 32 Am. Dec. 455; *Hutchings v. Western & A. R. Co.*, 25 Ga. 61, 64, 71 Am. Dec. 156; *Johnson v. Stone*, 30 Tenn. (11 Humph.) 419, 420; *Jones v. Voorhees*, 10 Ohio, 145, 150. *Contra*, *Nordemeyer v. Loeschner (N. Y.)* 1 Hilt. 499, 502.

The baggage of a passenger, which is included in the contract of carriers of persons, means "traveling conveniences which such passenger takes with him, and includes whatever may be reasonably necessary to the traveler under ordinary circumstances for the prosecution of the journey, for which nothing is more essential than an adequate supply of money for traveling expenses, and the amount must necessarily be measured not alone by the requirements of the transit over a particular part of the entire route on which the line of one class of carriers extends, but must embrace the whole of the contemplated journey, and includes such an allowance for accident and sickness and for sojourning on the way as a reasonably prudent man would consider it necessary to make." But the money must be limited to that taken for traveling expenses properly so called, and does not include money carried for the purpose of transportation or remittance, or for investment in another locality. *Merrill v. Grinnell*, 30 N. Y. 594, 609.

Both "baggage" and "luggage" mean articles intended for the use of the passenger while traveling, and neither includes money intended for trade, business, or investment. *Pfister v. Central Pac. R. Co.*, 11 Pac. 686, 688, 70 Cal. 169, 59 Am. Rep. 404.

Baggage is what travelers usually carry with them, or what is essential or necessary to the traveler in the course of his journey; and, where a traveler who had just arrived from Europe had \$450 in gold pieces in his portmanteau, such money constituted baggage. *Van Wyck v. Howard (N. Y.)* 12 How. Prac. 147, 151.

Baggage, for which a carrier is liable, does not include money of one passenger contained in a valise which another passenger, with the knowledge of the first, delivers as his own luggage; and to such a passenger a carrier is not liable at all, because he has not been shown to have made any contract with it to transport the baggage. *Dunlap v.*

*International Steamboat Co.*, 98 Mass. 371, 376.

"Baggage" is a relative term, and must be defined by the facts and circumstances of each case, including the object and length of the journey and the habits and condition of life of the passenger. So a particular sum of money for traveling expenses, contained in a trunk, is to be construed part of the passenger's personal baggage, and the amount must be determined by the whole journey, and include accidents, sickness, and sojourns by the way. *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. (12 Wall.) 262, 269, 20 L. Ed. 423.

Baggage extends to such things as might become necessary, convenient, or ornamental during the course of the journey, with such a reasonable sum of money as would be required to meet the actual and contingent expenses. Articles of merchandise, or samples of them, and large amounts of money, are not, on a mere passenger's ticket, carried at the risk of the carrier. *Weeks v. New York, N. H. & H. R. Co. (N. Y.)* 9 Hun, 669, 701.

A check is in the nature of a receipt for baggage, and may be given and received at any time which the convenience and custom of the company may dictate. It is not a contract, but evidence of the ownership, delivery, and identity of the baggage. *Hickox v. Naugatuck R. Co.*, 31 Conn. 281, 282, 83 Am. Dec. 143.

"The term 'baggage,' as used in connection with traveling in public conveyances, is difficult to define with technical precision; but it may be safely asserted that money, except what may be carried for the expense of traveling, is not included, and especially a sum" which was taken for the mere purpose of transportation in a trunk, together with the passenger's other baggage. *Orange County Bank v. Brown (N. Y.)* 9 Wend. 85, 117, 24 Am. Dec. 129.

Baggage, for which a carrier is liable, does not include money beyond a sum sufficient for the reasonable traveling expenses contained in a valise delivered as "baggage," without notice to the carrier of any peculiar value. *Dunlap v. International Steamboat Co.*, 98 Mass. 371, 376.

A carrier, by selling a ticket and agreeing to carry a passenger and his "baggage," cannot be reasonably supposed to contemplate incurring liability in respect to a large sum of money of which the carrier had no knowledge, and which the passenger was carrying solely for the purpose of transferring it from one point to another. *First Nat. Bank of Greenfield v. Marietta & C. R. Co.*, 20 Ohio St. 259, 260, 5 Am. Rep. 655.

The trunk of a passenger, containing \$11,000 in money belonging to a bank, which was lost, did not constitute "baggage." Or-

ange County Bank v. Brown (N. Y.) 9 Wend. 85, 117, 24 Am. Dec. 129.

#### **Theatrical property.**

The baggage of a passenger, which a common carrier is required to carry safely, consists of such articles of apparel as through necessity, convenience, comfort, or recreation the passenger may take for his personal use, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey. The right of the passenger is limited to the baggage required for his pleasure, convenience, and necessity during the journey. Stage properties, costumes, paraphernalia, advertising matter, etc., are not articles required for the pleasure or convenience or necessity of the passenger during his journey, but are plainly intended for the larger or ulterior purposes of carrying on the theatrical business, and do not fall under the denomination of "baggage." *Oakes v. Northern Pac. Ry. Co.*, 26 Pac. 230, 231, 20 Or. 392, 12 L. R. A. 318, 23 Am. St. Rep. 126.

#### **Tools of trade.**

The baggage of a passenger, which a common carrier is required to carry safely, means the necessities a traveler is compelled by legitimate considerations to transport with his person, and includes a small and select portion of a carpenter's tools, carried in his trunk with his clothing; they being a reasonable part of his baggage. *Porter v. Hildebrand*, 14 Pa. (2 Harris) 129, 133.

The term "baggage" includes tools used by the passenger in his trade, and which he usually carried with him from place to place in his trunk. *Davis v. Cayuga & S. Ry. Co.* (N. Y.) 10 How. Prac. 330, 332.

#### **Watch and chain.**

There is no uniform or definite rule with respect to what shall be deemed baggage. It includes all personal effects, useful or convenient to a traveler in the prosecution, or for use at the end, of his journey, according to his habits, rank, and condition. Carriers are not liable for articles transported as baggage, but not to supply any wants of the traveler as such on his journey, not made known to the carrier or its agents, nor paid for as freight, but put aboard for the convenience of the passenger, simply as baggage, and so treated by the passenger on his journey. The fee for transporting a reasonable amount of baggage by common usage is deemed to be included in the fare paid for passage; but the courts will not allow this trust to be abused, and under the pretense of "baggage" include articles not within the scope of the term or intent of the parties, and thereby defraud the carrier of its just compensation, besides subjecting him to unknown hazards. Articles treated as baggage may consist of clothing, money for defraying

traveling expenses, a few books for amusement or reading, a lady's jewelry for dressing, a watch, fishing tackle, a gun, and a pair of pistols; but, where the passenger wears one watch, he cannot carry four as baggage. *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671, 678, 679.

Baggage includes whatever forms the necessary appendages of a traveler, and where a traveler deposited a gold watch in his trunk it must be regarded as baggage. *American Contract Co. v. Cross*, 71 Ky. (8 Bush) 472, 475, 8 Am. Rep. 471; *Coward v. East Tennessee, V. & G. R. Co.*, 84 Tenn. (16 Lea) 225, 233, 57 Am. Rep. 227; *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. (12 Wall.) 262, 269, 20 L. Ed. 423; *Walsh v. The H. M. Wright* (U. S.) 29 Fed. Cas. 106; *Jones v. Voorhees*, 10 Ohio, 145, 150.

The baggage which a common carrier by sea is required to carry safely does not include a gold watch and chain. *The Ionic* (U. S.) 18 Fed. Cas. 88.

A watch, carried by a passenger on his person, is not to be construed as being baggage. *Clark v. Burns*, 118 Mass. 275, 277, 19 Am. Rep. 456; *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671, 678, 679.

A watch of reasonable value will be treated as baggage. *Torpey v. Williams* (N. Y.) 3 Daly, 162, 165.

#### **Wearing apparel.**

The baggage of a passenger, which a common carrier is required to carry safely, includes wearing apparel, which is not limited to such apparel only as the traveler must necessarily use on his journey. "Regard being had to the condition in life of the passenger, he may recover, if entitled to recover at all, for the loss of all such wearing apparel as he had provided for his personal use, and as it would be necessary or reasonable for him to use, after his arrival and settlement in this country. Cloth not yet made into garments, but which may have been procured for manufacture into wearing apparel, and which was intended to be so used, to a reasonable amount, may properly be included as a part of the passenger's wearing apparel." *Mauritz v. New York, L. E. & W. R. Co.* (U. S.) 23 Fed. 765, 771.

Baggage includes, within reasonable limits, whatever may be deemed proper or desirable for the necessity, comfort, convenience, pleasure, or amusement of the passenger on his journey, or his stay away from home; and where a person was away from home, without any article of wearing apparel except such as he had on his person, and purchased a trunk and apparel to take with him on his return home, such apparel constituted "baggage"; and the term is not limited to such articles as the passenger expected to use or needed by the way, but includes arti-

cles purchased for the immediate personal use of the passenger, though such articles had never been worn. *Dexter v. Syracuse, B. & N. Y. R. Co.*, 42 N. Y. 326, 331, 1 Am. Rep. 527.

Baggage, for which a carrier is liable, is such ordinary and reasonable wardrobe as is suitable for one in a traveler's station in life, together with such articles as are generally found in the paraphernalia of a traveler. *First Nat. Bank of Greenfield v. Marietta & C. R. Co.*, 20 Ohio St. 259, 260, 5 Am. Rep. 655.

## BAIL

See "Admission to Bail"; "Excessive Bail"; "Released on Bail"; "Special Bail"; "Straw Bail."

"Bail," as a verb, means the delivery of one under arrest to another, who is responsible for his appearance. *Stafford v. State*, 10 Tex. App. 46, 49.

Bail is a delivery or bailment of a person to his sureties, upon their giving, together with himself, a sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to jail. *Nicolls v. Ingersoll* (N. Y.) 7 Johns. 145, 155; *State v. McNab*, 20 N. H. 160, 161; *Gay v. State*, 7 Kan. 394, 402; *State v. Aubrey*, 8 South. 440, 441, 43 La. Ann. 188. Hence a person out on bail is regarded in legal theory as in the custody of the sureties, and a surrender of him by the sureties to the sheriff does not require the issue of a new process against him. *In re Siebert*, 58 Pac. 971, 972, 61 Kan. 112.

In legal contemplation, upon the recognizance being entered into, the principal is delivered into the friendly custody of his sureties, instead of being committed to prison. The sureties have control of his person, and they are bound at their peril to keep him within the jurisdiction, and to have his person ready to surrender when demanded. The arrest and imprisonment of the principal in another state for an offense committed in the latter place after the entering into of the recognizance is no excuse for the failure of the bail to surrender him at the time and place stipulated. *Devine v. State*, 37 Tenn. (5 Sneed) 623, 625.

The term "to bail" signifies "to deliver," and was, at common law, the delivery of the respondent to the persons who became sureties for his appearance, and who were, until that time, his jailers. *State v. Dwyer*, 39 Atl. 629, 70 Vt. 96.

Bail is the security given by a person accused of an offense that he will appear and answer before the proper court the accusation brought against him. This security is given by means of a recognizance or a bail bond. Code Cr. Proc. Tex. 1895, art. 303.

## Hold to bail.

"Hold to bail," as used in St. 1783, c. 51, § 1, authorizing justices of the peace to hold to bail all persons guilty or supposed to be guilty of offenses less than capital, not recognizable by the justice of the peace, does not comprehend a power to take a recognizance to the injured party for his treble damages, but means merely bail intended to secure the appearance of the person charged with a crime at a court of which the recognizance was to be returned. *Vose v. Deane*, 7 Mass. 280, 283.

## As jailers.

Bail are substituted for the officer whose duty it is to take charge of the party accused. A man's bail are jailers of his own choosing, who are bound to secure his appearance as effectually, and to put him as much under the power of the court, as if he had been in the custody of the proper officer. *Gilder-sleeve v. People*, 9 N. Y. Leg. Obs. 18, 22.

Where one became bail for another on a writ issued as a *capias* against such other in an action of assumpsit before a justice of the peace, the bail is the same as special bail, or bail above, or to the action at common law, and the right of such bail to apprehend their principal is not at all dependent upon their having a bail piece, which is not process, nor in the nature of process, but is only evidence that the surety has become bail. At common law the bail piece seems not to have been delivered to the person becoming bail, but it was signed by a judge and filed in the court in which the case was pending. Lord Coke says that "in truth 'bailly' is an old Saxon word, and signifieth a safe keeper or protector, and 'baile,' or 'ballium,' is safe-keeping or protection; and thereupon we say, when a man upon surety is delivered out of prison 'traditur in ballium,' he is delivered into bayle—that is, into their safe-keeping or protection from prison." Blackstone derives the word "bail" from the French "bailleur," to deliver. Some derive it from the Greek, *Ballein*, to deliver into hands. "Hence a defendant who is delivered to special bail is looked upon in the eye of the law as being constantly in their custody. They are regarded as his jailers, and have him always as it were upon a string that they may pull at pleasure and surrender him in their own discharge. They may take him on Sunday, which shows that it is not an original taking, but that he is still in custody. Their authority arises more from contract than from the law, and, as between the parties, neither the jurisdiction of the court nor of the state controls it; and so the bail may take the principal in another jurisdiction or another state, on the ground that a valid contract made in one state is enforceable in another, according to the law there. This shows that the authority need not be exercised by process, but that it inheres in the

bail themselves, and they may exercise it personally or depute to another to exercise it for them." *Worthen v. Prescott*, 11 Atl. 690, 392, 60 Vt. 68.

Bail are said to be the legal jailers of the defendant, and may take and render him at any time; but this is not the case with respect to bail to the sheriff. Their undertaking is that the party shall appear at the return of the writ, which can only be satisfied by their putting in good bail above. *Hamilton v. Wilson*, 1 East, 383, 390.

It is the constant language of the books that bail are their principal's jailers, and that it is on this opinion that they have authority to take them, and that, as the principal is at liberty only by the permission and indulgence of the bail, they may take him up at any time. *Nicolls v. Ingersoll* (N. Y.) 7 Johns. 145, 155.

A man's bail are looked upon as his jailers in the eye of the law, and for many purposes he is esteemed to be as much in the prison of the court by which he is bailed as if he were in the actual custody of the proper jailer; and it seems that, if the party bailed be suspected by his bailer as likely to deceive them, he may be detained by them and enforced to appear according to the condition of the recognizance, or may be brought by them before the justice of the peace, by whom he shall be committed, unless he find new sureties. *State v. McNab*, 20 N. H. 160, 161.

#### As sureties.

"Bail," as a noun, means either the process of bailing or the persons who are the sureties for the appearance of the one bailed. *Stafford v. State*, 10 Tex. App. 46, 49.

In the case of *Toles v. Adeo*, 84 N. Y. 222, 238, the court, having under consideration a bond accepted by the sheriff in discharge of the defendant from arrest in a civil action, said: "Bail are sureties, with the rights and remedies of sureties in other cases." Bail to secure a defendant's discharge from arrest on civil process and his obedience to any mandate to enforce final judgment sustain the character of sureties in the same manner as sureties for an appeal. *Culliford v. Walser*, 52 N. E. 648, 649, 158 N. Y. 65, 70 Am. St. Rep. 437.

Upon those contracts of indemnity which are taken in legal proceedings as security for the performance of an obligation imposed or declared by the tribunals, and known as "undertakings" or "recognizances," the sureties are called "bail." Civ. Code Cal. 1903, § 2780; Rev. Codes N. D. 1899, § 4623; Civ. Code S. D. 1908, § 1967.

#### Taking bail.

The taking of bail consists in the acceptance, by a competent court or magistrate,

of the undertaking of sufficient bail for the appearance of the defendant according to the terms of the undertaking, or that the bail will pay to the people of the state a specified sum. Code Cr. Proc. N. Y. 1903, § 551; B. & C. Comp. Or. § 1493.

The taking of bail shall consist in the acceptance, by a competent court, magistrate, or legally authorized officer, of the undertaking, with sufficient sureties, for the appearance of the defendant according to the terms of the undertaking, or that the sureties will pay to the state a specified sum if he does not appear. Rev. St. Utah 1898, § 4984.

#### BAIL BOND.

A bail bond is an undertaking entered into by the defendant and his sureties for the appearance of the principal therein before some court or magistrate to answer a criminal accusation. It is written out and signed by the defendant and his sureties. Code Cr. Proc. Tex. 1895, art. 305.

#### As recognizance.

Wherever the word "bail" is used with reference to the security given by the defendant in a criminal proceeding, it is intended to apply as well to recognizances as to bail bonds. Code Cr. Proc. Tex. 1895, art. 307.

#### Recognizance distinguished.

A recognizance at common law was an obligation entered into before some court of record or magistrate duly authorized, with a condition to do some particular act, as to keep the peace or appear and answer to a criminal accusation. It was not signed by the party entering into it. A recognizance differs from a bail bond merely in the nature of the obligation. The former is an acknowledgment of record of an existing debt. The latter, which is attested by the signature and seal of the obligor, creates a new obligation. *People v. Barrett*, 67 N. E. 23, 27, 202 Ill. 287, 63 L. R. A. 82, 95 Am. St. Rep. 230.

There are two methods of taking bail—by recognizance and by bond. In some respects a recognizance is very similar to a bond. It is defined to be an obligation of record, which a man enters into before some court of record or magistrate duly authorized, binding himself under a penalty to do some particular act. A bond, or, as it is commonly called, a "bail bond," is also an obligation, but under seal, signed by the party giving the same, with one or more sureties, under a penalty, conditioned to do some particular act. The chief distinction between the two methods of bailing is that the former is an acknowledgment of record of a debt already due, while the latter is a creation of a new

debt not of record. A law providing for a bail bond in criminal cases is different from a law providing for a recognizance in such cases, but is neither repugnant to nor inconsistent with it, being merely cumulative. *Swan v. United States*, 9 Pac. 931, 935, 936, 3 Wyo. 151.

The principal difference between a bail bond and recognizance lies in the fact that a recognizance is a matter of record in the nature of a conditional judgment, and is proceeded upon by scire facias, while a bond is but an evidence of debt, for the recovery of which an action must be brought. A bail bond is taken out of court in vacation, and a recognizance is taken in open court, in which the cognizors confess judgment, to be levied on their property in case the principal makes default in his appearance. *Cole v. Warner*, 23 S. W. 110, 111, 93 Tenn. (9 Pickle) 155.

### BAIL PIECE.

A bail piece is not a process, nor anything in the nature of it, but is merely a record or memorial of the delivery of the principal to his bail on security given. *Nicolls v. Ingersoll* (N. Y.) 7 Johns. 145, 154; *Worthen v. Prescott*, 11 Atl. 690, 692, 60 Vt. 68.

### BAILEE.

See "Special Bailee."  
Other bailee, see "Other."

A bailee is one to whom a thing has been delivered, to be held according to the purpose or object of delivery, and to be returned to the bailor, or delivered over to some other, when the object has been accomplished, or for the purpose of accomplishing it. *Phelps v. People*, 72 N. Y. 334, 357.

A bailee is one to whom the property involved in the bailment is delivered. *State v. Sienkiewicz* (Del.) 55 Atl. 346, 348.

The person who takes personal property for the purpose of bailment is called the "bailee." He is the one who is to hold it for the special purpose involved in the bailment, and the person who assumes the responsibility of taking the property in his possession in trust may do so with or without compensation; but, whether he receives pay for it or not, when a man assumes a trust knowingly, he assumes all of the responsibilities of the trust. *McGee v. French*, 27 S. E. 487, 488, 49 S. C. 454.

"Bailee," as used in statutes relative to larceny of a thing bailed, by the bailee, is used in its limited sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receive the goods bona fide and then fraudulently convert. When it does not appear that a fiduciary duty is imposed on the defendant

to return the specific goods of which the alleged bailment is composed, a bailment under the statute is not constituted. *Krause v. Commonwealth*, 93 Pa. 418, 421, 39 Am. Rep. 762; *People v. Cohen*, 8 Cal. 42, 43. The term as so used does not mean bailees merely to keep, to transfer, or to deliver property, but any bailee who converts the property of which he is the bailee to his own use, with intent to steal it, without regard to the nature of the bailment. *People v. Poggi*, 19 Cal. 600; *Dotson v. State*, 10 S. W. 18, 19, 51 Ark. 119. One who falsely represented to a jeweler that he with certain persons wished to make a wedding present, and that he wanted to take some jewelry to show such persons, and who was given the jewelry upon delivering an instrument purporting to guaranty the payment of whatever jewelry such person should buy of the jeweler for not over a certain sum, the jewelry not being returned or paid for, was a "bailee," within the meaning of such a statute. *Bergman v. People*, 52 N. E. 363, 364, 177 Ill. 244.

The word "bailee," as used in Pen. Code, 1860, § 108, relating to larceny by bailee, means any one intrusted with the possession of property for a time, and is not confined to the case of a carrier. Thus, where the personal property of a defendant in an execution was purchased by a friend, who permitted defendant to retain and use it until demanded, and, being so intrusted, defendant appropriated it to his own use, he was a bailee, within the meaning of the section, and hence guilty of larceny. *Commonwealth v. Chatham*, 50 Pa. (14 Wright) 181, 183, 88 Am. Dec. 539.

### As agent.

See "Agent."

### Consignee distinguished.

See "Consignee."

### Public officer.

A public officer, having property in custody in his official capacity, is a bailee. *York County v. Watson*, 15 S. C. 1, 8, 40 Am. Rep. 675 (citing *United States v. Thomas*, 82 U. S. [15 Wall.] 344, 21 L. Ed. 89). An officer who has taken property under an attachment acquires a special property in the goods, and may maintain an action, if his possession is violated. See, also, *Fowles v. Treadwell*, 24 Me. (11 Shap.) 377, 378.

### BAILIFF.

A bailiff is a servant who has the administration and charge of lands, goods, and chattels, to make the best benefit for the owner, against whom an action of account lies for the profits which he has raised or made, or might by his industry or care have raised or made; his reasonable charges and

expenses deducted. *Barnum v. Landon*, 25 Conn. 137, 149 (citing Co. Litt. 172); *Huff v. McDonald*, 22 Ga. 131, 161, 68 Am. Dec. 487; *Bredin v. Kingland* (Pa.) 4 Watts, 420, 422. Although the case of an attorney intrusted to collect money for his client may not be included in the words of this definition, yet by an equitable construction it may be so enlarged as to embrace his case. *Bredin v. Kingland* (Pa.) 4 Watts, 420, 422.

A bailiff in husbandry was at the common law one appointed by a private person to collect his rents and manage his estates. *West v. Weyer*, 18 N. E. 537, 538, 46 Ohio St. 66, 15 Am. St. Rep. 552; *Ellwell v. Burnside* (N. Y.) 44 Barb. 447, 458. He has no permanent estate, and may be removed at pleasure. *Ellwell v. Burnside* (N. Y.) 44 Barb. 447, 453.

#### As deputy sheriff.

The term "bailiff" signifies a keeper or protector, and, from the duties a bailiff performs in and about our courts, is synonymous with "under sheriff" or "deputy sheriff." The term "bailiff" is applied to him because of the special duty of guarding or protecting juries during their deliberations from improper communications or intrusions. In the performance of such duties they act as deputies of the sheriff, and must get their appointment and authority from him, even though they be deputized for the special duty alone. The circuit judges have no authority to appoint them. *Nicholson v. State*, 20 South. 818, 819, 38 Fla. 99.

### BAILIWICK.

"Bailiwick," as used in the return, "Not found in my bailiwick," by a deputy sheriff, does not necessarily include "county," but strictly means that part which is or may be assigned to the deputy. *Greenup's Representatives v. Bacon's Ex'rs*, 17 Ky. (1 T. B. Mon.) 106, 109; *Evans v. Wait*, 28 Ky. (5 J. Marsh.) 110, 113 (citing *Gully v. Sanders*, 16 Ky. [Litt. Sel. Cas.] 424).

### BAILMENT.

See "Gratuitous Bailment"; "Lucrative Bailment."

See, also, "Commodatum"; "Depositum"; "Mutuum."

The essential feature of bailment is a stipulation for the return of property at the end of the term. *Farquhar v. McAlevy*, 21 Atl. 811, 812, 142 Pa. 233, 24 Am. St. Rep. 497.

The word "bailment," according to Story, is derived from the French word "bailler," which signifies "to deliver." *In re Price* (Pa.) 16 Phila. 36, 38.

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A bailment is a delivery of goods in trust, on a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee. *Pool v. Adkisson*, 31 Ky. (1 Dana) 110, 131 (citing Bl. Comm.); *Commonwealth v. Maher* (Pa.) 11 Phila. 425; *Todd v. Figley* (Pa.) 7 Watts, 542, 543; *Krause v. Commonwealth*, 93 Pa. 418, 420, 39 Am. Rep. 762; *Harper v. Hogue*, 10 Pa. Super. Ct. 624, 630; *Ott v. Sweatman*, 15 Pa. Co. Ct. R. 97, 112; *Krause v. Commonwealth* (Pa.) 9 Wkly. Notes Cas. 61, 62.

A bailment is a delivery of goods in trust, on a contract, express or implied, that the trust shall be truly executed, and the goods restored to the bailor as soon as the purpose of the bailment shall be answered. *Commonwealth v. Maher* (Pa.) 11 Phila. 425 (citing Kent, Comm.); *Watson v. State*, 70 Ala. 13, 14, 45 Am. Rep. 70. See, also, *State v. Chew Muck Yon*, 25 Pac. 355, 356, 20 Or. 215; *Ott v. Sweatman*, 15 Pa. Co. Ct. R. 97, 112; *Harper v. Hogue*, 10 Pa. Super. Ct. 624, 630; *Commonwealth v. Cart* (Pa.) 2 Pittsb. R. 495, 496; *Krause v. Commonwealth* (Pa.) 9 Wkly. Notes Cas. 61, 62; *Siter v. Morris*, 18 Pa. (1 Harris) 218, 219; *Trunick v. Smith*, 63 Pa. (18 P. F. Smith) 18, 23.

"Bailment" is the delivery of goods for some purpose, under a contract, express or implied, that after the purpose has been fulfilled they shall be redelivered to the bailor, or otherwise dealt with according to his terms, or kept until he reclaims them. *McCaffrey v. Knapp, Stout & Co. Company*, 74 Ill. App. 80, 85 (citing Story, Bailm.). A bailment is a delivery of a thing in trust for some special object or purpose, on a contract, express or implied, to conform to the object or purpose of the trust. *Commonwealth v. Maher* (Pa.) 11 Phila. 425 (citing Story, Bailm.); *Todd v. Figley* (Pa.) 7 Watts, 542, 543; *Krause v. Commonwealth*, 93 Pa. 418, 420, 39 Am. Rep. 762; *People v. Cohen*, 8 Cal. 42, 43; *Watson v. State*, 70 Ala. 13, 14, 45 Am. Rep. 70; *Goodwyn v. State* (Tex.) 64 S. W. 251, 252. See, also, *Fulcher v. State*, 25 S. W. 625, 32 Tex. Cr. R. 621; *Harper v. Hogue*, 10 Pa. Super. Ct. 624, 630; *Ott v. Sweatman*, 15 Pa. Co. Ct. R. 97, 112; *Taylor v. Campbell* (Pa.) 1 Pittsb. R. 459, 462; *Siter v. Morris*, 18 Pa. (1 Harris) 218, 219; *In re Price* (Pa.) 16 Phila. 36, 38; *Krause v. Commonwealth* (Pa.) 9 Wkly. Notes Cas. 61, 62; *Commonwealth v. Cart* (Pa.) 2 Pittsb. R. 495, 496; *Lewis v. Park Bank* (N. Y.) 2 Daly, 85, 91.

"Bailment," according to Sir William Jones, consists of, or may be divided into, five sorts: (1) *Depositum*, or deposit; (2) *mandatum*, or commission without recompense; (3) *commodatum*, or loan for use without pay; (4) *pignori acceptum*, or pawn; (5) *locatum*, or hiring, which is always with



reward. *Todd v. Figley* (Pa.) 7 Watts, 542, 543.

The old and well-recognized definition of "bailment" is a delivery of goods in possession, and is either to keep or employ (Finch, Law, Bk. 2, c. 18); and such a full delivery of the property must have been made to the bailee as to require a redelivery of it by the bailee to the owner after the trusts of the bailment have been fully discharged. *Fletcher v. Ingram*, 46 Wis. 191, 202, 50 N. W. 424.

A bailment is a delivery of some personal property, the subject of larceny, by one person to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished. *State v. Davis* (Del.) 50 Atl. 99, 3 Pen. 220; *State v. Sienkiewicz* (Del.) 55 Atl. 346, 348; *McGee v. French*, 27 S. E. 487, 488, 49 S. C. 454.

A "bailment" is defined to be a delivery of goods for some purpose, on a contract, express or implied, that after the purpose has been fulfilled they shall be delivered to the bailee or otherwise dealt with according to his directions, or kept until he reclaims them. *Haskins v. Dern*, 56 Pac. 953, 955, 19 Utah, 89; *Knapp, Stout & Co. v. McCaffrey*, 52 N. E. 898, 899, 178 Ill. 107, 69 Am. St. Rep. 290.

A "bailment" is defined as a transfer of the possession of personal property from one person to another without the transfer of the ownership of it. *Malz v. State*, 37 S. W. 748, 36 Tex. Cr. R. 447.

"The objects of bailment may be as various as the transactions of man. They are made for the purpose of sale, hire, safe-keeping, etc. In some cases, in fact a large majority of the transactions, they are made for the purpose of the disposition or for the conversion of the property." *People v. Cohen*, 8 Cal. 42, 43.

Delivery, under which the bailee acquires an independent and temporarily exclusive possession, is essential to a contract of bailment. *Atlantic Coast Line R. Co. v. Baker*, 45 S. E. 673, 118 Ga. 809.

Delivery is one of the elements of a bailment. *Commonwealth v. Williams*, 72 Mass. (6 Gray) 1, 9.

All bailments, whether with or without compensation to the bailee, are contracts founded upon a sufficient consideration. *McCauley v. Davidson*, 10 Minn. 418, 421 (Gil. 335, 338).

A bailment is a delivery of goods or property for the execution of a special object, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to carry out this object and dispose of the property in conformity with the pur-

pose of the trust. *Civ. Code Ga. 1895*, § 2894; *Atlantic Coast Line R. Co. v. Baker*, 45 S. E. 673, 118 Ga. 809.

#### Carriage of goods.

See "Contract of Carriage."

Among the purposes included within such definition of "bailment" is hiring of the carriage of goods from one place to another for a stipulated or implied reward. There is nothing in this definition which excludes carriage of goods by water, and that such carriage of goods comes within the principles of bailment is evident from *Story, Bailm.* §§ 496, 501, 504, and elsewhere. *Knapp, Stout & Co. v. McCaffrey*, 52 N. E. 898, 899, 178 Ill. 107, 69 Am. St. Rep. 290.

The "carriage of goods" is by all legal writers classed as a different contract of bailment, having peculiarities and governed by principles characteristic of the relation quite apart from the contract of bailment of chattels for hire. *New York, L. E. & W. R. Co. v. New Jersey Electric Ry. Co.*, 38 Atl. 828, 832, 60 N. J. Law 338.

#### Conditional sale distinguished.

It is not infrequently a matter of difficulty to accurately distinguish between a conditional sale and a bailment of property. The border line is somewhat obscure at times. The question must be solved by the ascertainment of the real intent of the contracting parties as found in their agreement. *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.* (U. S.) 59 Fed. 49, 53, 7 O. C. A. 660.

A conditional sale implies the delivery to the purchaser of the subject-matter, the title passing only upon the performance of a condition precedent, or becoming reinvested in the seller upon failure to perform a condition subsequent. It is not infrequently a matter of difficulty to accurately distinguish between a conditional sale and a bailment of property. It is an indelible incident to a bailment that if the identical thing, either in its original or an altered form, is to be returned, it is a bailment. In a contract of sale there is this distinguishing test common to an absolute and a conditional sale: that there must be an agreement, expressed or implied, to pay the purchase price. In a bailment, if a bailment for hire, there must be payment for the use of the thing let or bailed. If service is to be rendered to the subject-matter of the bailment, there must be compensation for the service, unless the bailment be a mandate. An agreement to feed and care for cattle at the expense of a defendant, whose compensation was to be money realized from the sale of the cattle exceeding a certain sum per head, but who was liable for deterioration in flesh or condition, was a bailment, and not a conditional

sale. *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.* (U. S.) 59 Fed. 49, 53, 7 C. C. A. 660.

The most approved test to be applied to determine whether a contract is a conditional sale rather than a bailment lies in ascertaining whether there was a promise to pay for the goods. If so, as a general rule, the transaction will be declared a conditional sale. *Norton v. Fisher*, 85 N. W. 801, 802, 113 Iowa, 595.

The term "conditional sale," and not the term "bailment," is correctly applied to the relation arising by a contract by a manufacturer to construct a refrigerating plant in a brewery on foundations to be furnished by the brewer, with a stipulation that the title is not to pass until the entire purchase price has been paid; and therefore, while the sale is valid between the parties, the machinery and plant are subject to be sold on execution against the brewer. *Ott v. Sweatman*, 31 Atl. 102, 106, 166 Pa. 217.

Where one agrees with another to send him goods for the latter to sell or return, it is often difficult to determine whether the contract constitutes a sale or a bailment. The contract may not constitute a sale, but be a bailment, with an option on the part of the bailee to buy. Or it may be a sale with an option on the part of the vendee to return the goods; such a contract being termed a "contract of sale or return." An option to purchase if he like is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other, the property passes at once, subject to the right to rescind and return. *Hunt v. Wyman*, 100 Mass. 198. If the owner of goods deliver them to another with the understanding that there is to be no sale until the happening of a certain condition, this is a bailment, and the title does not pass until the condition happens. If the goods be delivered with the understanding that under certain circumstances the vendee may return them, this is a conditional sale, and title immediately passes, although under the contract the vendee may have the right to rescind and return the goods. In the one case the condition is precedent, in the other subsequent. Under a contract of sale or return, the title passes and remains in the vendee until the option to return is exercised. A bailee with an option to purchase does not become a purchaser until he exercises such option. *Furst Bros. v. Commercial Bank*, 43 S. E. 728, 729, 117 Ga. 472.

#### **Consignment for sale.**

An assignment of goods to the care of another, to be shipped to a foreign country and there sold to the best advantage, any loss resulting from sale below the invoice price to be borne by consignors, and profits

in excess thereof to be equally divided, consignee to bear expenses of shipment, and to return free of charge any goods not sold, is not a contract of sale or return, but a bailment. *Sturm v. Boker*, 14 Sup. Ct. 99, 104, 150 U. S. 312, 37 L. Ed. 1093.

An agreement was made to sell two horses, and conditioned that they be kept in good condition, that the vendee should turn over \$250 to the vendor with one-half received in addition to such sum, not to exceed \$25, or that they should become the property of the vendee on payment of \$275, and further, if not sold within a certain time, should be delivered to the vendor in good condition and without any charge for keep. It was held that such contract was a bailment for safe-keeping, and not an absolute sale. *Middleton v. Stone*, 4 Atl. 523, 526, 111 Pa. 589.

#### **Denial of bailor's title.**

"The right of a bailee to set up title in a third person as against the claim of his bailor has been much considered. It is said that neither a warehouseman nor a wharfinger can deny the right of the person from or for whom he receives the property; and this rule applies to all cases where the bailee seeks to avail himself of the title of a third person for the purpose of keeping the property himself from the bailor." *Western Transp. Co. v. Barber*, 56 N. Y. 544, 552.

#### **Deposit.**

See "Deposit."

#### **May be implied.**

A bailment is not always accompanied by a contract, expressed or implied, and in the absence of it the law imposes duties which the bailee cannot neglect without liability; and such duty consists in the restitution of the bailed goods. *State v. Chew Muck You*, 25 Pac. 355, 356, 20 Or. 215.

The obligation of a bailee to fulfill the trust need not be actually expressed, but may be implied only; thus where the defendant received \$10 from a justice of the peace, the money being collected by the justice as fees, and given to defendant to pay to the county treasurer, of both of which facts he had knowledge, defendant was the bailee of the money; there being an implied obligation on the part of defendant to deliver the money to the county treasurer. *Goodwyn v. State* (Tex.) 64 S. W. 251, 252.

A bailment arises by implication, as where one finds lost goods and becomes a bailee by the act of finding. *Phelps v. People*, 72 N. Y. 334, 358.

#### **Manufacture of flour.**

A bailment of wheat for the purpose of being converted into flour for the use of

the bailor is called in the books "*locatio operis facienda*," and undeniably exists in the case of a single bailment, and where the flour of the same wheat is to be received in return. *Slaughter v. Greer* (Va.) 1 Rand. 3, 9, 10 Am. Dec. 488.

#### Money paid by mistake.

A "bailment" may be defined as a delivery of personal property to another for some purpose upon a contract, expressed or implied, that such purpose shall be carried out. Money paid by a bank by mistake to defendant for more than his check called for is not a bailment. *Fulcher v. State*, 25 S. W. 625, 32 Tex. Cr. R. 621.

#### Sale distinguished.

If property be delivered to another under a contract that another thing shall be returned, there is a sale, while if the identical thing itself is to be returned, it is a bailment. *Marsh v. Titus* (N. Y.) 6 Thomp. & C. 29, 31.

The distinction between bailment and sale is not difficult of ascertainment, if due regard be had to the elements peculiar to each. In bailment the identical thing delivered is to be restored. In a sale there is an agreement, express or implied, to pay money or its equivalent for the thing delivered, and there is no obligation to return. *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093. The bailee may, however, by contract, enlarge his common-law liability without converting the bailment into a sale. The test would seem to be, has the sender the right to compel the return of the thing sent, or has the receiver the option to pay for the thing in money? In *re Galt* (U. S.) 120 Fed. 64, 67, 56 C. C. A. 470.

If a thing is delivered by one party to another, and the identical thing delivered is to be returned, it is a "bailment," and there is no transfer of title; but if the one to whom it is delivered may return another thing of the same kind, or an equivalent in the form of money, or otherwise, it will ordinarily constitute a "sale," and effect a change of title. *Scott Mining & Smelting Co. v. Shultz & Clary*, 73 Pac. 903, 904, 67 Kan. 605.

A recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed; on the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, the title to the property is changed, and the transaction is a sale. *Lafin & Rand Powder Co. v. Burkhardt*, 97 U. S. 110, 116, 24 L. Ed. 973; *Sturm v. Boker*, 14 Sup. Ct. 99, 104, 150 U. S. 312, 37 L. Ed.

1093; *Backus v. Lawbaugh* (Iowa) 86 N. W. 298, 299.

#### Storage of grain.

The distinction usually drawn between a bailment and a sale is that in the former the subject of the contract, although possibly in an altered form, is to be restored to the owner, while in the latter there is no obligation to return a specific thing; the party receiving it being at liberty to return some other thing of equal value for it. To meet the apparent exigencies of commerce the rule was somewhat extended in *Sexton v. Graham*, 53 Iowa, 181, 4 N. W. 1090, so that where grain is stored with the understanding that it may be mixed with other grain of like quality and kind, and the warehouseman may buy and mix his own therewith, and ship and sell therefrom, the owner does not loose his title to his proportionate share of the grain, even though the identity of the entire mass has changed through additions and subtractions. *Backus v. Lawbaugh* (Iowa) 86 N. W. 298, 299.

It is well settled that where a warehouseman has received grain on deposit for its owner in a common granary, where it is mingled with other grain in such receptacle, to which from day to day other grain of various owners of like kind and quality is added, and from which from time to time sales of grain are made, and the warehouseman keeps constantly on hand grain of the quality received, prepared for delivery on call to all depositors, the contract is a "bailment," and not a sale. *Potter v. Mt. Vernon Roller Mill Co.*, 73 S. W. 1005, 1006, 101 Mo. App. 581.

#### Voluntary assumption of custody.

A "bailment" implies the delivery of a chattel, and to subject one to liability as a bailee. It is a constituent that he has voluntarily assumed or retained the custody of the chattel alleged to have been bailed. The manager of a theater is not the bailee of the overcoat of the patron who hangs it on a hook in a box occupied by him while witnessing a play. *Pattison v. Hammerstein*, 39 N. Y. Supp. 1039, 1040, 17 Misc. Rep. 375.

#### BAILMENT FOR HIRE.

See "Contract of Hiring."

"A bailment for hire is a contract in which the bailor agrees to pay an adequate recompense for the safe-keeping of the thing intrusted to the custody of the bailee, and the bailee agrees to keep it, and restore it on the request of the latter, in the same condition substantially as he received it, unless it should be impossible to do so by reason of its injury, loss, or destruction from causes for which he is not responsible. If the restoration of it to the owner or bailor has be-

come impossible from any cause, it lies with the bailee to show it, for it is to be assumed that the one who has had the control and custody of the property is better able to account for its loss or injury than the other. If a pipe of wine, placed on storage, is returned to the owner half empty, or if goods intrusted to a warehouseman, who is paid for his care and trouble, are delivered materially damaged or injured, it is absurd to say that the owner must bear the loss, unless he can show how it occurred. It is sufficient for him to show that the property intrusted to the safe-keeping of the warehouseman had not been restored to him on demand, or has been returned injured or diminished in quantity." *Arent v. Squire* (N. Y.) 1 Daly, 347, 356.

## BAILOR.

The person who delivers personal property to another to be held in bailment is called the "bailor." He is the one who places the thing in trust. *McGee v. French*, 27 S. E. 487, 488, 49 S. O. 454.

## BAKER.

Pub. St. c. 98, § 2, forbids keeping open one's shop on the Lord's day, or doing any manner of labor, business, or work, except works of necessity or charity, and as amended by St. 1880, c. 82, provides that the section shall not apply to sales by bakers of bread and other articles of food usually dealt in by them between certain hours. Held, that "bakers" includes those whose occupation is to bake bread and other articles of food, and does not mean those who deal only in the products of bakers. "One keeping a shop for the purpose of selling bread and pastry which he did not make, or cause to be made, but bought from time to time from other parties, is not a baker." *Commonwealth v. Crowley*, 14 N. E. 459, 460, 145 Mass. 430.

## BAKERY.

A bakery is generally called a "store" or "shop," as is any other room or building where any kind or article of traffic is sold. The American word "store" applies to the building; the name more strictly belonging to the collection of wares within it. *Richards v. Washington Fire & Marine Ins. Co.*, 27 N. W. 586, 588, 60 Mich. 425.

The term "bakery property," as used in a mechanic's lien certificate in describing the property, includes not only those parts of the building in which the process of baking is carried on, but also those parts which are used for storage, distribution, or other purposes connected with the business. *York v. Barstow*, 55 N. E. 846, 847, 175 Mass. 167.

## Fixtures included.

In a referee's report finding that the defendant purchased from the plaintiffs a bakery and stock of groceries, agreeing to pay therefor the cost price, the term "bakery" should be construed to include and embrace all fixtures belonging thereto and forming a part thereof. *Neib v. Hinderer*, 4 N. W. 159, 160, 42 Mich. 451.

The term "bakery," in a lease of property to be used as a bakery, imports that the lessee shall acquire such appurtenances as usually belong to and are necessary to the carrying on of the bakery business; including the use of water. *Gans v. Hughes*, 14 N. Y. Supp. 930, 931.

## BALANCE.

See "Net Balance."

The term "balance" has in law no technical signification. It is a word, however, which is in popular use. In its literal import it is perhaps only applicable to weights, but is frequently in a figurative sense applied to other things. In this sense we speak of a balance of an account, and we may no doubt, in the same sense, and with the same propriety, speak of the balance of a tract of land. But the word when thus used does not signify the whole thing of which we speak, and always implies that there is something to be deducted or subtracted, and it is only applied to signify what remains after the deduction or subtraction is made. The term "balance" is never used to signify any precise quantity or definite proportion of a thing. It is equally applicable to a small as to a large quantity or proportion. *Taylor v. Taylor*, 10 Ky. (3 A. K. Marsh.) 18, 19.

"Balance," as used in Hutchinson's Code, p. 506, § 133, declaring that the guardian shall not be chargeable with interest on any balance of money in his hands, means simply the balance that may remain in his hands of the annual income of the ward over and above disbursements for the education and maintenance of the ward. *Brown v. Mullins*, 24 Miss. (2 Cushm.) 204, 206.

## Of accounts.

As claim, see "Claim."

A balance is the difference between the debits and credits of an account. *Loeb v. Keyes*, 51 N. E. 285, 286, 156 N. Y. 529.

In any sense in which the term "balance" is used in reference to an amount stated between guardian and ward, it would properly express the amount due by the guardian on his account whether such amount was composed of money received as a part of the estate of the ward, or as the income of his property. *Reynolds v. Walker*, 29 Miss. (7 Cushm.) 250, 266.

In the account of an officer, specifying a certain sum as the balance from last year, "balance," when taken by itself, refers "to the state of the account, and rather shows the amount necessary to make the account even than the actual possession or residue at that time of the sum named. It shows an indebtedness and nothing more, and is not inconsistent with evidence that the item rose from the transaction of the previous year." *Kellum v. Clark*, 97 N. Y. 390, 394.

"There is a broad distinction between an account and the mere balance of an account, resembling the distinction in logic between the premises of an argument and the conclusion drawn therefrom. A balance is but the conclusion or result of the debit and credit sides of an account. It implies mutual dealings, and the existence of debt and credit, without which there can be no balance." *McWilliams v. Allan*, 45 Mo. 573, 574.

St. 6 & 7 Wm. IV, c. 120, § 22, excepting out of the jurisdiction of the court of requests any debt for "any sum being the balance of an account originally exceeding the sum of five pounds," applies to cases where credit is given at one time for an amount exceeding five pounds, either in one or different sums, though afterwards the credit might have been reduced under that sum by part payment before the commencement of the suit; and the act did not intend to deprive the court of jurisdiction whenever the plaintiff should claim on the credit side of his account against the defendant items altogether exceeding five pounds, which were proved to that amount originally in the first instance before the defendant would go into his case of payment. *Pope v. Banyard*, 3 Mees. & W. 424, 430.

A balance is not an account, but the result of an account. It bears to an account the same relation that a conclusion does to the premises of a syllogism. *Thillman v. Shadrick*, 16 Atl. 138, 140, 69 Md. 528.

The phrase a "balance due on account" discloses no items. *Turgeon v. Cote*, 33 Atl. 787, 788, 88 Me. 108.

A "balance due upon an account" implies an account between two parties in which the amount of the items upon one side of the account are deducted from the amount of the items on the other side, and the balance thus ascertained. *Millet v. Bradbury*, 41 Pac. 865, 866, 109 Cal. 170.

#### Of estate.

The word "balance," as used in a bequest of the "balance of testator's estate," means after excluding what has been before given. It is a residuary clause. The word operates as a residuary clause. Any word importing residue so operates. The word when taken alone in a will imports that the

beneficiary shall get what is left after legacies already given and debts. Where it is manifest that the intent was that the legacies should be paid at all events, the implication is that the residuary devisee or legatee shall only have the remainder after satisfaction of the previous legacies. *Lynch v. Spicer*, 44 S. E. 255, 53 W. Va. 426 (citing *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852).

"Balance," as used in a will devising the balance of testator's estate, is to be construed as meaning the remainder of his estate. "It may be true that the word 'balance' in the sense of 'residue' or 'remainder' is not considered elegant English, but in this country it is very often used in that sense, and there is no difficulty in understanding what the testator meant by the phrase 'balance of my estate.' In one of his definitions Worcester gives the sense in which it is understood, 'remainder of anything, as the balance of an addition.'" *Lopez v. Lopez*, 23 S. C. 258, 269.

Where, after the making of certain specific bequests, a will provided that the balance should be divided, the phrase "balance to be divided" was equivalent to "residue be divided." *Davis v. Hutchings*, 15 Ohio Cir. Ct. R. 174, 177, 8 O. C. D. 52, 54.

Where a testator makes a bequest to legatees and then disposes of the balance of the estate in a residuary clause commingling real and personal property, the legacies will be charged upon the real estate so devised, as the word "balance" means the same as "residue." *Brooks v. Brooks*, 65 Ill. App. 326, 331.

A will, giving to testator's wife the balance of all his property, real, personal, and mixed, after certain specific devises, leaves to her the undisposed portion of his farm, and every article of personal property as specifically as if enumerated and described at length. He does not leave her a balance in the sense that she is to have what remains after payment of debts and legacies. She was to have the balance distinct and specific after cutting off the two fields specifically devised. The devise was not a residue of an estate, it was a specific devise of the land, and a bequest of the personality capable of absolute certainty the day after the testator's death. There was no room for the presumption that by the use of the word "balance" the testator meant to give his wife the residue of his estate after deducting the devises specified, debts not known, and other charges. In *re Pittman's Estate*, 38 Atl. 133, 134, 182 Pa. 355.

Where testator provided that after the payment of his lawful debts the residue of his estate, real and personal, should go to his wife, together with certain described lots, subject to the payment of a certain debt to C., and that the "balance of my estate" should go to his wife during her natural life, with the power to will one-half of the

estate to whom she chose, the words "balance of my estate" should be construed to refer to that land described specifically; and hence the widow's interest, which under the first part of the will alone would have been a fee, was limited by the concluding portion to a life estate in the land, with power to dispose of one-half the value by will. *Lomax v. Shinn*, 44 N. E. 495, 496, 162 Ill. 124.

Testator in his will gave certain annuities and pecuniary legacies, and made a devise of part of his real property, and also provided for the payment of his debts, after which he made the following provision: "It is my will that none of these legacies be paid until after the death of my brother G. W. and wife E., and after their death the balance of my estate, if any, to be equally divided between R. L., S. W., R. W., T. L. J., and A. B." Held, that the phrase "balance of my estate" means the balance of testator's estate, both real and personal, for the reason that testator had devised away part of the real estate and also part of his personalty, and therefore must be presumed to have had his real property in view as well as the personal property when he made the residuary clause. *Cook v. Lanning*, 40 N. J. Eq. (13 Stew.) 369, 372, 3 Atl. 132.

A will, directing the conversion of all the testator's real estate into money, and afterwards providing specific bequests and for the disposition of the "balance of my estate," is to be construed as meaning testator's entire estate after the payment of the specific bequests, including the proceeds of the sale of his real property. *Welsh v. Crater*, 32 N. J. Eq. (5 Stew.) 177, 180.

A will, giving to testator's brother all his household goods, books, clothing, furniture, etc., that he might desire, the "balance of the personal effects," to be divided among the others named, includes all of the testator's personal effects except such particular personal effects of a designated class as might have been taken by the brother under the will. In *re Reimer's Estate*, 28 Atl. 186, 188, 159 Pa. 212.

A will, which, after bequeathing most of the personal property, provided that a sum in excess of the remaining personalty might be paid out of the balance of the estate, meant to charge the payment thereof on the realty, and was not equivalent merely to a residuary clause as to the personalty. *Roman Catholic German Church v. Wachter* (N. Y.) 42 Barb. 43, 50.

#### Of means.

In construing a clause of a will in which testatrix directed that "I want the balance of my means to go to the African Kansas Freedmen's Association," the court says that "from the beginning of the second clause of the will, where the testatrix orders a sale of the personal property, down to the end of the pro-

vision in question, real estate is not mentioned, and it is apparent from the language used that testatrix had no reference to any property except money or personal property. Had the testatrix in the first part of the second clause of the will used language which might include real estate, and then said, 'and I want the balance of my means to go,' etc., there might be some ground for holding that the words 'balance' and 'means' referred to real estate, but such was not the case." *Williams v. Johnson*, 112 Ill. 61, 67, 1 N. E. 274.

#### BALANCE DUE.

The balance due on a general account by a correspondent is, in mercantile language, the fund found in his hands. *Parsons v. Armorer*, 28 U. S. (3 Pet.) 413, 430, 7 L. Ed. 724.

Where a compromise of debts, interest, and costs had been made, a devise by the debtor, directing the payment of the "balance due" on the claims compromised, will include the balance of the debt, interest, and costs. *Appeal of Sinclair*, 9 Atl. 637, 638, 116 Pa. 316.

In a statute limiting the jurisdiction of justices in action for a balance due, the term "balance due" means the sum found due by the creditor and debtor after an actual statement and settlement of their accounts. *Barker v. Baxter* (Wis.) 1 Pin. 407, 410.

In Rev. St. 1898, § 3572, giving a justice of the peace jurisdiction of actions on contract where the balance due does not exceed \$200, it was claimed that "balance due" meant a balance agreed on by the parties, and hence an action cannot be maintained in a justice's court where there was no such agreement, and the case of *Barker v. Baxter* (Wis.) 1 Pin. 407, is cited in support. But the court said: "It is true that it was held in that case, by the territorial Supreme Court, that the words 'balance due,' in an action somewhat similar to the present one, must receive their technical meaning as a balance found due by debtor and creditor upon settlement of accounts, and not their meaning according to common parlance. This construction was followed in *Woodward v. Garner* (Wis.) 2 Pin. 28, but we have been unable to find that it has been directly approved or reaffirmed in any subsequent cases in this court. If it were a rule of property, we should feel that we could hardly disturb it now, but it is not. We think it has been the universal practice to treat the words as used in their ordinary and common signification, namely, as meaning the remainder after deducting proper credits." *Prairie Grove Cheese Mfg. Co. v. Luder*, 90 N. W. 1085, 1086, 115 Wis. 20.

#### BALANCE OF PROBABILITIES.

"Balance of probabilities," as used in an instruction that the burden of proof was on

the plaintiff, and that the burden would be sustained if on the whole proof there was a preponderance of evidence, that is to say, a balance of probabilities of the case in his favor, has no well-settled or clearly defined meaning. It is not equivalent to the words "preponderance of proof." *Haskins v. Haskins*, 75 Mass. (9 Gray) 390, 393.

### BALANCE SHEET.

A "balance sheet," as that term is uniformly used by bookkeepers and business men, is a paper which shows a summation or general balance of all accounts, but not the particular items going to make up the several accounts, and in that way differs essentially from an itemized account, which embraces a full and complete statement of all the disbursements and receipts, showing from what sources they were derived, and for what and to whom the disbursements or payments were made. *Eyre v. Harmon*, 28 Pac. 779, 780, 92 Cal. 580.

### BALANCED.

"'Balanced' is an ambiguous word. It is sometimes used to denote an ascertained state of accounts, but more often, in the sense of all being cleared off and adjusted between the parties." *Finney v. Tootell*, 5 Man. G. & S. 504, 509.

### BALDIOS O REALENGOS.

Propios, in Mexican laws, were the productive lands, the use of which had been set apart to several municipalities for the purpose of defraying the charges of their respective governments. Escribiche, Dict., words "Propios y Arbitrios." The vacant lands—that is to say, the unappropriated royal domain—are designated as "baldios o realengos." *Sheldon v. Milmo*, 36 S. W. 413, 415, 90 Tex. 1.

### BALE.

A "bale of cotton" means a certain number of pounds of cotton, and not a package of so many cubic feet. *Bonham v. Railroad Co.*, 16 S. C. 633, 634.

Cotton is the staple article of our commerce, and the term "bale" conveys to the mind a distinct idea of a parcel or quantity packed together in a particular form; and they may be of different weights, different qualities, and, of course, of different value. *Penrice v. Cocks*, 2 Miss. (1 How.) 227, 229.

### BALLAST.

There is considerable analogy between "dunnage" and "ballast." Ballast is used for trimming the ship to bring it down to a draft of water proper and safe for sailing.

Dunnage is placed under the cargo to keep it from being wet by water coming into the hold, or between the different parcels to keep them from bruising and injuring each other. *Great Western Ins. Co. v. Thwing*, 80 U. S. (13 Wall.) 672, 674, 20 L. Ed. 607.

### BALLOT.

See "Double Ballot"; "Joint Ballot"; "Quad Ballots"; "Voting by Ballot"; "Written Ballots."

"Ballot," as used in Const. art. 8, § 2, providing that the voting for general officers shall be by "ballot," should not be construed in its primary meaning, which signifies a little ball, but with the broader meaning, which has been substituted for the word by reason of the change in the mode of voting from little balls to that of a paper vote. *Opinion of the Justices*, 36 Atl. 716, 19 R. I. 729, 36 L. R. A. 547.

The word "ballot" is of French origin, and has been adopted in the English language without any change in its meaning, so far as the authorities give us light. In the standard French dictionaries it is defined to mean the act of voting by balls or tickets by putting the same into a box or urn; secret voting by means of ball or ticket. In *Worcester's Dictionary* it is defined as a secret method of voting at election. An able essay in the *Encyclopedia Americana* presents the word "ballot" as expressing the idea of secret voting as against viva voce or public voting. *State v. Shaw*, 9 S. C. (9 Rich.) 94, 133.

A ballot is a ticket bearing the name of a person to be voted for at an election, which is deposited in a receptacle provided for the purpose in such a way as to secure to the elector the privilege of complete and inviolable secrecy in regard to the person voted for. *Brisbin v. Cleary*, 1 N. W. 825, 26 Minn. 107.

"Ballot" means, in the election of public officers, a paper so prepared by printing or writing thereon as to show the voter's choice, and is so used in Const. art. 3, § 3, providing that all votes shall be by ballot. *State v. Anderson*, 76 N. W. 482, 485, 100 Wis. 523, 42 L. R. A. 239.

"Ballot," as used in Code, c. 3, § 34, providing that the several ballots to be voted at any election shall be printed side by side on the same sheet of paper—the Democratic ballot on one side thereof, and the Republican ballot on the other, and the other ballots, if any, between them, with one black line between each of them—and all persons or candidates voted for by any voter shall be those whose names are printed or written as aforesaid thereon, means the whole column of candidates to be voted for, and does not mean the separate offices and candidates to be voted for; a ballot being a single

piece of wide paper, containing the names of all the persons for whom the voter wishes to vote, and the designation of the office he desires each of them to fill, without any other name on it, or any mark save those sanctioned by the act, the names of the poll clerks on the back of it and the defaced columns on the face of it. *Daniel v. Simms*, 89 S. E. 690, 692, 49 W. Va. 554.

A ballot is any printed or written ticket used in voting. The ballot is identical with the piece of paper used by the voter, and means the same as "ballot paper," as used in *Sess. Acts 1893*, § 5, providing for the punishment of any person personating another person by applying for a ballot paper in his name, so that an indictment for attempting to vote by applying for a ballot in the name of another person is not defective. *State v. Timothy*, 49 S. W. 499, 500, 147 Mo. 532.

"A ballot is a bit of paper having printed or written thereon the designation of an office, the name of a person to fill it, and that the person casting it has a right to do so in secrecy." *Taylor v. Bleakley*, 55 Kan. 1, 14, 39 Pac. 1045, 1049, 49 Am. St. Rep. 233, 25 L. R. A. 683.

A "ballot," as used in *Const. art. 2, § 13*, providing that all elections by the people shall be by ballot, is a piece of paper or other suitable material, with the name written or printed upon it of the person to be voted for, and the term "ballot" implies secrecy. The distinguishing feature of voting by ballot is that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy in regard to the person for whom he votes. *Williams v. Stein*, 38 Ind. 89, 92, 10 Am. Rep. 97.

A ballot is a paper ticket containing the names of the persons for whom the elector intends to vote, and designating the office to which each person so named is intended by him to be chosen; that is, it is a single piece of paper, containing the names of the candidates, and the offices for which they are running. *People v. Holden*, 28 Cal. 123, 136.

A ballot is a ticket or scroll of paper, purporting to express the voter's choice, given by the voter to the officer or person holding an election, to be put into the ballot box. *Shannon's Code Tenn. 1896*, § 1265.

#### As vote.

The expression of choice by or through a ballot, or by outcry, or any other particular means by which the choice of the voter may be lawfully known or communicated. *Bourland v. Hildreth*, 26 Cal. 161, 194.

#### Vote distinguished.

The word "ballot" signifies that by which the right of suffrage is exercised. It is the means by which the will is expressed, and

is distinguished from the word "vote," in that the latter means suffrage—expression of the will. *Gillespie v. Palmer*, 20 Wis. 544, 546.

While the terms "ballot" and "vote" are sometimes confused, and while they sometimes may be used synonymously, the ballot is, in fact, under our form of voting, the instrument by which the voter expresses his choice between two candidates or propositions, and his vote is his choice or election between the two, as expressed by his ballot; and when his ballot makes no choice between two candidates, or on any question, then he casts no vote for either of these candidates or on the question. *Davis v. Brown*, 84 S. E. 839, 841, 46 W. Va. 716.

The word as used in *Const. art. 4, § 13*, providing that for each judicial circuit a judge shall be elected by joint ballot of the General Assembly, is not synonymous with "vote," but it is used in its popular meaning of a secret vote. *State v. Shaw*, 9 S. C. (9 Rich.) 94, 138.

#### BALLOT BOX.

The ballot box is any receptacle provided by the officer or person holding an election for receiving the ballots, which box is to be kept locked, or otherwise well secured, until the election is finished. *Shannon's Code Tenn. 1896*, § 1266.

#### BALLOT PAPER.

The expression "ballot paper," as used in *Sess. Acts 1893*, p. 157, § 5, providing for the punishment of any person personating another by applying for a "ballot paper" in his name, means the same as ballot, so that an indictment for attempting to vote at an election by personating another person, and applying for a ballot in his name, is not defective. *State v. Timothy*, 49 S. W. 499, 500, 147 Mo. 532.

#### BALLROOM.

An indictment charging an offense to have been committed in a ballroom will be understood to mean a place where a social gathering composed of men and women were engaged in dancing, and it is not necessary that dancing was going on. *Owens v. State*, 3 Tex. App. 404, 406.

#### BALM.

The word "balm," as used in the expression "Balm of a Thousand Flowers," is certainly not a fancy phrase. It has a clear and definite meaning. In its literal and proper sense, as distinguished from its metaphorical, it means an aromatic, vegetable juice, whether extracted from trees, shrubs, or flowers. And as used for a trade label



in connection with a cosmetic, we have on every label on the bottles sold a positive assertion that the liquid inclosed is the aromatic juice of unnumbered flowers. *Petridge v. Wells* (N. Y.) 4 Abb. Prac. 144, 149; *Id.*, 13 How. Prac. 385, 390.

## BALUSTRADE.

Gen. St. c. 19, § 13, in authorizing cities to make rules and regulations for the erection and maintenance of balustrades or other projections upon the roofs of buildings, as the safety of the public requires, would seem to refer to those additions or structures upon the roof which might under certain circumstances render a highway unsafe for travelers. *Cushing v. City of Boston*, 128 Mass. 330, 331, 35 Am. Rep. 383.

## BAMBOO.

According to the various dictionaries and encyclopedias, "bamboo" is a species of grass, and bamboo blinds and scrolls are properly dutiable as manufactures of grass, under Tariff Act Oct. 1, 1890, par. 460. *China & Japan Trading Co. v. United States* (U. S.) 66 Fed. 733, 734.

Split bamboo, cut in lengths intended for use in making brooms, is entitled to free entry as bamboo, rattan, and reed unmanufactured, under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 700, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689]. *R. Brauss & Co. v. United States* (U. S.) 120 Fed. 1017.

## BAND.

"A 'band' means a company of persons—perhaps a company of armed persons—but a petition stating that oxen were captured by a hostile band of Indians does not show the organization of the Indians, if there was any." *Guttman v. United States*, 85 U. S. (18 Wall.) 84, 87, 21 L. Ed. 816.

A "band" means a company of persons—perhaps a company of armed persons. An allegation in a petition that an army transportation train "was attacked by a band of hostile Indians," and the claimant's oxen "were captured by the said band of hostile Indians," does not entitle the claimant to relief under Act March 3, 1849, providing that any person who has sustained damage by the capture by an enemy shall be paid therefor, since the words "hostile band" may imply merely marauders and plunderers, and not a tribe at war with the United States. *Guttman v. United States* (U. S.) 9 Ct. Cl. 60, 67.

In Act March 3, 1891, c. 538, 26 Stat. 851 [U. S. Comp. St. 1901, p. 758], giving the Court of Claims jurisdiction over all claims for property taken or destroyed by Indians

belonging to any band in amity with the United States, "band" means a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design. While a "band" does not imply the separate racial origin characteristic of tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. Whether a collection of marauders should be treated as a band whose depredations are not covered by the act may depend not so much upon the numbers of those engaged in the raid, as upon the fact whether their depredations are part of a hostile demonstration against the government or settlers in general, or are for the purpose of individual plunder. *Montoya v. United States*, 21 Sup. Ct. 358, 359, 180 U. S. 261, 45 L. Ed. 521.

## BANISHMENT.

"Banishment" was first known in England as abjuration, where the party accused fled to a sanctuary, confessed his crime, and took an oath to leave the kingdom and not return without permission. This was not as a punishment, but as a condition of pardon. The practice of granting conditional pardons is sustained by the principles of the common law, and therefore the condition of such a pardon may be banishment from the United States. *People v. Potter* (N. Y.) 1 Parker, Cr. R. 47, 54.

## BANJO.

A banjo is described as a musical instrument of the guitar class, having a neck with or without frets, and a circular body covered in front with tightly stretched parchment. It has from five to nine strings, of which the melody string—the highest in pitch, but placed outside of the lowest of the others—is played by the thumb of the performer. As in the guitar, the pitch of the strings is fixed by stopping them with the left hand, while the right hand produces the tone by plucking or striking. *Dobson v. Cubley*, 149 U. S. 117, 118, 13 Sup. Ct. 796, 37 L. Ed. 671.

## BANK.

A mound, pile, or ridge of earth, raised above the surrounding level; hence anything shaped like a mound or ridge of earth; as a bank of clouds; a bank of snow. Webster.

### BANK (In Commercial Law).

See "Incorporated Bank"; "National Bank"; "Savings Bank."

All banks, see "All."

Any bank, see "Any."

Circulation of, see "Circulation."

Other bank, see "Other."

The sense in which the words "bank or banks" are used occur every day in conversation, and are understood by every one. But the sense in which they are intended to be used is determined by their connection with what is said besides. When we speak of an act to be done by a bank or banks, we mean an act to be done by those who have the authority to do it. If it be an act within the franchise of the bank, or the ordinary power of the banking contract, and it is done by the president and the directors, or by their agent, we say the bank did it. If, however, an act is to be done relative to the institution, by which its charter is to be in any way changed, the stockholders must do it, unless another mode has been provided by the charter. In one sense, and after it has been done, we may say the bank did it, but only so because what the stockholders had done became a part of the institution, which it was not before. *Gordon v. Appeal Tax Court*, 44 U. S. (3 How.) 133, 147, 148, 11 L. Ed. 529.

The term "bank" implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safe-keeping until the depositor should see fit to draw it out for use. But the business, in the progress of events, was extended, and bankers assumed to discount bills and notes, and to loan money on mortgage, bond or other security, and at a still later period to issue notes of their own, intended as a circulating currency, and as a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two, or frequently all three, of these functions; but it is still true that an institution prohibited from exercising any more than one of those functions is a bank, in the strictest commercial sense. The fact that a corporation receiving money on deposit loans it in the name of the depositors, instead of its own name, does not prevent the business from constituting a banking business. So, where a corporation received money, invested it for the depositors by loaning it in their names, and collected rents and interest on the loans, which were subject to check by those for whom they were collected, and for which it charged a commission to both borrower and lender, it was held that the corporation was a bank. *Western Inv. Banking Co. v. Murray* (Ariz.) 56 Pac. 728, 731.

A bank is a place where money is laid up, to be called for occasionally. *Parker v. Marchant*, 1 Younge & C. Ch. 290, 300.

The term "bank" means any moneyed corporation authorized by law to receive deposits of money or commercial paper, and to make loans thereon. *Hobbs v. National Bank of Commerce* (U. S.) 101 Fed. 75, 76, 41 C. C. A. 206.

Banks are financial institutions regulated by law, one branch of whose business is to receive money on deposit, subject to check; the money deposited becoming their property, to be used subject to those rules of law or custom which limit the amount used so that a sufficient fund may always be on hand to meet the checks of the depositors. *Cannon v. Apperson*, 82 Tenn. (14 Lea) 553, 583.

A bank is an institution for the custody and loan of money, the exchange and transmission of the same by means of bills and drafts, and the issuance of its own promissory notes, payable to bearer, as currency, or for the exercise of one or more of these functions. *Kiggins v. Munday*, 52 Pac. 855, 856, 19 Wash. 233.

Banks are establishments intended to serve for the safe custody of money, and to facilitate its payment by one individual to another, and sometimes for the accommodation of the public with loans. *Niagara County Bank v. Baker*, 15 Ohio St. 68, 87.

A bank is an institution of a quasi public character. It is chartered by the government for the purpose, inter alia, of holding and safely keeping the moneys of individuals and corporations. It receives such moneys on an implied contract to pay the depositors' checks on demand. *American Nat. Bank v. Morey*, 69 S. W. 759, 760, 24 Ky. Law Rep. 658, 58 L. R. A. 956 (citing *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778).

"Bank" is defined by Burrill as a house or place where business is carried on; and by Bouvier as a place for the deposit of money; and by Wharton as a place where money is deposited for the purpose of being let out at interest, returned by exchange, disposed of to profit, or to be drawn out again as the owner shall call for it; and by Abbott as an establishment for the custody of money, or for the loaning and investing of money, or for the issue, exchange, and circulation of money, or for more than one or all of these purposes. The term is applied to corporations or associations authorized to perform such functions, and to the body of directors or officers authorized to manage its operations, and to the office or place where its business is conducted. *Rominger v. Keyes*, 73 Ind. 375, 377.

Bouvier, in defining a "bank," says: "A place for the deposit of money; an institution, generally incorporated, authorized to receive deposits of money, to lend money and issue notes, usually known by the name of 'bank notes,' or to perform one or more of these functions. Banks are said to be of three kinds—deposit, discount, and circulation." Speaking in a commercial view, Bouvier is doubtless correct, but one of the chief characteristics of a bank, as that term

is ordinarily understood, is that it is a place for the deposit of money. The powers of a bank are well stated in *Oulton v. German Savings & Loan Society*, 84 U. S. (17 Wall.) 109, 117, 21 L. Ed. 618. Banks, in a commercial sense, are of three kinds—of deposit, of discount, and of circulation. Strictly speaking, the term "bank" implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Modern bankers frequently exercise any two, or even all three, of these functions; but it is still true that an institution, by exercising any one, or more than one, of these functions is a bank, in the strictest commercial sense. *Reed v. People*, 125 Ill. 592, 596, 18 N. E. 295, 1 L. R. A. 324.

Morse, in his work on Banks (3d Ed.) § 2, defines a bank as "an institution, usually incorporated, with power to issue its promissory notes, intended to circulate as money, known as 'bank notes,' or to receive the money of others on general deposit; to form a joint fund that shall be used by the institution for its own benefit for one or more of the purposes of making temporary loans and discounts, of dealing in notes, foreign and domestic bills of exchange, coin, bullion, credits, and the remission of money, or with both these powers, and with the privilege, in addition to these basic powers, of receiving special deposits, and making collections for the holders of negotiable paper, if the institution sees fit to engage in such business." As a further definition, he says: "Practically a bank is a place where deposits are received and paid out on check, and money is loaned on security. If the institution has the additional power of issuing its promissory notes to circulate as money, it is called a 'bank of issue.'" *Hamilton Nat. Bank v. American Loan & Trust Co. (Neb.)* 92 N. W. 189, 190; *Auten v. United States Nat. Bank*, 19 Sup. Ct. 628, 635, 174 U. S. 125, 43 L. Ed. 920; *State v. Comptoir National D'Escompte de Paris*, 26 South. 91, 96, 51 La. Ann. 1272. See, also, *State v. Franklin County Savings & Trust Co.*, 52 Atl. 1069, 1070, 71 N. H. 246.

The Century Dictionary, in defining "banks," classifies them under four distinct heads, viz., "national banks, private or state banks, loan and trust companies, and savings banks." In the case of *Savings Bank v. Field*, 70 U. S. (3 Wall.) 495, 18 L. Ed. 207, Justice Clifford, in defining a "bank," says: "Banks, in a commercial sense, are of three kinds: First, of deposit; second, of discount; third, of circulation. All or any two of these functions may be, and frequently are, exercised by the same institution, but there are still banks of deposit without authority to make discounts or issue a circulating medium." In *Oulton v. German Savings & Loan Soc.*, 84 U. S. (17 Wall.) 109, 21 L. Ed. 618, it is said: "Associations engaged in money transactions, whether incorporated or not, having a place of business where cred-

its are opened by the deposit or collection of money or currency, subject to be paid out or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, are regarded as banks." From the definitions and authorities quoted, it is quite apparent that to buy and sell commercial paper, to make and negotiate loans—that is, to discount commercial paper, to receive money to be transferred to and paid at other places, to buy and sell exchange upon other cities in this and foreign countries, to receive money on deposit, and to pay the same out upon checks or orders—are each banking functions. *Hamilton Nat. Bank v. American Loan & Trust Co. (Neb.)* 92 N. W. 189, 190, 191.

A bank is "(1) a place for the deposit of money; (2) an association or corporation whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, and issue promissory notes payable to bearer, called 'bank notes'; (3) the building, apartment, or office where such business is transacted." Banks are of three kinds—"banks of deposit, which include savings banks, and all others which receive money on deposit; banks of discount, being those which loan money on collateral, or by means of discounts of commercial paper, and banks of circulation, which issue bank notes payable to bearer." But the same bank generally performs all these several operations. *Wells, Fargo & Co. v. Northern Pac. Ry. Co. (U. S.)* 23 Fed. 469, 471.

The word "bank," in 2 Hill's Code, p. 662, § 46, which defines burglary as an unlawful entry, with intent to commit a felony, of an office, shop, store, warehouse, malt-house, still-house, mill, factory, bank, church, school-house, railroad car, barn, stable, ship, steamboat, and water-craft, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, means any bank, without regard to whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

As used in Rev. St. 1876, p. 636, § 6, providing that notes payable "in a bank" shall be considered on a footing with bills of exchange, and shall be governed by the law merchant, "in" embodies the idea of place; and the purpose of the statute was to have the place of payment specified, so that a demand of payment might be made there, and proper notice of nonpayment given, so as to charge the indorser; and a note payable at the Indiana Banking Company

is not payable in or at a bank, within the meaning of the statute. *Rominger v. Keyes*, 73 Ind. 375, 377.

The term "bank," as used in the internal revenue act of 1864, § 110, taxing deposit banks, meant an association engaged in money transactions, whether incorporated or not, having a place of business open for deposits or for collection of money or currency, subject to be paid or remitted on draft, check, or order, or where money is advanced or loaned on stocks, bonds, bills of exchange, or promissory notes, or where stocks, bonds, bills of exchange, or promissory notes are received for sale or discount. *Oulton v. German Savings & Loan Soc.*, 84 U. S. (17 Wall.) 109, 116, 21 L. Ed. 618. See, also, *Hamilton Nat. Bank v. American Loan & Trust Co. (Neb.)* 92 N. W. 189, 190, 191.

The word "bank," as used in the negotiable instruments law, includes any person or association of persons carrying on the business of banking, whether incorporated or not. *Ann. Codes & St. Or.* 1901, § 4592; *Bates' Ann. St. Ohio*, 1904, § 3178; *Negotiable Instrument Law*, N. D. § 191; *Rev. Codes N. D.* 1899, p. 1060; *Rev. Laws Mass.* 1902, p. 562, c. 73, § 207; *Code Va. Supp.* 1898, § 2481a.

In the construction of statutes, the term "banks" shall include all incorporated banks. *Gen. St. Conn.* 1902, § 1.

The words "bank," "banker," "broker," "stock jobber," when used in the revenue act, shall be construed to include whoever has money employed in the business of dealing in coin, notes, or bills of exchange, or in the business of dealing in or buying or selling any kind of bills of exchange, checks, drafts, bank notes, promissory notes, bonds, or other writing obligatory, or stock of any kind or description whatsoever, or receiving money on deposit. *Hurd's Rev. St. Ill.* 1901, p. 1493, c. 120, § 202, subd. 3.

Every corporation, company, individual, person, or association of persons, whether authorized by law to issue notes for circulation or not, that shall keep an office, counting house, or other place for the transaction of business within the state, and shall discount, buy or sell, or exchange notes, bonds, stocks, certificates of public debt, or other evidences of debt, claims or demands, with a view of profit, shall be deemed a bank, within the meaning of the revenue act. *Ann. St. Ind. T.* 1899, § 4944.

The word "bank," whenever used in the chapter relating to banks and banking, shall include every banking, savings, or trust institution, concern, and place of business in this state receiving moneys on deposit, except national banks and concerns engaged in other lines of business, and receiving on deposit or in trust the money of their employees only. *Rev. St. Wis.* 1898, § 20231.

Within the meaning of the chapter relating to the listing of personal property for taxation, the term "bank" includes every company, association, or person not incorporated under any law of this state or of the United States, for banking purposes, who shall keep any office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit. *Bates' Ann. St. Ohio* 1904, § 2758.

#### As bank of issue.

"Banks," as used in *National Banking Act* June 3, 1864, § 41, authorizing the taxing by the state of shares of stock in such banks, but providing that the tax so imposed thereon shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the state where such national banking association is located, means banks of issue only. *Lionberger v. Rowse*, 76 U. S. (9 Wall.) 468, 473, 19 L. Ed. 721.

The words "banks or banking institutions" are confined to corporations which are authorized to issue bills or notes for circulation as currency. *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U. S. (16 How.) 416, 438, 14 L. Ed. 987.

#### Corporation receiving deposits and making loans.

A corporation formed for the purpose of receiving deposits and loaning money is not a bank, within the meaning of *Const. art. 4, § 34*, although it is called a bank, if it does not issue paper to circulate as money. *Bank of Sonoma County v. Fairbanks*, 52 Cal. 196, 198.

A corporation engaged in loaning its own money on note or mortgage is not a banking corporation. *Oregon & W. Trust Inv. Co. v. Rathburn (U. S.)* 18 Fed. Cas. 764.

#### Express company.

A corporation authorized to engage in the express business, and to draw drafts and bills of exchange or sale, and buy the same, in the course of such business, is not a bank, within *Rev. St. §§ 1924, 1889*, providing that the *Legislative Assembly of Washington* shall have no power to incorporate a bank, etc. *Wells, Fargo & Co. v. Northern Pac. Ry. Co. (U. S.)* 23 Fed. 469, 471.

#### As incorporated company.

See "Incorporated Company."

#### Loan and trust company.

"Bank," as used in an indorsement on a note made payable at any bank in a certain city, will be construed not to include a loan and trust company, which is neither a nation-

al nor a state bank. *Nash v. Brown*, 43 N. E. 180, 165 Mass. 384.

Trust companies are not "banks," in the commercial sense of that word, and do not perform the functions of banks, in carrying on the exchange of commerce. *State v. Reid*, 28 S. W. 172, 175, 125 Mo. 43 (citing *Mercantile Nat. Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895).

#### **As moneyed corporation.**

See "Moneyed Corporation."

#### **Private bank.**

As the term "bank" is used in Laws 1857, c. 416, § 2, dispensing with days of grace on all checks or bills of exchange on any bank or individual banker carrying on a banking business, it means a bank organized and doing business by virtue of the act of April 18, 1833, entitled "An act to authorize the business of banking," and does not apply to a private person operating a mere private banking house, without regard to the statute. *Kern v. Lewis*, 8 N. Y. Supp. 79, 80.

Revenue Act June 8, 1891 (P. L. 229) § 1, imposing a tax on mortgages and moneys owing by solvent debtors, whether by promissory note, or penal or single bill, bond, or judgment, except bank notes or notes discounted by any bank, means a corporation—an incorporated institution—and not a private bank. *Commonwealth v. McKean County*, 49 Atl. 982, 200 Pa. 383.

"Bank," as used in a note in which the maker promised to pay the amount contracted for at any "bank" in D., means an institution incorporated for banking purposes, and not an office kept by individuals or a co-partnership for the purpose of doing such banking business as such persons have been authorized to do. *Way v. Butterworth*, 108 Mass. 75, 76.

"Bank," as used in a promissory note by which the maker promised to pay a certain sum at any bank in Boston, cannot be construed to include or mean a private bank. *Way v. Butterworth*, 108 Mass. 509, 513.

Act March 9, 1891, entitled "An act concerning bank officers, brokers," etc., receiving deposits after insolvency, etc., embraces not only officers of incorporated banks, but all persons officiating in a banking establishment, or place doing a banking business, and hence includes private bankers doing a partnership business. *State v. Arnold*, 38 N. E. 520, 821, 140 Ind. 628.

The word "bank," in Act May 9, 1889 (P. L. 145), prohibiting the receiving of deposits with the knowledge "that \* \* \* the bank is at the time insolvent," includes in its meaning a private as well as an incorporated bank; but, when applied to the former kind of a bank, it clearly means the persons associated together in the banking busi-

ness, who, as between themselves, are legally bound to contribute proportionally to the payment of the debts, and, as between themselves and creditors, are jointly and severally liable for the same. *Commonwealth v. Hazlett*, 14 Pa. Super. Ct. 352, 374.

#### **Savings bank.**

Revenue Act June 30, 1864, § 110, providing that a tax shall be levied each month on the average amount of deposits with "any bank" or "company engaged in the business of banking," includes savings banks which receive deposits and lend the same for the benefit of their depositors, though they have no capital stock, and neither make discounts, nor issue money for circulation. *Savings Bank v. Field*, 70 U. S. (3 Wall.) 495, 511, 18 L. Ed. 207.

Generally, "when the word 'bank' is used in the statutes without words of qualification, a bank of issue is meant. This is the meaning ordinarily given to the word in the community. No one would suppose that a note payable at any bank in Boston was payable at a savings bank." *Commonwealth v. Pratt*, 137 Mass. 98, 104.

#### **As shop, store, or warehouse.**

See "Shop"; "Store"; "Warehouse."

#### **Trust company distinguished.**

The distinction between a bank and a trust company is well defined. The powers of the trust company depend upon the terms of its charter, of course, but they are not banking powers. The trust company, like the savings bank, pays interest upon deposits, but its deposits are strictly loans, not subject to check. It may not issue its own notes for circulation, nor does it buy or sell exchange in the ordinary course of its dealings. In directions that are not akin to banking, its powers are much broader, and extend outside the monetary realm into real estate transactions, trusteeships, and the conduct of property interests of all kinds. The exercise by a trust company of some of the functions of a bank does not make the company a banking institution, nor lay its officers liable to prosecutions for violating the banking laws. *Dietrich v. Rothenberger*, 75 S. W. 271, 272, 25 Ky. Law Rep. 338.

#### **BANK (In Gaming).**

See "Faro Bank."

Other gaming bank, see "Other."

"Bank," as used relative to gaming, signifies the fund which every one has a right to bet against, and into which is placed all that is won, and from which all that is lost is paid out. *People v. Carroll*, 22 Pac. 129, 131, 80 Cal. 153.

"Bank," as used in the statute making it an offense to exhibit a gaming bank for gam-

ing purposes, means the fund of money offered and ready to be staked on all bets others may make against the banker on a game which he keeps or exhibits. This element is a distinguishing feature between a bank and a gambling table. *Webb v. State*, 17 Tex. App. 205, 206.

As the term is used in the language of the gambling house, the bank "is a fund of money or property or credit offered to be staked on all bets which others may choose to make against the banker on a game which he shall exhibit to entice bets." *Commonwealth v. Burns*, 27 Ky. (4 J. J. Marsh.) 177, 180.

Pen. Code, art. 359, prohibiting the keeping of every species of gaming device known by the name of "table" or "bank," of every kind whatever, means a bank made or constructed with a view to certain specific games in which the bank is not only part of the gaming device, but is also necessary to the proper playing of the game. In other words, the bank is an essential to the game, and its peculiar construction and the manner in which it is operated form part of the game. *Whitney v. State*, 10 Tex. App. 377, 378.

The term "gaming table or bank," in a statute making it criminal to keep or exhibit any roulette or gaming table, etc., or any other gaming table or bank of the like kind, or of any other description, includes a faro bank; it being immaterial whether it is included in the term "gaming table" or the term "gaming bank." *State v. Whitworth* (Ala.) 8 Port. 434, 440.

#### **BANK (Of Stream or Pond).**

See "Fishing Banks."

The word "bank" means, among other things, an elevation of earth. *Scott v. Willson*, 8 N. H. 321, 322.

"Bank," as used in stating the principle that the right which the public enjoys in a navigable stream is generally limited by its banks, is to be construed as meaning "a steep acclivity on the side of a lake, river, or sea," but it is hardly supposable that anything that could be properly termed the bank of a stream would afford a foothold for travelers. *Hooper v. Hobson*, 57 Me. 273, 275, 99 Am. Dec. 769.

The word "bank," in a grant of land, though not strictly appropriate to land adjoining the tidal waters, is to be construed in this connection after the analogy of its use in relation to fresh-water streams—meaning, not the shore, but the land adjacent to the shore—and is a definite monument. The bank extends to the margin of the shore. *Proctor v. Maine Cent. R. Co.*, 52 Atl. 933, 937, 96 Me. 453.

The "bank" of a river or stream extends to the margin of the stream—to that point where the bank comes in contact with the stream. *Morrison v. First Nat. Bank of Skowhegan*, 33 Atl. 782, 784, 88 Me. 155.

#### **Bed of stream distinguished.**

"The banks of a river are those elevations of land which confine the waters when they rise out of the bed, and the bed is that soil so usually covered by water as to be distinguished from the banks by the character of the soil or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark or ordinary low-water mark, nor of the actual stage of water, can be assumed as a line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the absence and action of water are so common and usual and so long-continued in all ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation, as well as in respect to the nature of the soil itself. The bed of the river is a natural object, and is to be sought for not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearance they present; the banks being fast land, on which the vegetation appropriate to such land in the particular locality grows, where the bank is not too steep to permit such growth, and the bed being soil of a different character, or having no vegetation, or only such as exists when commonly submerged in water." *Howard v. Ingersoll*, 54 U. S. (13 How.) 381, 427, 428, 14 L. Ed. 189.

#### **Bed of stream included.**

A conveyance of land to the bank of the stream includes the stream itself. *Axline v. Shaw*, 17 South. 411, 413, 35 Fla. 305, 28 L. R. A. 391.

"Bank," as used in a description in a deed which gave one boundary of the land conveyed as the bank of a creek, means a grant to the margin of the stream, and does not pass title to the bed thereof. *Halsey v. McCormick*, 13 N. Y. (3 Kern.) 296, 297.

A deed defining the boundary of the land by the bank of a millpond passes no title to the land under the pond, for the bank is a defined boundary, without regard to the contingent subsidence of the water constituting the pond, and thereby leaving the land dry. The riparian owner can acquire no title to the land under the pond by accretion, as in the case of a navigable stream. *Holden v. Chandler*, 18 Atl. 310, 311, 61 Vt. 291.

When land is bounded by a river itself, it extends to the thread of the stream, except

in case of navigable rivers. But when bounded upon the bank, it does not go to the water. Where the southern boundary of a highway was described as the northerly bank of a river, the outer edge of a wharf, although extended by filling up beyond the original bank, was regarded as the bank of the river. *Clement v. Burns*, 43 N. E. 609, 616.

"It is said in *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145, that, where land is bounded on the bank of a stream, such description excludes the bed of the stream. That remark, as applied with the facts of that case, is clearly founded on proof. The facts of the case were such as to indicate with great certainty that by the use of the phraseology the parties intended to exclude from the operation of the release the bed of the stream. But I do not think that such is the necessary construction of such descriptive words in a grant. The popular understanding of them would doubtless limit the grant to the land adjoining to the stream, and so would the popular understanding of the description which bounded the premises upon the margin of the stream, or the stream itself, but the legal construction of such words contained in the description of premises in the land has by repeated adjudications been established otherwise." A conveyance describing one boundary as commencing on the bank of a certain river, then along said river and the bank thereof, was construed to pass the land to the thread of the stream, though it was navigable, and subject to the right of the public to navigate the navigable portion of such stream. *Varick v. Smith* (N. Y.) 9 Paige, 547, 551.

Where the bank of a nonnavigable stream is used to designate the boundary of a tract of land, it operates to prevent the tract from extending to the center of the stream, although there is a presumption that land bounded by such a stream extends to the thread of the stream. As was said by Parker, C. J., in *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145, where land was bounded by the bank of a stream, it necessarily excluded the stream itself; and an owner may sell the land without the privilege of the stream, as he will do if he bounds his grant by the bank. This case was approved by the Court of Errors of the state of New York, and the case of *Child v. Starr*, 4 Hill, 369, decided in conformity thereto. *Rockwell v. Baldwin*, 53 Ill. 19, 21.

A call of a boundary in a deed beginning on the "bank of the creek thence up the creek" with its meanders, fixes the boundary of the land at the margin of the creek, and not at the middle thereof. *Fleming v. Kerney*, 27 Ky. (4 J. J. Marsh.) 155, 157.

In *Jones v. Soulard*, 65 U. S. (24 How.) 41, 16 L. Ed. 604, a boundary of the city of

St. Louis, described as on the bank of the Mississippi, was construed to carry the boundary of the city to the center line of the river. *State v. City of Columbia*, 3 S. E. 55, 59, 27 S. C. 137.

#### As edge at high water.

The banks of a stream are "elevations of land which confine the waters of the stream in their natural channel when they rise the highest and do not overflow." Gould on Waters, § 45. In *Howard v. Ingersoll*, 54 U. S. (18 How.) 381, 14 L. Ed. 189, Wayne, J., defined "bank" as "the fast land which confines the water of the river in its channel or bed for its whole width." *People v. Madison County Sup'rs*, 17 N. E. 147, 154, 125 Ill. 9.

Mr. Justice Story, in *Thomas v. Hatch* (U. S.) 23 Fed. Cas. 946, defines "banks" to be what contains the water in its greatest flow, and such will be held to be its meaning in the cession by Georgia to the United States of land running along the bank of a river. *Alabama v. Georgia*, 64 U. S. (23 How.) 505, 513, 514, 16 L. Ed. 556.

The bank of a river is that elevation of land which confines the waters of the river in their natural channel when they rise the highest, and do not overflow the banks; and, in that condition of the water, the banks and the soil which is permanently submerged form the bed of the river. The banks are part of the river bed. *Paine Lumber Co. v. United States* (U. S.) 55 Fed. 854, 864. See, also, *State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow*, 69 S. W. 374, 377, 169 Mo. 109.

The bank of a river "is defined to be that which contains the river in its utmost heights. The bank is part of the river. The bank is that space which the water covers when the river is highest in any season of the year. The bank is a part of the river, which consists of three things—the water, the bed, and the bank." *Morgan v. Livingston* (La.) 6 Mart. (O. S.) 19, 118.

That is considered the bank of a river which contains the river when fullest. Another definition approvingly quoted is that the banks of rivers or other water courses are those boundaries which contain their waters at their highest flow. *Ventura Land & Power Co. v. Meiners*, 68 Pac. 818, 820, 136 Cal. 284, 89 Am. St. Rep. 128.

The "bank of the river," as used in a deed bounding the land conveyed as beginning at a certain point on the westerly bank of the river, thence to a certain point on the same bank of said river, etc., means only to the high-water mark on the bank of such river, and does not include the flats

below. *Dunlap v. Stetson* (U. S.) 8 Fed. Cas. 75.

The ordinary idea of a river bank is that portion of the earth which confines the water in its channel. It joins the bed of the river, and belongs to the riparian proprietor. The bed, if the stream is navigable, belongs to the public. While the banks are supposed to confine the water to its channel, they are sometimes, in freshets, overflowed, but they are not the less defined because they are sometimes overflowed. In determining the boundary line between the bank and bed of the stream, freshets are not counted. *Houghton v. Chicago, D. & M. R. Co.*, 47 Iowa, 370, 372.

The banks of a river are those elevations of land which confine the waters when they arise out of the bed. *Gibbs v. Williams*, 25 Kan. 214, 220, 37 Am. Rep. 241.

The bank of a river is that space of rising ground above low-water mark which is usually covered by high water, and the term, when used to designate a precise line, is vague and indefinite. *Howard v. Ingersoll*, 17 Ala. 780, 789.

#### As edge at low water.

"Bank," in a conveyance of land describing the land conveyed as a lot of land fronting a turnpike road, and running from said road to the bank of a certain creek, means the land to the water's edge at low water. *Halsey v. McCormick*, 13 N. Y. (3 Kern.) 296, 297.

Where a deed mentions a stream as the boundary in general terms, or the land is described as bounded or running along a river, the stream will be held to be the monument, and the thread of the stream the boundary; but, if the land is described as bounded on the bank or shore of the stream, then the low-water mark on the bank will be the boundary, the particular reference to the bank excluding the stream. *Brophy v. Richeson*, 36 N. E. 424, 425, 187 Ind. 114.

#### As edge at ordinary height.

The "bank of a river," when used to describe the boundary of land, means the edge of the water when the river is at its ordinary height. *Daniels v. Cheshire R. Co.*, 20 N. H. 85, 88.

Where a deed described one of the boundaries of the land conveyed as "bounded by the bank of said brook," it meant that the boundary line was ordinary high-water mark. *Stone v. City of Augusta*, 46 Me. 127, 138.

#### As land between high and low water.

As the term is used when speaking of the banks of a river or stream, a bank is the land between ordinary high and ordinary low water mark, which serves to hold the waters within their course. *Johnson v. Knott*, 10 Pac. 418, 420, 13 Or. 308.

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#### Levees.

The banks of a river or stream are understood to be that which contains it in its ordinary state of high water, for the nature of the banks does not change, although for some cause they may be overflowed for a time. Nevertheless, on the borders of the Mississippi and other navigable streams where there are levees established according to law, the levees shall form the banks. Civ. Code La. 1900, art. 457; *Pulley v. Municipality No. 2*, 18 La. 278, 282.

#### As line of vegetation.

The bank of a stream is the continuous margin where vegetation ceases. *McCullough v. Wainright*, 14 Pa. (2 Harris) 171, 174.

"Bank," as used by commissioners in describing a boundary as running along the western bank of a certain river, means those elevations of land which confine the water when it rises out of its bed. It is the fast land on which the vegetation appropriate to the locality grows, unless the bank is too steep for vegetation. *Howard v. Ingersoll*, 54 U. S. (13 How.) 381, 415, 416, 14 L. Ed. 189.

#### BANK ACCOUNT.

A bank account, properly so called, is defined to be a fund which merchants, traders, and others have deposited in the common cash of some bank, to be drawn out by checks from time to time as the owner or depositor may require. *Gale v. Drake*, 51 N. H. 78, 84.

A bank account, even when it is a trust fund, and designated as such by being kept in the name of the depositor as a trustee, differs from other funds which are permanently invested in the name of trustees for the sake of being held as such, for a bank account is made to be checked against, and represents a series of current transactions. The contract between the bank and the depositor is that the former will pay according to the checks of the latter; and, when drawn in proper form, the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly. *Pennsylvania Title & Trust Co. v. Real Estate Loan & Trust Co.*, 50 Atl. 998, 201 Pa. 299 (citing *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693).

#### BANK BILL.

See "Current Bank Bill"; "National Bank Bills."

Bank bills are only private contracts, having no public sanction similar to that which gives operation to the lawful money of



a country. *Young v. Adams*, 6 Mass. 182, 185.

The term "bank bill," as used in Cr. Code, § 76, providing that every person who shall have in his possession any forged promissory note or notes, bank bill, or bills for the payment of money, with intention to utter or pass the same, shall be punished, etc., means a written promise on the part of a bank to pay to the bearer a certain sum of money on demand. It is understood by the community generally to mean a written promise for the payment of money, and hence an indictment charging one with the possession with intent to utter of a forged bank bill sufficiently charges the offense prescribed in the Code, without alleging that it was for the payment of money. *Townsend v. People*, 4 Ill. (3 Scam.) 326, 328.

A bank bill is a promise to pay money, signed by officers of a bank, and, where there is no such signature, a paper, though engraved in the similitude of a bank bill, is not a bank bill; so that an indictment for "uttering an uncurrent and worthless bank bill" is not sustained by proof of the passing of an unsigned sheet of paper, duly engraved and adapted for bank bills, but with the spaces for the signature of the cashier and president left blank. *Commonwealth v. Clancy*, 89 Mass. (7 Allen) 537, 538.

#### **Bank note synonymous.**

Under statutes making punishable the counterfeiting or larceny of bank bills or bank notes, the two terms are held synonymous. *Low v. People* (N. Y.) 2 Parker, Cr. R. 37, 40; *Munson v. State* (Iowa) 4 G. Greene, 483, 484; *Eastman v. Commonwealth*, 70 Mass. (4 Gray) 416, 417; *Commonwealth v. Stebbins*, 74 Mass. (8 Gray) 492, 495; *State v. Wilkins*, 17 Vt. 151, 155; *State v. Hays*, 21 Ind. 176, 177; *State v. Stimson*, 24 N. J. Law (4 Zab.) 9, 29; *Roth v. State*, 10 Tex. App. 27, 30.

#### **As goods and chattels.**

See "Chattel."

#### **As money.**

See "Money."

#### **Promissory note synonymous.**

The terms "bank bill" and "promissory note," as used in Rev. St. c. 96, § 4, relating to the offense of passing counterfeit bank bills or promissory notes, are synonymous. *State v. Wilkins*, 17 Vt. 151, 155.

"A bank bill is a promissory note, as is manifest from the fact that it is the promise of the banking corporation to pay the borrower of the instrument a certain sum of money on demand." *Commonwealth v. Butta*, 124 Mass. 449, 452.

The term "bank bills" is used in modern times to designate promissory notes issued by banks, and in the earlier history of banks they were known as "bills of credit," but in modern times they have lost the designation. *Briscoe v. Bank of Kentucky*, 36 U. S. (11 Pet.) 257, 311, 9 L. Ed. 709, 928.

A bank bill or note is a promissory note of the corporation which issues it. *Greeson v. State*, 6 Miss. (5 How.) 33, 39.

#### **As property.**

See "Property."

#### **BANK BOOK.**

See "Savings Bank Book."

#### **BANK CHECK.**

Bank checks, in this country, are regarded as inland bills of exchange, for the purpose of presentment and demand and notice of dishonor. *German Nat. Bank v. Beatrice Nat. Bank*, 88 N. W. 480, 481, 63 Neb. 246 (citing *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, 746, 55 N. W. 230).

#### **Bill of exchange distinguished.**

A bank check is not a bill of exchange, within the meaning of act of 1875, § 1, providing that no circuit or district court shall have cognizance of any suit founded on contract in favor of an assignee, unless the suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. A bank check differs from a bill of exchange, in that it is drawn on a bank or banker, and allows no days of grace, and the drawer is not discharged by the laches of the holder in presentment for nonpayment, unless he can show that he has sustained some injury by the default, and it is not due until payment is demanded. *Levy v. Laclede Bank* (U. S.) 18 Fed. 193, 194.

A bill of exchange usually states the time of payment, and days of grace are allowed on it. There are no days of grace on checks. A bill of exchange is generally drawn with more formality, and payment at sight or at a specified number of days is requested, and that the amount be charged to the drawer's account. When intended for transmission to another state or country, they are usually drawn in duplicate or triplicate, and designated as first, second, or third of exchange. A regular bill of exchange, it is true, may be in a form similar to a bank check, so that it may sometimes be difficult, from their form, to distinguish between the two classes of instruments. But when the instrument is drawn on a bank or a person engaged in banking business, and simply directs the payment to a party named of a specified sum of money, which is at the

time on deposit with the drawee, without designating a future day of payment, the instrument is to be treated as a check, rather than as a bill of exchange, and the liability of the parties thereto is to be determined accordingly. If the instrument designates a future day for its payment, it is, according to the weight of authorities, to be deemed a bill of exchange, when, without such a designation, it would be treated as a check. *Bull v. First Nat. Bank*, 8 Sup. Ct. 62, 63, 123 U. S. 105, 81 L. Ed. 97.

Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper, and many of the rules of the law merchant are alike applicable to both. Each is for a specified sum, payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawer. The chief point of difference is that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is, by its face, the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of the bill should have funds in the hands of the drawee. A check in that case would be a fraud. *Merchants' Nat. Bank v. State Nat. Bank*, 77 U. S. (10 Wall.) 604, 647, 19 L. Ed. 1008.

"Bank checks are not bills of exchange, and, though the rules applicable to each are in many respects the same, they differ in important particulars. Among these particulars is that the check is drawn against funds on deposit with the banker, and the indorsement that it is good implies that, when the indorsement is made, there were funds there to pay it. A bill of exchange is not drawn on such deposits, necessarily, and its acceptance raises no implication that the drawer has such funds to meet it. In both cases the bank is supposed to know the signature of its correspondent, and cannot, after indorsing it as good or accepted, dispute the signature." *Espy v. First Nat. Bank of Cincinnati*, 85 U. S. (18 Wall.) 604, 620, 21 L. Ed. 947.

#### **BANK CLAIM.**

A bank claim, in mining law, is a tract 100 yards square, lying back of an abutting upon a creek claim; i. e., a tract 100 yards square abutting on a creek, or, rather, extending to the middle thread of it. *Chapman v. Toy Long* (U. S.) 5 Fed. Cas. 497, 498.

#### **BANK DEPOSIT.**

A bank deposit is different from an ordinary debt, in this: that, from its very nature, it is constantly subject to the check of the depositor, and is always payable on demand. *Houston v. Braden* (Tex.) 37 S. W. 467, 468; *People's Bank of Wilkes-Barre v. Legrand*, 103 Pa. 309, 314, 49 Am. Rep. 126.

#### **BANK DEPOSITOR.**

See "Depositor."

#### **BANK DIRECTOR.**

See, also, "Trustee."

Bank directors are not mere agents, like clerks, cashiers, tellers, and collectors; they are trustees for the stockholders; and, as to their dealings for the bank, they act not only for it in its name, but, in a qualified sense, are the bank itself. *Hall v. Henderson* (Ala.) 28 South. 531, 544, 85 Am. St. Rep. 53 (citing *Davenport v. Underwood*, 72 Ky. [9 Bush] 609).

#### **BANK FOR SAVINGS.**

See "Savings Bank."

Banks for savings are banks established for the receipt of small sums deposited by the poorer class of persons for accumulation at interest. *Savings Bank v. Field*, 70 U. S. (3 Wall.) 495, 513, 18 L. Ed. 207.

#### **BANK MONEY.**

See "Current Bank Money."

"Bank money" means that species of money called "bank notes." *Hopson v. Fountain*, 24 Tenn. (5 Humph.) 140, 141.

#### **BANK NOTES.**

See "Current Bank Notes"; "Good Bank Notes"; "National Bank Notes"; "United States Bank Notes."

As synonymous with bank bill, see "Bank Bill."

An indictment for larceny alleging that defendant stole a bank note of the value of —, of goods and chattels of —, was a sufficient description. *Commonwealth v. Richards*, 1 Mass. 337, 338.

Pen. Code, § 480, provides that every person who makes or knowingly has in his possession anything employed in counterfeiting bank notes or bills is punishable, etc. Held, that the term "bank notes or bills," as there used, was not limited to bills and notes of domestic banks, but included foreign bank notes and bills, as well, and hence a conviction could be had under such

section for having in possession appliances for the counterfeiting of notes of the Bank of England. *People v. McDonnell*, 22 Pac. 190, 191, 80 Cal. 285, 13 Am. St. Rep. 159.

**As bill of credit.**

See "Bill of Credit."

**As bill redeemable in gold or silver.**

"Bank notes," as used in a note payable in current bank notes, imported such bank bills only as are redeemable in gold or silver. *Hodges v. Ward*, 1 Tex. 244, 248, 247.

"The term 'bank notes,' when used in notes and obligations, imports generally such as are convertible into gold and silver at par." *Williams v. Arnis*, 30 Tex. 37, 40.

The term "bank notes," as used in a note payable in current bank notes, imports and means such bank bills only as are redeemable in gold or silver, or such as are equivalent thereto. The terms "bank notes," "good bank notes," or "current bank notes," in such connection, are synonymous. *Fleming v. Nail*, 1 Tex. 246, 247.

**As cash.**

See, also, "Cash."

"Bank notes" are not to be considered only as security for money, but as cash. *Southcot v. Watson*, 3 Atk. 226, 232. See, also, *Miller v. Race*, 1 Burr. 452, 457; *Green v. Sizer*, 40 Miss. 530, 543; *Jones v. Overstreet*, 20 Ky. (4 T. B. Mon.) 547, 550.

A bank note is evidence of a credit at the bank for a like sum of money, and a contract to pay it to the holder in specie. The law presumes it will be paid on request, and it gives a penalty to the holder for damages for nonpayment, which is deemed sufficient to make the bank note equivalent to cash. *Phillips v. Blake*, 42 Mass. (1 Metc.) 156, 158, 159.

**Check distinguished.**

A check differs materially from a bank note. The latter is issued as currency under legal restrictions which give to it the character of money. The check is not currency, though it may pass current from hand to hand. *Dike v. Drexel*, 11 App. Div. 77, 83, 42 N. Y. Supp. 979.

**As goods, etc.**

As goods, wares, and merchandise, see "Goods."

As personal property, see "Personal Property."

**As money.**

See, also, "Money."

Bank notes are treated, civiliter, as money. *Crane v. Freese*, 16 N. J. Law (1 Har.) 305, 307.

Bank notes are not goods or securities nor documents for debts, nor are they so esteemed, but are treated as money—as cash—in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payment as money or cash. *Miller v. Race*, 1 Burr. 452, 457. See, also, *Green v. Sizer*, 40 Miss. 530, 543; *Jones v. Overstreet*, 20 Ky. (4 T. B. Mon.) 547, 550.

"Bank notes" are not money. They are not always and in all places of the value of money. However, by their common currency, they may resemble money, and however, by the common consent, they may answer the purpose of money, yet they certainly are not so in reality. *Scott v. Conover*, 6 N. J. Law (1 Halst.) 222, 226.

"Bank notes constitute a large and convenient part of the currency of our country, and, by common consent, serve to a great extent all the purposes of coin. In themselves they are not money, for they are not legal tender, and yet they are a good tender unless specifically objected to as being notes merely and not money. They subserve the purposes of money in the ordinary purpose of life by the mutual consent, expressed or implied, of the parties to a contract, and not by the binding force of any common usage, for the party to whom they may be tendered has an undoubted right to refuse to accept them as money. Bank notes, however, as well as the negotiable notes of individuals, which pass by delivery, and not by indorsement, have by judicial determinations acquired, to a certain extent, and under certain circumstances, a character as money, which may with propriety be termed a legal character. This arises not from the intrinsic character or worth of the notes, but from the circumstances under which, and the objects for which, they are transferred and accepted. If they have worked payment or satisfaction, actual or legal, they are in such cases construed as money, and equivalent to so much coin. Thus, if at the time of a contract a bank note be paid without indorsement, guaranty, and agreement, it is received as money, and the risk of the solvency of the bank is on the part of the receiver." *Corbit v. Bank of Smyrna (Del.)* 2 Harrington, 235, 252.

Bank notes may be, and some of them are, esteemed as valuable things, but are they money? The legal definition of the term "money" is given by Lord Hale. He calls it the measure of commerce. So, also, because it is equal in value. Bank notes are neither equal in value, nor are they the measure of commerce. The ideas of every man in the country will change in a day or an hour with respect to the value of bank

notes, according as they are measured by the unerring standard, gold or silver. So far from being the measure of commerce, it is a lamentable fact that they are almost always the subject of it. The notes of different banks are not equal in value. So that where one is indicted for gaming for money, and the proof is that he bet bank notes, it will not sustain the indictment. *Johnston v. State*, 8 Tenn. Mart. & Y. 129, 131.

Bank notes, in the ordinary transaction of business, are considered as money, and do not come under the denomination of goods, wares, and merchandise. By the universal consent of mankind, when bank notes pass from one to another they pass as money, and in the course of business they are charged and credited as cash—as money—and a contract to pay a certain amount in current bank notes is a contract to pay money if the notes be neither paid nor tendered when the note matures. *Morris v. Edwards*, 1 Ohio (1 Ham.) 189, 204.

In *United States Bank v. Bank of Georgia*, 23 U. S. (10 Wheat.) 333, 6 L. Ed. 334, Story, J., says: "Bank notes constitute a part of the common currency of the country, and ordinarily pass as money. They are a good tender as money, unless specially objected to; and a sheriff, without specific directions to the contrary, would be authorized, in payment of an execution for collection, to receive bank notes constituting the currency of the country at the time and place where they are so received." *State v. Moseley*, 10 S. O. (10 Rich.) 1, 4.

Bank bills intrusted to a carrier are regarded as money. *Chouteau v. The St. Anthony*, 11 Mo. 226, 229.

Under 14 & 15 Vict. c. 1, § 18, providing that in indictments it shall be sufficient to describe bank notes as money, the term "money" would include bank notes stolen before they were in circulation, and when they were in the hands of the bankers themselves. *Regina v. West*, 40 Eng. Law & Eq. 564.

The term "bank notes," as used in a contract authorizing the payment of a certain sum of money in current bank notes of a certain bank, must be paid in the notes of the specific bank mentioned, or in their numerical value in specie, and not in their value as fixed by shavers and brokers, and the ability or inability of the bank to pay cannot be taken into consideration, since bank notes are considered as money. *Edwards v. Morris*, 1 Ohio (1 Ham.) 524, 533.

A mortgagor, after foreclosure of the mortgage, and before the time of redemption had expired, paid to the clerk of court, in national bank notes, the sum requisite to redeem the premises from the foreclosure sale. The clerk received such notes as money, and tendered to the holder of the sher-

iff's certificate the amount in legal-tender money, which was refused on the ground that the notes paid by the mortgagor to the clerk were not money, and that there had therefore been no redemption. The court held that, while the clerk was not under obligation to accept the notes, he having done so, and tendered the holder of the certificate legal tender, the redemption was effected. *Boyd v. Olvey*, 82 Ind. 294, 298.

Bank notes are not money, but it is held that the acceptance of bank notes as money by a sheriff making a sale of goods is not malfeasance in office. *Governor v. Carter*, 10 N. C. 328, 338, 14 Am. Dec. 588.

#### As moneyed capital.

See "Moneyed Capital."

#### As note for payment of money.

"Bank notes," as used in an indictment charging defendant with stealing a bank note, necessarily implies a note for the payment of money. *Commonwealth v. Richards*, 1 Mass. 337, 340.

#### As promissory note.

The term "bank notes" is used in modern times to designate promissory notes issued by a bank. They were known in the early history of banks as "bills of credit," but in modern times they have lost that designation. *Briscoe v. Bank of Kentucky*, 36 U. S. (11 Pet.) 257, 311, 9 L. Ed. 709, 928.

Bank notes are properly described in an indictment for the larceny of them as "promissory notes." *Commonwealth v. Collins*, 138 Mass. 483.

A bank note is a promissory note. *Stone v. State*, 20 N. J. Law (Spencer) 404, 407 (citing *Brown v. Commonwealth*, 8 Mass. 64).

#### As public token.

"Bank notes" are public tokens—as much so as weights and measures or the alnager's seal. It is not necessary that they should have a common-law existence, to make the obtaining property by means of mere counterfeits at least the object of trespass or larceny. It is sufficient that they have, no matter when invented or discovered, the qualities of a public token that is calculated to inspire public confidence. In practice they represent the coin of our country, and pass currently as money. *State v. Patillo*, 11 N. C. 348, 349.

#### BANK OF ISSUE.

Within the meaning of Rev. St. U. S. § 5197 [U. S. Comp. St. 1901, p. 3493], providing that the rate of interest to be charged by national banks shall be the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where, by the laws of

any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for national banks, "banks of issue" mean those having the power to issue circulating notes, and which would therefore compete with the national banks. *First Nat. Bank of Clarion v. Gruber*, 87 Pa. 468, 471, 30 Am. Rep. 378.

### BANK STOCK.

The term "bank stock," in a will devising bank stock by a testator not owning bank stock, was construed to mean his bank deposit. *Tomlinson v. Bury*, 14 N. E. 137, 140, 145 Mass. 346, 1 Am. St. Rep. 464.

Where testatrix had state and railroad bonds on deposit in a bank, and in her will she bequeathed her "bank stock," such phrase should be construed to mean the bonds on deposit in the bank. *Clark v. Atkins*, 90 N. C. 629, 640, 47 Am. Rep. 538.

### Capital stock distinguished.

Bank stock or stock owned by the individual stockholders of the bank is the undivided interest in the dividends as they are declared, and a right to a pro rata distribution of the effects of the charter on hand at the expiration of the charter. It is a very different thing from the capital stock of the bank, which is the whole undivided fund paid in by the stockholders, the legal right to which is vested in the corporation, to be used and managed in trust for the benefit of the members. An exemption from taxation of the capital stock of a bank does not exempt the stock belonging to individual stockholders. *State v. Petway*, 55 N. C. 396, 406.

"Bank stock," as used in Const. art. 2, § 28, making bank stock liable to taxation, not mentioning the capital stock of a bank, is to be construed to mean "individual interest in the dividends as they are declared, and a right to a pro rata distribution of the effects of a bank on hand at the expiration of the charter." *Union Bank of Tennessee v. State*, 17 Tenn. (9 Yerg.) 490, 498.

### As credit.

Bank stock is merely evidence of title to shares in the capital stock of a bank, and not a credit, within Rev. St. art. 5063, authorizing taxpayers to deduct the amount of their indebtedness from their taxable credits. *Primm v. Fort*, 57 S. W. 86, 89, 23 Tex. Civ. App. 606.

### As moneyed capital.

See "Moneyed Capital."

### As personal estate.

"Bank stock is personal estate. According to the rule of law, it follows, with all other personal property, the person of the owner. Such stock, whether owned by a

resident or a nonresident, is usually taxed in the state where the bank is located." *Duer v. Small* (U. S.) 7 Fed. Cas. 1164, 1165.

### BANK STOCK CERTIFICATE.

"Bank stock certificates, while not possessing all the characteristics of commercial paper, are nevertheless esteemed by the business world as having a value somewhat superior to ordinary securities. For this reason they have come to be regarded as one of the most desirable bases of commercial transactions; and, when transferred to a purchaser for value, and without notice of any defect in title, the certificate is of itself generally an assurance to the transferee that upon its presentation the holder will be entitled to have the stock transferred to him upon the books of the bank." *Buffalo German Ins. Co. v. Third Nat. Bank*, 29 App. Div. 137-141, 51 N. Y. Supp. 667, 670. The case from which the foregoing language is quoted was reversed by the Court of Appeals (162 N. Y. 163, 56 N. E. 521), but the reversal, so far from criticising such language, apparently recognized it as a correct statement of the rule now existing in this state and country. *Lyman v. State Bank of Randolph*, 80 N. Y. Supp. 901, 903, 81 App. Div. 367.

### BANK TELLER.

As a clerk, see "Clerk."

"A teller is an officer of a bank who receives and pays money on checks. Webster's Dictionary." *Union Dime Sav. Inst. v. Nepert*, 3 N. Y. Supp. 797, 800.

"The office of the teller of a bank is implied in the word used to designate it—to tell or count the moneys of the bank which are received or paid out. The office is often divided into two branches—that is, of receiving teller and of paying teller—where the business of the bank is large, and the duties cannot conveniently be united in one person. When united, the duty of a teller is to receive all moneys offered at the bank in payment of notes and bills previously discounted or lodged for collection, as they severally fall due, and all moneys offered by customers of the bank to be deposited to their credit and account, whether arising from money brought by them to the bank, or the proceeds of discounts made for them, to pay the checks of depositors, as money is from time to time drawn out, or for notes discounted, and to redeem the bills of the bank with specie when the same is demanded." *Mussey v. Eagle Bank*, 50 Mass. (9 Metc.) 306, 311.

A teller of a bank is an agent acting under special or express authority, whose appointment is not such that any implication of undefined powers can arise. His duties are defined with an approach to exactness. Such a one—sometimes called a "spe-

cial agent," though the phrase is open to objection—the principal holds out to the public as an agent with limited powers, and with such a one third persons deal suo periculo. *Walker v. St. Louis Nat. Bank*, 5 Mo. App. 214, 217.

The teller of a bank is an agent acting under a special or express authority, and not one so appointed by a principal that there can arise any implication of undefined powers. The teller consequently has no implied authority to certify checks, though such authority may be implied from his conduct in certifying checks, and the subsequent payment of them by the bank. *Muth v. St. Louis Trust Co.*, 67 S. W. 978, 981, 94 Mo. App. 94.

### BANKABLE.

"Bankable," as used in regard to "bankable" paper, means high credit paper, which, if the time of payment was reasonable, and the bank had loanable funds, would be discountable. *Edward P. Allis Co. v. Madison Electric Light, Heat & Power Co.*, 70 N. W. 650, 651, 9 S. D. 459.

### BANKABLE CURRENCY.

A contract for the sale of slaves, by which the purchaser agreed to pay on delivery the sum of \$25,000 in bankable Confederate currency, and, in addition, to give his note for the further sum of \$20,000, to be paid in 12 months after call—the seller covenanteeing that he would not call on the purchaser for specie when it was at a premium, but engaged to be satisfied with the bankable currency of the day—means the currency of the Confederate States; the only currency in circulation at the time the contract was made being Confederate currency. *Rives v. Duke*, 105 U. S. 132, 140, 26 L. Ed. 1031.

### BANKABLE FUNDS.

Confederate money, used in New Orleans in 1862 universally in the payment of debts due to banks, recognized in Mississippi as money, and generally received in every kind of trade, occupation, and business as a medium of exchange, was "bankable funds." *Foster v. Bank of New Orleans*, 21 La. Ann. 338, 340.

### BANKER.

See "Individual Banker"; "Private Bankers."

"A banker is one who keeps a place for traffic in money; who there receives it from others, and keeps it with his own, using the whole fund as his own, or remits it at request to other places; who repays it at the will and call of his customer; who furnishes

money to others on the discount of their obligations, or on securities brought by them; and who buys and sells bills of exchange. To these is sometimes added the issuing of his notes to pass as money, when allowed by law to do so." *People v. Doty*, 80 N. Y. 225, 228 (quoting Zane on Banks & Banking, § 2).

A banker is a trader who buys money, or money and debts, by creating other debts, which he does with his credit; exchanging for a debt payable in the future one payable on demand. The very first banking in England was pure borrowing. It consisted in receiving money in exchange, for which promissory notes were given, payable to bearer on demand; and so essentially was this banking, as then understood, that the monopoly given to the Bank of England was secured by prohibiting any partnership of more than six persons, "to borrow, owe, or take up any sum or sums of money, on their bills, or notes payable at demand." And it had effect until 1772 (about 30 years), when the monopoly was evaded by the introduction of the deposit system. The relations created are the same as those created by the issue of notes. In both a debt is created. The evidence only is different. In one case it is a credit on the banker's books; in the other, his written promise to pay. In the one case he discharges it by paying the orders (checks) of his creditor; in the other, by redeeming his promises. *Auten v. United States Nat. Bank*, 19 Sup. Ct. 628, 635, 174 U. S. 125, 43 L. Ed. 920.

The internal revenue act of June 30, 1864, declaring that "all brokers and bankers doing business as brokers" shall be subject to certain taxes on merchandise, gold, silver, etc., means all brokers and bankers who do brokerage business together with their banking business, and does not apply to those who are engaged merely in the banking business. *United States v. Fisk*, 70 U. S. (3 Wall.) 445, 448, 18 L. Ed. 243.

"Banker," as used in Laws 1875, c. 371, § 49, providing that it shall not be lawful for any bank, banking association, or individual banker to advertise or put forth a sign as a savings bank, or in any way to solicit or receive deposits as a savings bank, and providing for a forfeiture in case of a violation of the statute, means one who has availed himself of the banking statutes of the state, and has become empowered to do banking thereunder, and does not mean a private banker, who exercises in his business no more than the rights and privileges common to all. *People v. Doty*, 80 N. Y. 225, 227.

Two attorneys at law were partners in the ownership of a business, which was held forth to the public, by their notes, checks, etc., as the Perry County Bank. Held, that they were bankers, within Act May 9, 1889, providing for the punishment of any banker receiving a deposit, knowing himself to be

Insolvent. Commonwealth v. Sponsler, 16 Pa. Co. Ct. R. 116, 119.

The words "bank," "banker," "broker," "stockjobber," when used in the revenue act, shall be construed to include whoever has money employed in the business of dealing in coin, notes, or bills of exchange, or in the business of dealing in or buying or selling any kind of bills of exchange, checks, drafts, bank notes, promissory notes, bonds, or other writing obligatory, or stock of any kind or description whatsoever, or receiving money on deposit. Hurd's Rev. St. Ill. 1901, p. 1493, c. 120, § 292, subd. 3.

Within the meaning of the chapter relating to the listing of personal property for taxation, the term "banker" includes every company, association, or person, not incorporated under any law of this state or of the United States for banking purposes, who shall keep any office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit. Bates' Ann. St. Ohio, 1904, § 2758.

Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be a banker, within the meaning of the war revenue act of 1898, U. S. Comp. St. 1901, p. 2286.

#### Broker distinguished.

"Banker," as used in Rev. St. §§ 3407, 3408, providing that every person having a place of business where money is advanced or loaned on stocks, bonds, etc., or where stocks, bonds, etc., are received for discount or for sale, shall be regarded as a banker, and subject to certain tax, includes one who employs capital in his business, and has a regular place for transacting it, and whose business is buying and selling stocks for his customers; such person not being a broker, who, without employing capital of his own, simply negotiated purchases and sales of stocks for others, receiving only the usual commissions for services of that character. Richmond v. Blake, 10 Sup. Ct. 204, 205, 132 U. S. 592, 33 L. Ed. 481.

#### As dealer in capital.

A banker is a dealer in capital—an intermediate party between the borrower and the lender, who borrows of one party and lends to another—and the business of banking is, among other things, the establishment

of a common fund for lending money. Meadocroft v. People, 45 N. E. 303, 304, 163 Ill. 56, 35 L. R. A. 176, 64 Am. St. Rep. 447.

A banker is a dealer in capital—an intermediate party between the borrower and lender. He borrows of one party and lends to another, and the difference between the terms on which he borrows and lends is the source and measure of his profits. Curtis v. Leavitt, 15 N. Y. 9, 167. Banking, regarded as a business, includes the borrowing of money, as one of its features or incidents. Deposit Bank of Carlisle v. Fleming (Ky.) 44 S. W. 961, 963.

The business of a banker implies capital. A man holding himself out as a banker gives public proclamation that he has money and property readily convertible into money, in his possession and subject to his control, and for that reason he may be safely trusted. Baker v. State, 12 N. W. 12, 17, 54 Wis. 368.

#### As money changer.

The term "banker" includes all the business of a money changer. "Money changer" is defined by Webster to be "a broker who deals in money or exchanges." Thus defined, it is included in the business of a banker, and constitutes the greater part of it. Uncurrent funds and the exchanging of one kind of money for another are equally the practice of the money changer and the banker. Hence a banker may be required to obtain a license under a city charter authorizing it to license, tax, and regulate money changers. Hinckley v. City of Belleville, 43 Ill. 183, 184.

#### As one who receives and sells for another.

Rev. St. § 3407, enacts that every person, firm, or company, having a place of business where stocks, bonds, bills of exchange, or promissory notes are received for discount or for sale shall be regarded as a bank or as a banker. It was sought to collect from a corporation, whose only business was the investing of its own capital in mortgage securities on real estate, and selling such mortgage securities with the company's guaranty, an internal revenue tax as a banker. In considering this claim, the court said: "Surely Congress did not intend that corporations or persons who have a place of business where they sell their own stocks, bonds, bills, or notes should be regarded as bankers. If they did, the vast proportion of the corporations and of the merchants and manufacturers of the country would be included. But the language of the statute is, 'Where such property is received for discount or for sale.' The use of the word 'received' is significant. In no proper sense can it be understood that one receives his own stocks and bonds or bills or notes for discount or for sale. He receives the bonds,

bills, or notes belonging to him as evidences of debt, though he may sell them afterwards. Nobody would understand that to be banking business. But when a corporation or natural person receives from another person, for discount, bills of exchange or promissory notes belonging to that other, he is acting as a banker; and, when a customer brings bonds or stocks for sale, and they are received for the purpose for which they are brought—that is, to be sold—the case is presented which we think was contemplated by the statute. In common understanding, he who receives goods for sale is one who receives them as an agent for a principal who is the owner. He is not one who buys and sells on his own account." *Selden v. Equitable Trust Co.*, 94 U. S. 419, 422, 423, 24 L. Ed. 249.

**As one who receives deposits and loans money.**

Having a place of business where deposits are received and paid out on the checks, and where money is loaned on security, is the substance of the business of a banker. *Warren v. Shook*, 91 U. S. 704, 712, 23 L. Ed. 421.

A banker is one having a place of business where deposits are received and paid out on checks, and where money is loaned on security, and it seems that at least these elements must coincide in order to bring a person within any definition of "banker." A person is not rendered a banker by reason of the fact that he exercises one of the functions usually appertaining to bankers, but, to come within the definition, must prosecute at least all the lines of business named. *State v. Comptoir National D'Es-compte de Paris (La.)* 26 South. 91, 95.

**Trustee distinguished.**

The trade of a banker is to receive money and use it as if it were his own; he becoming debtor to the person who has lent or deposited the money with him, and accountable to such person as a debtor, but not as a trustee. The relationship existing is that of debtor and creditor, purely, with no admixture of any fiduciary character; the banker being, with relation to his customer, neither a trustee nor a quasi trustee, but simply a debtor for a loan. *Collins v. State (Fla.)* 15 South. 214, 218.

**As unincorporated association.**

Bankers are unincorporated associations exercising banking powers, while the banks are incorporated associations. *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1, 32.

**BANKER (In Gaming).**

A banker is the one who conducts the bank in a game where every one bets against

a fund into which all winnings are placed, and from which all losses are paid. *People v. Carroll*, 22 Pac. 129, 181, 80 Cal. 153.

A banker, in the language of the gambling house, is a person who exhibits a fund of money or property to be staked on all bets which others may choose to make against him on the game which he exhibits to entice bets. *Commonwealth v. Burns*, 27 Ky. (4 J. J. Marsh.) 177, 180.

**BANKING.**

As franchise, see "Franchise."

Banking, when viewed in detail, may consist of a succession of receiving, depositing, loaning, and borrowing money, and buying and selling exchange, and acts of like character intended to be pursued as a business and occupation. Nevertheless any person may, without being a banker, borrow or loan money, or be a depository of money, or buy and sell exchange, or be the drawer or holder of any kind of commercial paper, provided that it be not done as a business and occupation. But where a corporation which by its charter was prohibited from banking was accustomed, as a business and occupation, to deal in exchange for profit, such transactions were in controversy of the charter. *Ohio Life Ins. & Trust Co. v. Merchants' Ins. Co.*, 80 Tenn. (11 Humph.) 1, 23, 53 Am. Dec. 742.

The business of banking, as defined by law and custom, consists of issuing notes, payable on demand, intended to circulate as money, where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans; and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. *First Nat. Bank v. Turner*, 57 N. E. 110, 112, 154 Ind. 456; *Richards v. Incorporated Town of Rock Rapids (U. S.)* 31 Fed. 505, 509; *Mercantile Nat. Bank v. City of New York*, 7 Sup. Ct. 826, 835, 121 U. S. 138, 30 L. Ed. 895; *Bressler v. Wayne County*, 49 N. W. 787, 788, 32 Neb. 834, 13 L. R. A. 614; *First Nat. Bank v. Chehalis County*, 32 Pac. 1051, 1054, 6 Wash. 64.

Banking is the business or employment of the banker, or the business of the bank. *Baker v. State*, 12 N. W. 12, 17, 54 Wis. 368.

Banking is the employment of establishing a common fund for the loan of money and discounting of notes, issuing bills, taking deposits, making collections of money or notes deposited, and negotiating bills of exchange. *City of New Orleans v. New Orleans Savings Inst.*, 32 La. Ann. 527, 531.



At common law the business of banking and all its branches was open and free to all, and it did not constitute one of the prerogatives of the sovereign, or pertain to sovereignty. *State v. Scougal*, 51 N. W. 856, 860, 3 S. D. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756.

The investment of the premiums, etc., received by a life insurance association, in loans secured by mortgage or otherwise, does not constitute carrying on a banking business. *Life Ass'n of America v. Levy*, 33 La. Ann. 1203, 1209.

The issue of paper designed to circulate in the form of bank bills is an act of banking. *People v. River Raisin & L. E. R. Co.*, 12 Mich. 389, 395, 86 Am. Dec. 64.

The business of banking has acquired a restricted legal signification, applying only to those banks which exercise the function of issuing paper money. It is in this sense that the term "banking" has been used in the statutes of Ohio, with very few exceptions, since 1816, and such is the meaning given to the word by the constitution, as is apparent from article 13, § 7, providing that no act of the General Assembly authorizing associations with banking powers shall take effect until it shall have been submitted to the people at a general election, and approved by a majority of all electors voting at such election. *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1, 31.

"Banking," as used in Laws 1838, c. 260, under which moneyed corporations organized in accordance with its provisions are authorized to carry on the business of banking by discounting bills, notes, and other evidences of debt, by receiving deposits, by buying and selling gold and silver bullion, foreign coins, and bills of exchange, and by loaning money on both real and personal property, means the establishing of a common fund for lending money, discounting notes, issuing bills, receiving deposits, collecting money on notes deposited, and negotiating bills of exchange. *Nassau Bank v. Jones*, 95 N. Y. 115, 120, 47 Am. Rep. 14.

"Banking," as used in Const. art. 4, § 35, providing that the Legislature shall prohibit any person, association, or corporation from exercising the privilege of banking or creating paper to circulate as money, means the issuing of paper money or bank bills, and does not include the ordinary functions of banking. *Bank of Martinez v. Hemme Orchard & Land Co.*, 38 Pac. 963, 964, 105 Cal. 376.

The act prohibiting the carrying on of banking business by individuals and incorporated companies, unless specially authorized by law, does not preclude individuals or corporations, if otherwise authorized, from lending their funds on promissory notes by way of discount or otherwise. The evil in-

tended to be guarded against is the keeping of an office of deposit for the purpose of carrying on the banking business. *People v. Brewster* (N. Y.) 4 Wend. 498, 500.

The act of having a deposit in a Chicago bank, and drawing checks thereon in payment of obligations, and buying checks or exchange from other banks or persons to replenish the deposit fund in the Chicago bank, is not transacting the business of a banker, within the interdiction of a bond that the obligor would not engage in the banking business at a place named during the period of five years. *Scott v. Burnham*, 56 Ill. App. 28, 30.

#### BANKING ASSOCIATION.

See "Moneyed Corporation."

#### BANKING CORPORATION.

A building and loan association is not a banking corporation, within the meaning of Rev. St. U. S. § 5243, prohibiting the use of the word "national" in the corporate name of banking corporations, excepting national banking corporations. *Lomb v. Pioneer Savings & Loan Co.*, 106 Ala. 671, 17 South. 670, 671.

"Banking corporations" are but trustees. They are artificial bodies created with the view, in a great measure, to the public interest. *Agricultural Bank v. Burr*, 24 Me. (11 Shep.) 256, 270.

The term "banking corporation," as used in Laws 1894, c. 1, § 28, providing that taxation of banking corporations is specifically provided for in this act, is to be understood as including not only every corporate body doing a general banking business, whether under state or national authority, but also all property employed by banking, whether owned by corporations or individuals. *Board of Com'rs of Rice County v. Citizens' Nat. Bank of Faribault*, 23 Minn. 280, 281, 283.

The term "banking corporation," as used in Const. Ohio 1857, art. 8, relating to the liability of stockholders in such corporations, means banks of issue only, and not banks of discount and deposit. *Allen v. Clayton*, 18 N. W. 663, 667, 63 Iowa, 11, 50 Am. Rep. 716.

#### BANKING GAME.

The essential element of a "banking game" is that it is one against the many, and the banker accepts all the bets. A banking game is where one person keeps or exhibits the game, and bets against all comers, and does not include a game ordinarily a game of craps. *Cummings v. State* (Tex.) 72 S. W. 395, 396.

A banking game is a game conducted by one or more persons, where there is a fund against which everybody has a right to bet; the bank being responsible for the payment of all the funds, taking all that is won and checking out all that is lost. *People v. Carroll*, 22 Pac. 129, 131, 80 Cal. 153.

The terms "banking" or "other game for money," as used in a statute prohibiting gambling, do not refer to some intangible mental device, but a tangible device adapted, devised, and used for the purpose of carrying on a gambling game. *State v. Gitt Lee*, 6 Or. 425, 426, 428.

The supreme test of a gaming table or banking game is whether the exhibitor pays all the winnings of the bettors, and takes all their losses—whether it is a case of the one against the many. *Bell v. State*, 32 Tex. Cr. R. 187, 22 S. W. 687.

#### **Craps.**

"Banking game," as used in Pen. Code, art. 358, which provides a penalty for the keeping of any gaming table or bank of any name or description whatever, or any table or bank used for gaming which has no name, does not include the game of craps. *Bell v. State* (Tex.) 21 S. W. 366.

#### **Dice throwing.**

Where a person threw the dice, took all the bets, stood behind the table, and was one against many, he was the dealer of the game, and hence the game was a "banking game." *Shaw v. State*, 33 S. W. 1078, 35 Tex. Cr. R. 394.

"A banking game, in the meaning of the law, is one in which the owner or exhibitor of the game bets against all persons who come, and includes a game played by means of dice thrown from a box by a player who paid a certain sum for each throw of the dice, and, if he threw the number corresponding with the one on either of the prize checks on the cloth, on which there were several blank checks or numbers, he won the prize of that check; the owner giving the privilege of throwing the dice to all who desire upon their giving the regular sum." *State v. Martin*, 22 Ark. 420, 422.

#### **Faro.**

The game called "faro" is a banking game. *Patterson v. State*, 12 Tex. App. 222, 224.

#### **Monte.**

The game of monte is especially enumerated in Pen. Code, art. 360, as a banking game. *Evans v. State* (Tex.) 22 S. W. 18.

#### **Rondo.**

"Rondo is a banking game, and included in a statute making it criminal to bet at certain specified games, or at any other

gaming table or bank, or any other gaming device." *Randolph v. State*, 9 Tex. 521-523.

#### **Senate poker.**

The term "gaming bank," in a statute prohibiting the exhibition for the purpose of gaming of a gaming bank and table, does not include the game of senate poker, which may be played on any table or smooth surface, though conducted by one who takes a percentage from the gamblers, but who does not gamble himself. *Hairston v. State*, 30 S. W. 811, 34 Tex. Cr. R. 346.

#### **BANKING HOURS.**

Banking hours are those hours in the day when the bank is open to do its ordinary business over the counter. It does not include the time after the bank closes to public custom or business, but which is devoted by the employés or officials to settling up the affairs of the day, etc., and to the sending or receiving of packages or messages, etc. *Marshall v. American Exp. Co.*, 7 Wis. 1, 23, 73 Am. Dec. 381.

#### **BANKING HOUSE.**

Currency Act of 1864 requires banks created under the statute to transact their usual business at an office or banking house specified in its organization certificate. Held, that the phrase "banking house" did not prevent the purchase of coin by one bank at the banking house of another; it being unavoidable that some of the business of a bank be transacted away from the bank. *Merchants' Nat. Bank v. State Nat. Bank*, 77 U. S. (10 Wall.) 604, 651, 19 L. Ed. 1008.

#### **BANKING HOUSE (In Gaming).**

"Banking house," as used in Rev. St. § 911, prohibiting gaming, and punishing the keeping of a banking house or banking game, means any house carrying on a game of chance, which has capital always ready for play, whether the capital is owned or furnished by the house, or made up at the time by the players. The expression is sufficiently definite in its meaning to constitute a sufficient description of the offense, without further definition. *State v. Lenares*, 12 La. Ann. 226; *State v. Markham*, 15 La. Ann. 498; *State v. Hunter* (La.) 30 South. 261, 262; *People v. Carroll*, 22 Pac. 129, 131, 80 Cal. 153; *State v. Thomas*, 50 Ind. 292, 293; *In re Lee Tong* (U. S.) 18 Fed. 253; *State v. Gitt Lee*, 6 Or. 425, 428; *Miller v. State*, 48 Ala. 122, 126; *Foster v. Territory*, 1 Wash. St. 411, 25 Pac. 459, 460; *Lowry v. State*, 1 Mo. 722; *Evans v. State* (Tex.) 22 S. W. 18; *Stearnes v. State*, 21 Tex. 692, 694.

#### **BANKING INSTITUTION.**

Revenue Act Pa. June 8, 1891 (P. L. 229) § 1, imposing a tax on mortgages and

moneys owing by solvent debtors, whether by promissory note, or penal or single bill, bond, or judgment, except bank notes or notes discounted by any banking institution, means a corporation—an incorporated institution—and not a private bank. *Commonwealth v. McKean County*, 49 Atl. 982, 200 Pa. 383.

### BANKING POWERS.

"Banking powers consist in the right of issuing notes, making discounts, and receiving deposits." *New York Firemen Ins. Co. v. Ely* (N. Y.) 2 Cow. 664, 711.

Const. art. 13, § 7, providing that no act of the General Assembly authorizing associations with banking powers shall take effect until it shall be submitted to the people at the next general election, and be approved by a majority of all the voters voting at such election, includes only banks of issue, or those banks which have the authority of issuing notes intended to circulate as money, since at the date of the adoption of the Constitution, and for a long time prior thereto, the phrase "banking powers" had become used in a restricted sense, which related only to the powers employed in the making and issuing of paper money; and it appears from the debates in the constitutional convention that the evil which the convention intended to restrict was the power of banks to issue their own notes to circulate as money. *Dearborn v. Northwestern Sav. Bank*, 42 Ohio St. 617, 619, 51 Am. Rep. 851.

The phrase "banking powers," as used in Const. art. 13, § 7, which declares that no act authorizing associations with banking powers shall take effect until it shall be submitted to the people and approved by a majority of the electors, does not include a building and loan association authorized to collect money from its members, and to loan it among them for the purpose of enabling its members to buy lots or houses, or to build and repair houses. *Forrest City United Land & Bldg. Ass'n v. Gallagher*, 25 Ohio St. 208, 214.

### BANKING PRINCIPLES AND USAGES.

Banking principles and usages, within the meaning of a bank charter providing that it shall be lawful for the bank to loan money, buy, sell, and negotiate bills of exchange, checks, and promissory notes, and discount, upon bank principles and usages, bills of exchange, post notes, and promissory notes, and other negotiable paper, do not impose upon the bank a prohibition against receiving on its loans and discounts more than 6 per cent. per annum. The plain and obvious meaning of the words is that the bank may take on loans and discounts the interest in

advance. *McLean v. Lafayette Bank* (U. S.) 16 Fed. Cas. 264, 268.

### BANKING PRIVILEGES.

The term "banking privileges" in Const. Art. 10, § 1, in reference to banks and corporations embracing banking privileges, does not include the character or the power of corporations to receive money on general or special deposit, to lend money securities, to discount or purchase bills, notes, or other evidences of indebtedness, as the right to carry on such business is neither a privilege nor a franchise. It does not include annuity, safe deposit, and trust companies, though, in addition to their other corporate powers, they have power to receive general deposits of money, or to loan or invest the money so deposited, as well as their own capital, on mortgages, or by purchasing bills, notes, and other evidences of indebtedness. *International Trust Co. v. American Loan & Trust Co.*, 65 N. W. 78, 79, 62 Minn. 501.

### BANKRUPT.

"The following are the definitions of the word 'bankrupt' by Ash, who wrote his dictionary several years before our Revolution: Adjective, 'Broken for debt,' 'incapable of payment,' 'insolvent'; substantive, 'Incapable of paying his debts'; verb, 'to break a person,' 'to render a person incapable of paying his debts.' He defines 'bankruptcy' the 'state of a bankrupt.' Johnson carries the definitions through the various parts of speech to the same effect. Adjective, 'in debt beyond the power of payment'; substantive, 'a man in debt beyond the power of payment'; verb, 'to disable one from satisfying his creditors.' We are referred to Webster as narrowing the word 'bankrupt' to an 'insolvent trader.' He does so, indeed, following Blackstone, whose definition does not pretend to give the general sense. The latter wrote for students of the English law, and of course took the statute definition as it stood in the time of Elizabeth, or had been expanded by subsequent legislation or judicial construction. Webster himself thus treats the term as one of legal art, entirely destroying the harmony of signification between the substantive and its kindred words in other parts of speech." *Kunzler v. Kohaus* (N. Y.) 5 Hill, 317, 320.

"Judge Story construed the word 'bankrupt' in the bankruptcy act of the United States [Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418)] in *Arnold v. Maynard* (U. S.) 1 Fed. Cas. 1181. He says it describes one acting in contemplation of actually stopping his business, because he is insolvent and utterly incapable of carrying it on." *Utley v. Smith*, 24 Conn. 290, 310, 63 Am. Dec. 163.

A "bankrupt" was originally defined to be one who concealed his property, or fraudulently evaded payment, and hence his bank for trade was broken up and his assets divided. *Ashby v. Steere* (U. S.) 2 Fed. Cas. 15, 17.

A bankrupt is one who is unable, or who willfully refuses, to pay his debts in full. *In re Scott* (U. S.) 21 Fed. Cas. 800, 808.

A corporation is "bankrupt," in a legal sense of that term, when it has done, or has suffered to be done, some act which is by law declared to be an act of bankruptcy, or when proceedings in bankruptcy have been instituted by or against it. Mere financial embarrassment causing a discontinuance of business does not make it bankrupt. *Barr v. Bartram & Fanton Mfg. Co.*, 41 Conn. 502, 505.

#### **Debtor distinguished.**

"Bankrupt," as used in the bankruptcy act, shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt. U. S. Comp. St. 1901, p. 3418.

In the statute relating to acts of bankruptcy committed by any debtor or bankrupt, the word "bankrupt" is used as descriptive of a person who is a debtor, but who has not at the time of committing the offense become a bankrupt. A "bankrupt," in the sense of the act, is a debtor and something more. He is a debtor who has committed an act of bankruptcy declared to be such by the bankrupt law. A debtor may or may not be a bankrupt. *United States v. Pusey* (U. S.) 27 Fed. Cas. 631, 632.

#### **As insolvent trader.**

"In England the bankrupt system is confined exclusively to traders and the creditors of traders, and does not apply to persons in any other class of business. In this country the term has had uniformly the same meaning, so that it may well be doubted whether an act of Congress subjecting to such a law every description of persons within the United States would comport with the spirit of the powers vested in relation to the subject." *Adams v. Storey* (U. S.) 1 Fed. Cas. 141, 142.

#### **BANKRUPT LAW.**

A bankrupt law is a law for the benefit and relief of creditors and their debtors, in cases in which the latter are unable or unwilling to pay their debts; and a law on the subject of "bankruptcies," in the sense of the Constitution, is a law making provision for cases of persons failing to pay their debts. 4 Elliot, Deb. 282. The laws upon that subject, in a general sense, concern the relation of debtor and creditor, a relation

existing largely between citizens of different states, and, in fact, constituting a branch of those great commercial relations over which the power of Congress is also extended. The expression has also a limited signification; that is, that it concerns the relation of debtor and creditor in cases where the debtor is unable or unwilling to pay his debts. Such laws have for their object the appropriation, either voluntarily or by compulsion, of the debtor's property to the payment of his debts pro tanto, or in full as the case may be, and the relief of honest debtors. To accomplish this object these laws are made to operate upon, affect, and control the relations of the parties, so as to limit and circumscribe the rights of the debtor in and his control over his property, in many particulars, before any proceedings in bankruptcy shall have been commenced. Under these principles section 44 of the bankrupt act of 1867, providing for the punishment of any debtor or bankrupt who fraudulently disposes of his goods within three months next before the commencement of proceedings in bankruptcy, is a "necessary and proper" law on the subject of bankruptcy, as provided for by the Constitution. It is as though Congress had made the commencement of the bankruptcy proceedings conclusive proof that the debtor contemplated bankruptcy in disposing of the property. *United States v. Pusey* (U. S.) 27 Fed. Cas. 631, 632.

#### **Insolvent law distinguished.**

In the reign of Henry the Eighth the first act was passed making special provision for bankrupt traders. Following this, and prior to the American Revolution, the bankrupt laws grew to be a great system. Distinct from this system were the insolvent laws made for the relief of those imprisoned for debt. They respected a different class of men, and their objects, effects, and administration were different. The insolvent laws were optional, the bankrupt laws were compulsory, and they were never, either in common conversation or in juridical language, confounded. The insolvent laws operated equally upon all men and had for their object only the liberation of the insolvent from the imprisonment of his person; while the bankrupt system respected only merchants and traders, and their negotiations and concerns. It took a retrospective view of their proceedings, it detected their frauds, it set aside their fraudulent contracts and conveyances, it restored to the fair creditor the proceeds of that property to which he was justly entitled, and it dealt with the debtor according to his merits. If misfortune had overtaken him in the paths of integrity and truth, it discharged him from imprisonment, exonerated him from his debts, and left him something wherewith to begin the world anew. Such should be the interpretation of the constitutional provision which delegated to Congress the power of establishing

uniform laws upon the subject of bankruptcy throughout the United States, and all laws which have in view the objects of the bankrupt system as it existed at the time of the adoption of the Constitution, and especially those which exonerated the debtor from his debt, are "bankruptcy laws," and can only properly be passed by Congress. *Vanuxen v. Hazlehurst*, 4 N. J. Law (1 Southard) 192, 218, 222, 7 Am. Dec. 582.

Not every law which discharges the person and property, as well future as in possession, of the debtor, is a bankrupt law. A distinction is recognized both in this country and England between "bankrupt laws" and "insolvent laws." In England the bankrupt system has been confined exclusively to traders and the creditors of traders, whereas the insolvent laws of this country embrace every class of debtors. It is of no importance whether the debt has been contracted by way of trade or not, for a person to come within the purview of an insolvent law. So exclusively have bankrupt laws operated on traders, that it may well be doubted whether an act of Congress subjecting to such a law every description of persons within the United States would comport with the spirit of the powers vested in them in relation to this subject. But it is not only in the persons who are the objects of these laws that a difference exists, but their general and most important provisions are essentially dissimilar. Under a "bankrupt law" the debtor is at once, by operation of law, as soon as he has committed an act of bankruptcy, divested of all his property, which is transferred to assignees in trust for his creditors. All dispositions by the bankrupt himself after this are void. An "insolvent," on the contrary, retains the management of his own estate, however he may misbehave towards his creditors at large, and it is rarely, unless on his own application, vested in others. It is of no importance how many acts he may commit which under a bankrupt system would enable his creditors to take from him the control of his property; they can seldom act upon him compulsively under the provisions of an "insolvent law" if he is obstinate or dishonest until he has given what preferences he thinks proper, and is become so poor as to be scarcely worth pursuing. Under the one system the creditors are actors, and under the other the debtor himself originates the proceedings. *Adams v. Storey* (U. S.) 1 Fed. Cas. 141, 142.

Laws which merely liberate the person are "insolvent laws," and those which discharge the contract are "bankrupt laws." "Insolvent laws" operate at the instance of an imprisoned debtor, "bankrupt laws" at the instance of a creditor. The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who may be excluded from or included within this descrip-

tion. *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 194, 4 L. Ed. 529.

The only substantial difference between a strictly bankrupt law and an insolvent law lies in the fact that the former affords relief on the application of the creditor, and the latter on the application of the debtor. In the general character of the remedy there is no difference between the two, however much the modes by which the remedy may be administered may vary. *Martin v. Berry*, 37 Cal. 208, 222.

Mr. Justice Story in his Commentaries on the Constitution, in respect to what are to be deemed "bankrupt laws," says: "Attempts have been made to distinguish between 'bankrupt laws' and 'insolvent laws.' For example, it has been said that laws which merely liberate the person of the debtor are insolvent laws, and those which discharge the contract are bankrupt laws. But it would be very difficult to sustain this distinction by any uniformity of laws at home or abroad. \* \* \* Again, it has been said that insolvent laws act on imprisoned debtors only at their own instance, and bankrupt laws only at the instance of creditors. But, however true this may have been in past times as the actual course of English legislation, it is not true, and never was true, as a distinction in colonial legislation. It is believed that no laws ever were passed in America by the colonies or state which had the technical denomination of 'bankrupt laws.' But insolvent laws are quite co-extensive with the English bankrupt system in their operation and effect, and have not been unfrequent in colonial and state legislation. No distinction has ever practically, or even theoretically, been attempted to be made between 'bankruptcies' and 'insolvencies.'" In *Re Klein* (U. S.) 14 Fed. Cas. 716, it is said: "The ideas attached to the word 'bankruptcy' in the Constitution are numerous and complicated, and extend to all cases where the law causes to be distributed the property of the debtor among his creditors. This is its least limit; its greatest is the discharge of a debtor from its contract, and all intermediate legislation affecting the substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress." Hence Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], is not unconstitutional because it provides that others than traders may be adjudged bankrupts, and that this may be done on voluntary petition. *Hanover Nat. Bank v. Moyses*, 22 Sup. Ct. 857, 859, 186 U. S. 181, 46 L. Ed. 1113.

#### BANKRUPTCY.

See "Act of Bankruptcy"; "Adjudication of Bankruptcy"; "Involuntary Bankruptcy"; "Matters in Bankruptcy"; "Voluntary Bankruptcy."

"Bankruptcy" is an absolute inability to pay a debt, without respect to time; a want of assets convertible into money sufficient to pay the debt. *Phipps v. Harding* (U. S.) 70 Fed. 468, 470, 17 C. C. A. 203, 30 L. R. A. 513.

In *Everett v. Stone*, 8 Fed. Cas. 901, Mr. Justice Story observed: "In short, 'contemplation of bankruptcy' means a contemplation of becoming a broken up and ruined trader, according to the original signification of the term; a person whose table or counter of business is broken up, *bancus ruptus*." *Curtis v. Leavitt*, 15 N. Y. 9, 110.

"Bankruptcy," as used in the bankruptcy act, with reference to time, shall mean the date when the petition was filed. U. S. Comp. St. 1901, p. 3419.

#### As insolvency.

"'Bankruptcy' is an ancient English word, which has come down to us at least from the time of Elizabeth, bearing all the way a meaning coextensive with 'insolvency,' and it was especially equivalent to that word when the Constitution was adopted, and hence was used in that sense in the clause of the federal Constitution giving Congress the power to establish uniform laws on the subject of bankruptcy." *Kunzler v. Kohaus* (N. Y.) 5 Hill, 317, 320.

The word "bankruptcy" has two meanings, one the popular meaning, in which it is convertible with the word "insolvency," describing the mere inability of a debtor to pay; the other the technical meaning, describing a legal process by which a lease is put to an end. *Bernhardt v. Curtis*, 33 South. 125, 126, 109 La. 171, 94 Am. St. Rep. 445.

"Chancellor Kent says 'bankruptcy' in the English law has by long and settled usage received an appropriate meaning, and has been considered to be applicable only to unfortunate traders, or persons who get their livelihood by buying and selling for gain, and who do certain acts which afford evidence of an intention to avoid the payment of their debts. 2 Kent, Comm. 389. Crabb, in his *English Synonyms*, points out the distinction which has been mentioned between 'bankruptcy' and 'insolvency,' but he did not speak as a lawyer, but as a master of language. 'Bankruptcy' is applied to merchants and traders, 'insolvency' to other persons. As the state of insolvency usually precedes and is attendant upon bankruptcy, it is not surprising that the two words should sometimes be confounded, and hence it is that in common parlance the word 'bankruptcy' has occasionally been applied to an insolvent farmer, physician, lawyer, mechanic, or other person. 'Insolvency' is said to be the generic term, comprehending 'bankruptcy' as a species." As used in a clause of the federal Constitution authorizing Congress to make un-

iform laws on the subjects of bankruptcy it is to be construed in its narrower signification of tradesmen who are incapable of paying their debts, and not as including all insolvent persons. The term is not synonymous with "insolvency." A man may be insolvent without becoming a bankrupt, or having a capacity to become such, and a bankrupt may be proved to be entirely solvent. Mere insolvency never makes one a bankrupt, without the concurrence of some act done to the injury of his creditors. *Sackett v. Andross*, 3 N. Y. Leg. Obs. 11, 17; *Id.* (N. Y.) 5 Hill, 327, 343.

#### BANKRUPTCY PROCEEDING.

A "bankruptcy proceeding" is a proceeding or suit, in itself not equitable, sequestrating a debtor's property. In *re Weitzel* (U. S.) 29 Fed. Cas. 604, 605.

A proceeding in bankruptcy is in the nature of a bill in equity, in which the bankrupt is complainant and the creditors are defendants. Where a discharge is refused on the merits, the judgment inures to the benefit of all the creditors. Both parties are bound by it, and neither party should be permitted to try the same question again. In *re Fliegenbaum* (U. S.) 121 Fed. 69, 70, 57 C. C. A. 409.

Proceedings in bankruptcy are in the nature of a suit in equity, the ultimate relief in which is the distribution of the unexempt property of the bankrupt among his creditors, and a discharge of the bankrupt. In *re Gasser* (U. S.) 104 Fed. 537, 538, 44 C. C. A. 20.

"Bankruptcy proceedings have been likened to an equitable attachment (In *re Hinds*, 12 Fed. Cas. 202) in respect to their purpose and their effect upon the debtor's property." *Farmers' Loan & Trust Co. v. Baker*, 46 N. Y. Supp. 266, 273, 20 Misc. Rep. 387; *Farmers' L. & T. Co. v. Minneapolis E. & M. Works*, 35 Minn. 543, 546, 29 N. W. 349.

"Matters and proceedings in bankruptcy," as used in Rev. St. U. S. § 711 [U. S. Comp. St. 1901, p. 577], declaring that the jurisdiction of United States courts shall be exclusive in all matters and proceedings in bankruptcy, "means the matters and proceedings which pertain to the special and peculiar jurisdiction of federal courts as courts of bankruptcy. The adjudication of the bankruptcy, the appointment of assignees and other agents for the administration of the system, the vesting of the title of the bankrupt's property in the assignee, the marshaling and distribution of the assets, the discharge of the bankrupt from his debts—these and other like powers belong to the jurisdiction in bankruptcy, and are matters and proceedings in bankruptcy of which the state courts have no jurisdiction." *Kidder v. Horrobin*, 72 N. Y. 159, 167.

The District Court sitting in bankruptcy has no jurisdiction over a controversy, between trustees in bankruptcy and an adverse claimant, relating to the title or possession of property in the custody of the latter, in the absence of his consent, but such an issue is a controversy at law or in equity, as distinguished from a "proceeding in bankruptcy," within the meaning of section 23, Bankr. Act July 1, 1898, c. 541, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431]. *In re Rochford* (U. S.) 124 Fed. 182, 185, 59 C. C. A. 388.

#### As proceeding in rem.

A bankruptcy proceeding is a proceeding in rem, and all parties interested in the res are regarded as parties to the bankruptcy proceedings. These include the bankrupt and the trustee, as well as the creditors of the bankrupt, both secured and unsecured. *Southern Loan & Trust Co. v. Benbow* (U. S.) 96 Fed. 514, 528.

### BANQUET.

"A banquet is a grand entertainment of eating and drinking, a sumptuous feast," and indicates the distinction between a hotel, as such, for entertaining travelers, and the bar or drinking place. *In re Breslin* (N. Y.) 45 Hun, 210, 213, 10 N. Y. St. Rep. 80, 82.

### BAR.

See "Plea in Bar"; "Presumptive Bar"; "Public Bar."

A "bar" is a bar or counter from which liquors and food are passed to customers, hence the portion of the room behind the counter where liquors for sale are kept; and it may also be defined as a room or counter where liquors or refreshments are dispensed, as in a public house. *Town of Leesburg v. Putnam*, 29 S. E. 602, 603, 103 Ga. 110, 68 Am. St. Rep. 80.

A "bar" is an inclosed place of a tavern, inn, or coffeehouse where the landlord or his servants deliver out liquors and wait upon customers, and, as used in a mortgage of property in the "room or rooms known as the Buford Hotel Bar," refers to the room where the liquors were sold, and did not include liquor in a cellar on a different floor from and unconnected with the barroom. *Latta v. Bell*, 30 S. E. 15, 16, 122 N. C. 639, 641.

### BAR DOCKET.

A "bar docket" printed in small pamphlet form for distribution among the members of the bar is not known to or recognized by statute. It is not a part of the court records, and can only become such, or made available on appeal, when duly incorporated in or sufficiently identified by a bill of exceptions. Code, § 2747, contemplates or refers

to the "appearance docket" which is materially different from what is called a "bar docket." *Gifford v. Cole*, 10 N. W. 672, 57 Iowa, 272.

### BAR IRON.

"Bar iron" means only such iron as is known as "bar iron" in the commercial sense, and iron in flat pieces less than one inch in width and three inches in thickness, known commercially as "nail rods," and never in a commercial sense designated as "bar iron," is not to be regarded as such within Rev. St. § 2504, Schedule E, fixing duty on bar iron. *Worthington v. Abbott*, 8 Sup. Ct. 562, 563, 124 U. S. 434, 31 L. Ed. 494.

"Bar iron" is a term of trade, including, it may be, what to those out of the trade would not be deemed to be bars of iron, and excluding what they would. At all events, the question of what is included under that term is one of fact, not to be decided by a court, but for a jury. *Evans v. Commercial Mut. Ins. Co.*, 6 R. I. 47, 53.

### BARKEEPER.

As laborer, see "Laborer."

"Barkeeper," *ex vi termini*, imports a person hired, who from the nature of his station is forced to perform servile offices within the walls of a public house. He is a domestic living intra moenia, assisting in the economy of the family. They are hirelings making a part of the family, whose sole occupation and employment is about the house, many of whose duties are menial, subject to the command, not only of his employer, but of all his guests in matters connected with such employment. The wages of a barkeeper in a tavern are to be considered as servant's wages, and are entitled to a preference as such under the intestate act of April 19, 1794. *Boniface v. Scott* (Pa.) 3 Serg. & R. 351-354.

### BARROOM.

A "barroom" is defined to be a room containing a bar or counter at which liquors are sold. *Town of Leesburg v. Putnam*, 103 Ga. 110, 113, 29 S. E. 602, 603, 68 Am. St. Rep. 80.

"Barroom," as used in the general local option law of 1885, § 8, providing that "nothing in this act shall be construed to prevent the manufacture, sale and use of domestic wines or cider, or the sale of wines for sacramental purposes, provided such wines or cider shall not be sold in 'barrooms' by retail," means a place for the sale of intoxicating liquors, by retail, for consumption at the place of sale. *Belser v. State*, 4 S. E. 257, 258, 79 Ga. 326.

"Barroom," as used in a city ordinance taxing and regulating barrooms, signifies and

means a place where intoxicating liquors are sold, to be drunk on the premises owned or occupied by the dealer. In *re Schneider*, 8 Pac. 289, 290, 11 Or. 288.

Act March 3, 1893, 27 Stat. 563, defines a "barroom" to be every place where intoxicating liquors are sold to be drunk on the premises. *Army & Navy Club v. District of Columbia* (U. S.) 8 App. Cas. 544, 550.

#### Dispensary.

A room containing a bar or counter at which liquors are sold, or a room with a bar where liquors and refreshments are served, is a "barroom," and a dispensary cannot be correctly so termed. *Town of Leesburg v. Putnam*, 29 S. E. 602, 603, 103 Ga. 110, 68 Am. St. Rep. 80.

#### BARROOM FIXTURES.

The term "fixtures" has a well-ascertained and certain meaning as something affixed to realty, and the word "barroom" has a certain meaning, so that the term "barroom fixtures," as used in an insurance policy, can only be reasonably interpreted to mean fixtures in a barroom. *Hegard v. California Ins. Co. (Cal.)* 11 Pac. 594, 598.

#### BARRED.

Within the meaning of a city ordinance making it unlawful to exhibit in a "barred or barricaded" house or room, or in any place protected in a manner to make it difficult of access by the police, any cards, dice, or gaming implements whatsoever, the words "barred and barricaded," when rightly construed, do not mean an ordinary private residence or room, where doors are sometimes locked or bolted in the ordinary method, but relate to such as are barred against intrusion by officers, and hence the ordinance is not unreasonable. In *re Ah Cheung*, 69 Pac. 492, 493, 136 Cal. 678.

#### By Limitations.

"Barred" is the word in general use to characterize the effect of the statute of limitations. An action or a cause of action is commonly said to be "barred" by such a statute. *Knox County v. Morton* (U. S.) 68 Fed. 787, 791, 15 C. C. A. 671.

When we say that a debt is "barred by the statute of limitations," we do not mean that it has been satisfied or otherwise extinguished, but we mean that the man who owes it can avoid a personal judgment by pleading the bar of the statute. *Cowan v. Mueller*, 75 S. W. 606, 607, 176 Mo. 192.

"Barred," as used in the act of limitations of 1715, declaring that any person claiming interest to any slave by virtue of any parol gift shall commence or prosecute his suit for the same within 3 years from

the passing of the act, otherwise the same shall be forever barred, means that the suit, and not the title, shall be barred. The word "bar" is technically applied to actions and suits. *Skinner v. Skinner*, 7 N. O. 535, 537.

The word "barred," in Rev. St. 1889, § 3195, providing that a county warrant having been delivered and not presented for payment within five years from its date, and having been presented and not paid for want of funds, which is not again presented within five years after the funds shall have been set apart for its payment, shall be barred, must be held to have been used in its well-defined technical sense. It necessarily implies an action to be barred, defeated, or destroyed, and the meaning of the phrase "such warrant shall be barred" is just as plain and unmistakable as if the phrase had been written "action on such warrant shall be barred." *Willson v. Knox County*, 34 S. W. 45, 46, 132 Mo. 387.

#### BARBAROUS.

"Cruel and barbarous treatment, and indignities to the person endangering life or health," within the meaning of the divorce law, must consist of willful and malicious acts, or they would not come within the description of the terms. "Cruel" and "barbarous" are words implying a merciless and savage disposition, taking pleasure in suffering, and without pity; while "indignities" involves an insulting and contemptuous purpose. The evil and malicious will must be present to constitute an act cruel or barbarous, and an insulting intent to make it an indignity. Accidental acts, no matter how injurious, would not be sufficient, for the wrongful intent would be absent. Hence cruel and barbarous treatment resulting from the insanity of the party is not ground for divorce. *Hansell v. Hansell*, 15 Pa. Co. Ct. R. 514, 515.

#### BARBED WIRE.

A wire consisting of flat iron twisted ribbons about 1/2 inch wide, with teeth 1 1/2 inches apart, is not a "barbed wire," within the meaning of Laws N. Y. 1891, c. 367, providing that barbed wire shall not be used in constructing fences required of a railroad company against adjoining premises. *Stisser v. New York Cent. & H. R. R. Co.*, 52 N. Y. S. 861, 862, 32 App. Div. 98.

#### BARBER.

As mechanic, see "Mechanic."

#### BARBERING.

"Barbering," as used in the title to an act making it a misdemeanor to carry on barbering on Sunday, and providing in the body of



the act that it shall be a misdemeanor for any one engaged in the business of a barber to shave, shampoo, cut hair, or keep open their bathrooms on Sunday, means the act of one whose occupation is to shave the beard and cut and dress the hair of others, and cannot be construed to include bath-rooms, which are apartments for bathing. "Barbering" and 'bathing,' or 'barber shop' and 'bath-house,' are neither synonymous nor convertible terms." *Raglio v. State*, 6 S. W. 401, 86 Tenn. (2 Pickle) 272.

Any person who is engaged in the capacity so as to shave the beard or cut and dress the hair for the general public shall be construed as practicing the occupation of "barber." Rev. St. Mo. 1899, § 5046.

## BARE NAKED LIE.

A "bare, naked lie" within the meaning of the rule that an action for fraud cannot be supported for telling a bare, naked lie, is defined as saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person. *Pasley v. Freeman*, 3 Term R. 51, 58.

## BARGAIN.

See "Catching Bargain"; "Grant, Bargain, and Sell."

If the word "agreement" embraces a mutual act of both parties, surely the word "bargain" is not less significative of the consent of two. In a popular sense the former is frequently used as declaring the engagement of one only, but the word "bargain" is seldom used unless to express a mutual contract or agreement. *Packard v. Richardson*, 17 Mass. 122, 131, 9 Am. Dec. 123.

A bargain, is a contract or agreement between two parties, the one to sell goods or lands, and the other to buy them. *Hunt v. Adams*, 5 Mass. 358, 360, 4 Am. Dec. 68.

"Bargains, in most instances, are trials of skill. It is not expected that a purchaser will point out the advantages of the objects of sale. The buyer will not tell the seller his horse is younger than he represents him to be." *Edelman v. Latshaw* (Pa.) 13 Montg. Co. Law Rep'r, 27, 31 (quoting 2 Brown, Ch. 420).

Where the word "bargain" is employed in a deed, it is not used for the purpose of expressing the quantity of estate conveyed, but merely for the purpose of passing the title to an estate, therein described, by other words specially introduced for that purpose. *Krider v. Lafferty* (Pa.) 1 Whart. 303, 314-316.

The word "bargain," in section 14, How. & Hutch. 374, 375, enacting that no person

shall take, directly or indirectly, "in any contract, bond or note, for the payment of money, founded on any bargain, sale, or loan of wares and merchandise, interest at the rate of more than 8 per cent. per annum," grammatically considered, has exclusive relation to wares and merchandise, etc., and not to money. The meaning of the word, in its common acceptance, is "an agreement between persons concerning the loan, exchange, or sale of property." *Grand Gulf Bank v. Archer*, 16 Miss. (8 Smedes & M.) 151, 192.

"Bargain," as used in the seventeenth section of the statute of frauds, means the terms on which the parties contract. *Kenworthy v. Schofield*, 2 Barn. & C. 945.

### Sell distinguished.

To "sell" means to transfer a thing in consideration of a price paid or agreed to be paid in current money, while a "bargain" is where the consideration, instead of being payable in money, is made in goods or merchandise. *Commonwealth v. Davis*, 75 Ky. (12 Bush) 240, 241.

## BARGAIN AND SALE.

A "bargain and sale," is the transfer and delivery of personal or real property, or chose in action, by one person to another, for a consideration agreed on between them as the value of the property sold. *Brittin v. Freeman*, 17 N. J. Law (2 Har.) 191, 231. It "is a real contract, for a valuable consideration, for passing the title of land from one to another." *Claiborne v. Henderson* (Va.) 3 Hen. & M. 322, 349. It is a real contract, upon a valuable consideration, for passing lands by deed indented. 2d Inst. 672. *Guest v. Farley*, 19 Mo. 147, 150. As defined by Blackstone, it is a real contract whereby a person contracts to convey land. Cruise says that it is "where a contract is made by which a person conveys his lands to another for a pecuniary consideration, in consequence of which a use arises to the bargainee." *Perry v. Price*, 1 Mo. 553, 554. Bargain and sale is a method of conveyance founded on the statute of uses. "The bargainor contracts to sell the land, and receives the purchase money. After this he is, in equity, considered as seised of the land to the use of the bargainee, and the statute unites the possession to the use, so that the very instant the use is raised the possession is joined to it, and the bargainee becomes seised of the land. The words of transfer applicable to this conveyance are 'bargain and sell,' but they are by no means necessary nor material to its operation. There must be a pecuniary consideration; but, if a man for such a consideration covenants to stand seised to the use of another person, a use is thereby raised, which the statute will execute." *French v. French*, 3 N. H. 234, 261.

The words "bargain and sale," as used with reference to the title to real estate, import a contract to convey, and raise a use in favor of the bargainee. It does not import a payment of the consideration in money. *State of Iowa v. McFarland*, 4 Sup. Ct. 210, 219, 110 U. S. 471, 28 L. Ed. 198.

The words "bargain and sell" are not necessary to constitute a deed of bargain and sale, in order to pass a fee simple or less estate in land under the statutes of uses. *Krider v. Lafferty* (Pa.) 1 Whart. 303, 314, 315.

The words "bargain, sell, release, quitclaim and convey," as used in a deed, "are words of release and quitclaim merely. They carry the grantor's interest and estate in the land described, whatever it may be." *Gibson v. Chouteau*, 39 Mo. 536, 566.

The words "bargained and sold," or words to the same effect, in all conveyances of hereditary real estate, unless restricted in express terms on the part of the person conveying the same, himself, and his heirs, to the person to whom the property is conveyed, his heirs and assignees, shall be limited to the following effect: (1) that the grantor, at the time of the execution of said conveyance, is possessed of an irrevocable possession in fee simple to the property so conveyed; (2) that the said real estate, at the time of the execution of said conveyance, is free from all incumbrance made or suffered to be made by the grantor, or by any person claiming the same under him; (3) for the greater security of the person, his heirs and assignees, to whom said real estate is conveyed by the grantor and his heirs, suits may be instituted the same as if the conditions were stipulated in the said conveyance. *Comp. Laws N. M. 1897, § 3941.*

#### Conveyance.

The term "conveyance" includes a grant by way of bargain and sale. *Wilhelm v. Wilken*, 44 N. E. 82, 83, 149 N. Y. 447, 32 L. R. A. 370, 52 Am. St. Rep. 743.

#### Covenant to stand seised distinguished.

"The only essential difference between a covenant to stand seised to uses and a bargain and sale, setting aside the external formalities required to give validity to the latter—that is, the enrollment thereof—is the nature of the consideration, and hence the deed may operate for the benefit of the different parties both as a bargain and sale and a covenant to stand seised." *Burt. Real Prop.* 45, pl. 145. *Cornish* also takes it for granted that there is no difference between a bargain and sale enrolled, and a covenant to stand seised, in conveying a future freehold under the statute of uses; hence he concludes that a grant of lands generally by either of these modes of conveyance, with

the habendum limiting the freehold to commence in futuro, will be valid to convey such estate, though it could not be thus limited by any common-law conveyance. *Rogers v. Eagle Fire Co. (N. Y.)* 9 Wend. 611, 630 (citing *Corn. Deeds*, 35).

#### As transferring title.

A bargain and sale, since the enactment of the statute of uses and trusts, is a kind of real contract, whereby the bargainor, for some pecuniary consideration, bargains and sells—that is, contracts to convey the land to the bargainee—and becomes by such a bargain trustee for, or seised to the use of, the bargainee, and then the statute of uses completes the purchase; or, as it hath been well expressed, the bargain first vests the use, and then the statute vests the possession. Where an owner of certain real estate agreed with a broker that if the latter would find a purchaser or make a sale of the real estate the owner would pay the broker for his commission a specified sum, and in pursuance of the agreement the broker effected a bargain and sale of the real estate on the contract, which was mutually obligatory on the owner as vendor and a third person as vendee, the broker was entitled to said commission, though the vendee afterwards refused to execute his part of said contract of sale. *Love v. Miller*, 53 Ind. 294, 296, 21 Am. Rep. 192.

A bargain and sale is a real contract, upon valuable consideration, for passing lands, etc., whereby the bargainor does not convey, but contracts to convey, the land to the bargainee, and becomes by such bargain a trustee for or seised to the use of the bargainee. The property or possession of the soil remained in the bargainor; the bargainee had neither *jus in re* nor *ad rem*, but only a confidence or trust; or, in other words, he was entitled to the use or profits of the land. "Deeds of bargain and sale do not of themselves transfer the title, but merely raise a use in favor of the bargainee." *Thatcher v. Omans*, 20 Mass. (3 Pick.) 521, 529.

A bargain and sale is a real contract whereby a person bargains and sells his lands to another for a pecuniary consideration, in consequence of which a use arises to the bargainee, and the statute of uses immediately transfers the legal estate and actual possession to the cestui que use, without any entry or other act on his part. *Silfer v. Beates* (Pa.) 9 Serg. & R. 166, 176.

A simple bargain and sale of land in writing, in words of the present and without any more, is a conveyance operating under and by virtue of the statute of uses, always on sufficient consideration. It was devised in England as a common assurance soon after the passage of the statute, and has become the most common mode of conveyance in

the United States. It is more than a quitclaim or a release. It actively effects a divestiture of title from the grantor, and transmits it to the grantee, with or without covenants of warranty, and it is no less a conveyance, in the strictest sense, because it may also have clauses of quitclaim or release. *Holland v. Rogers*, 33 Ark. 251, 255.

"A deed of bargain and sale (which mode of conveyance was not introduced in consequence of the enactment of the English statute of uses, but existed long before, deriving only from that statute greater efficacy than it possessed when uses remained at common law. *Saund*. 311), although purporting to convey an estate in fee simple, yet actually conveys nothing more than the estate of the bargainor—such an estate only as the bargainor might lawfully transfer, an estate commensurate with the estate of the bargainor at the execution of the deed." *Micheau v. Crawford*, 8 N. J. Law (3 Halst.) 90, 108.

At common law the term "bargain and sell" was used to evidence a contract to convey, which made the bargainor to hold for the use of the bargainee, and the statute of uses vested the title in the usee. A release was used only when the releasee was in possession, and the releasor conveyed to him his own title. The signification of these terms has been somewhat modified, and in America to-day the words "bargain and sell" are sufficient to convey the full fee-simple title to any species of property. Thus, if one "grants, bargains, sells, and releases," the grantee by such words takes the fee. *Richardson v. Levi*, 3 S. W. 444, 448, 67 Tex. 359.

An ordinary deed of bargain and sale is an executed contract between the bargainor and bargainee. *Higdon v. Rice*, 26 S. E. 256, 119 N. C. 623.

Where the partition words in a deed are "bargain, sell and quitclaim," the deed not only releases, but transfers any interests which the grantor possessed at the expiration of the deed. *Touchard v. Crow*, 20 Cal. 150, 160, 81 Am. Dec. 108.

The word "grant," the phrase "bargain and sell," in a deed, or any other words purporting to transfer the whole estate of the grantor, shall be construed to pass to the grantee the whole interest and estate of the grantor in the lands therein mentioned, unless there be limitations or reservations showing, by implication or otherwise, a different intent. Code Pub. Gen. Laws Md. 1888, p. 254, art. 21, § 12.

### BARGAINED.

"Bargained," as used in a written contract whereby one person "bargained" and agreed to sell to another for a specified consideration the pine timber on certain lots,

imports a sale in present, not an agreement to sell by some further conveyance. "It implies a conveyance of a present interest, and was a sale of the timber." *Warren v. Leland* (N. Y.) 2 Barb. 613, 616.

### BARGE.

See "Coal Barge."

Rev. St. § 4492 [U. S. Comp. St. 1901, p. 3058], requiring a barge carrying passengers, while in tow of a steamer, to be equipped with fire buckets, etc., did not include a canal boat, laden with coal for transportation, having on board the wife and children of the captain. *Eastern Transp. Line v. Cooper*, 99 U. S. 78, 79, 25 L. Ed. 382.

### Lighter synonymous.

"Barge," as used in Rev. St. § 4289 [U. S. Comp. St. 1901, p. 2945], providing that the limited liability act shall not apply to the owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation, means, according to Webster, "a flat-bottomed vessel of burden for the loading and unloading of ships," and is synonymous with "lighter," and used wholly in local navigation. *The Mamie* (U. S.) 5 Fed. 813, 818.

### Scows included.

"Scows" are classed with "barges," and are charged at the same graded rates under the classification of vessels by the New York statute prescribing different rates for wharfage. *The Scow No. 15* (U. S.) 88 Fed. 305, 306.

### As ship or vessel.

As sail vessel, see "Sail Vessels."

A barge is a boat or vessel, and hence is within the letter of a law relating to "boats and vessels." *The Resort v. Brooke*, 10 Mo. 531, 534. See, also, *The Mac*, 7 Prob. Div. 126 (cited in *Cope v. Vallette Dry-Dock Co.*, 7 Sup. Ct. 336, 119 U. S. 629, 30 L. Ed. 501); *The New York* (U. S.) 93 Fed. 495, 497.

A coal barge is a rough, square-cornered box from 156 to 180 feet long, about 26 feet wide, and 8 to 10 feet deep, specially made for the transportation of coal down the Mississippi river and its tributaries. It is usually sold with the coal, and when the coal is unloaded is broken up for old lumber and firewood, but sometimes, when in good condition, and if such boats are in demand, is towed back up the river and used once more. It is not a ship or vessel within the admiralty laws. *Wood v. Two Barges* (U. S.) 46 Fed. 202, 204; *Jones v. Coal Barges* (U. S.) 13 Fed. Cas. 950.

That species of water craft known on the western rivers of Pennsylvania as "barges" are neither ships, boats, nor vessels,

within an act giving a lien for work furnished in the construction or repair of such vessels. *Appeal of Nease (Pa.)* 3 Grant, Cas. 110, 113.

#### Steam yacht.

A steam pleasure yacht running in and out of the port of Detroit is to be treated as a barge, within Rev. St. § 4289 [U. S. Comp. St. 1901, p. 2945], excepting canal boats, barges, and lighters from the preceding sections limiting the liability of owners of vessels. *The Mamie (U. S.)* 8 Fed. 367.

### BARLEY.

An indictment for setting fire to a "stack of barley" was sufficient under a statute describing the punishment for setting fire to a "stack of corn or grain." *Rex v. Swatkins*, 4 Car. & P. 548.

### BARN.

See "In Barn."

A barn is a covered building for securing productions of the earth. *State v. Laughlin*, 53 N. C. 354, 355. It is defined by Webster to be "a covered building for securing grain, hay, flax, and other products of the earth." *State v. Laughlin*, 53 N. C. 354, 355.

A conveyance of a "barn," without other words being added to extend its meaning, will not be construed as including the same appurtenances as a conveyance of a "house," and the conveyance will pass no more land than is necessary for its complete enjoyment. The word "barn" is of more limited significance than that of "house," and the appurtenances necessary for the enjoyment of the same are more limited. *Bennet v. Bittle (Pa.)* 4 Rawle, 339, 342.

Under Rev. St. § 4226, punishing a malicious burning of any barn, a building may be a "barn," whether used to receive the crop, for the stabling of animals, or other purposes. Webster defines a "barn" as "a covered building for receiving grain, hay, or other productions of the farm," and says that in the Northern states farmers generally use these buildings for stabling their horses or cattle, so that among them a barn is both a cornhouse and a stable. *State v. Smith*, 28 Iowa, 565, 568.

Under the Kentucky statute making it a felony to willfully burn a stable, barn, or other place where wheat, corn, or other grain is usually kept, or any other house whatever, an indictment for burning a barn is sufficient without an allegation that wheat, corn, or other articles named in the statute were usually kept in it, the word "barn" being an ordinary term, the meaning of which is well understood. *Evans v. Commonwealth*, 12 S. W. 769, 11 Ky. Law Rep. 573.

"Barn," as used in Rev. Code, c. 34, § 2, providing that any one who should burn a barn having grain in it should be punished with death, includes a building of hewn logs 26 feet by 15, divided by a partition, on one side of which horses were kept, and the other side of which was used for storing corn, oats, and wheat, and other products of the farm, and farming utensils. *State v. Cherry*, 63 N. C. 493, 496.

2 Hill's Code, p. 662, § 46, defines burglary to be the unlawful entry of any "barn \* \* \* or any building in which goods, merchandise or valuable things are kept for sale or deposit." Held, that the word "barn" means any barn, irrespective of whether it contains any valuable thing, since the latter clause of the statute refers only to buildings not specifically designated. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

#### Buggy house.

In the ordinary acceptance of the term, a "barn" does not include a house built as a shelter for buggies, though it was also used to store rough food for cattle, such as peas, pea vines, etc., and, as used by a testator in bequeathing to his wife "all the contents of barns, storehouse, and smokehouse," means a building whose primary use or adaptation was to the storing away of corn, wheat, and other grain and rough food, and this meaning is not destroyed by the fact that sheds were attached to the building, where wagons, etc., were kept out of the weather. *Johnson v. Johnson*, 26 S. E. 722, 725, 48 S. C. 408.

#### As dwelling house.

See "Dwelling—Dwelling House."

#### Dwelling house used for storage.

As used in an indictment, a "barn" includes a building which the owner had erected on his farm for a dwelling house, but which he had never occupied or used as such, and which had been used for several years for storing wheat and corn and other products of the farm. *Barnett v. State*, 38 Ohio St. 7.

A building intended for and constructed as a dwelling house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, is not a "house, outhouse, or barn," within St. 9 Geo. I, c. 22, § 7, entitling the owner of a "house, outhouse, or barn" to maintain an action against the hundred for an injury sustained in consequence of malicious setting fire to the same. *Elsmore v. Inhabitants of St. Briavells*, 8 Barn & C. 461.

#### Fodder house.

"Barn," as used in Cr. St. § 140, defining arson to be the willful and malicious setting fire to or burning any "barn, stable, coach house, gin house, store-house or warehouse,"

does not include a fodder house and corn-crib, and an indictment charging the felonious burning of a "fodder house" is insufficient. *State v. Jeter*, 24 S. E. 839, 891, 47 S. C. 2.

#### Granary.

A house 18 feet long, 15 feet wide, built of logs, the cracks covered with rough boards, with a good plank floor and the door 4 feet high, containing corn and oats, though the only building on the farm used for storing crops, is not a "barn" within the statute as to arson. *State v. Jim*, 53 N. C. 459, 460.

A "barn" is said to be, in Webster's Dictionary, a covered building for securing grain, hay, flax, and other productions of the earth. Bouvier's Law Dictionary describes it as a building on a farm used to receive the crop, the stabling of animals, and other purposes. A house 17 feet long and 12 feet wide, sitting on blocks in a stable yard, having two rooms in it, one for storing nubbins and refuse corn and the other for storing peas, oats, and other products, is not a "barn" within the statute making burning of a barn a felony. *State v. Laughlin*, 53 N. C. 455, 458.

#### Incomplete building.

A building in process of erection and not completed is not a "barn" within the statute punishing the burning of a barn. *State v. Wolfenberger*, 20 Ind. 242, 243.

#### Sheep shed.

A deed of a homestead, reserving to the grantor the undivided half part of the "barn" thereon, includes the sheep shed connected with it, and the land on which it stood, and the barn yard used with the barn, being within the exception, under the general term "barn," as applicable to the purposes for which the building and land were used. *Cunningham v. Webb*, 69 Me. 92, 95.

#### Stable synonymous.

In an indictment for barn burning, which alleges the offense to have been committed by burning a barn and stable, "barn" is used interchangeably with the word "stable." Primarily, a barn is a building for the storage of grain and fodder, and a stable is a building for lodging and feeding horses and other domestic animals. It is stated in Webster's International Dictionary that in the United States a part of a barn is often used for stable. *Saylor v. Commonwealth (Ky.)* 57 S. W. 614, 615.

#### Tobacco storehouse.

"Barn," as used in an indictment for burglary, includes a building erected on a farm, and designed and used mainly for the purpose of storing and drying tobacco, and occasionally for the purpose of storing hay and flax. *Ratekin v. State*, 26 Ohio St. 420.

## BARON AND FEME.

"Baron and feme" means "lord and woman," and was used in the feudal legal nomenclature and in the earlier text-books as properly expressing the feudal theory that the wife was subject to the husband. *Cummings v. Everett*, 19 Atl. 456, 82 Me. 260.

## BARQUE.

A fire insurance policy describing the subject-matter as a "barque" on the stocks near a shipyard, being built for a certain person, does not cover timbers not united to the keel or structure thereon of the contemplated barque, though they are intended and completely prepared to be used in its framework, and are lying in the yard in the proper place to be conveniently applied to that use, and are valueless for any other vessel. The term "barque," standing by itself, has for its primary signification a completed vessel. As used in the policy, it includes timbers when they have entered into the structure which, when completed, will be a barque. In a technical sense, neither the keel with the incomplete structure thereon, nor any of the materials intended for the vessel, is a barque, but in the ordinary use of language the former would be so spoken of, and the others, though the work on them was all done, would not. *Hood v. Manhattan Fire Ins. Co.*, 11 N. Y. 532, 539.

## BARRACK.

A "barrack" is an erection of upright posts supporting a sliding roof, usually of thatch, and is so used in the statute making it an indictable offense to wilfully set fire to any "barrack" or stack of hay, grain, or bark. A "barrack" is not generally, if at all, used by the tanner to cover his bark, but if containing that material its contents would be within the words of the statute, and the protection intended to be given by it. *Chapman v. Commonwealth (Pa.)* 5 Whart. 427, 429, 34 Am. Dec. 565.

## BARRATRY.

See "Common Barrator."

Barratry is the institution of several suits, where one would have served every justifiable purpose, with a malicious design to harass and oppress the debtor. *Commonwealth v. McCulloch*, 15 Mass. 227, 229.

"Barratry" is defined to be the practice of exciting groundless judicial proceedings. Information on an outstanding title to land in the adverse possession of another constitutes a good consideration for a promissory note, and the sale of such information is not barratrous. *Lucas v. Pico*, 55 Cal. 126, 128.

**BARRATRY (In Maritime Law).**

As the sole definition of "barratry," Kersey, in his edition in 1707 of Phillips' New World of Words, gives, "a word that is used in policies of insurance for ships, signifying dissensions and quarrels among the officers and seamen." And Martin in his English Dictionary of 1748 says: "Barratry, in insurance, signifies dissensions and quarrels among officers and seamen." But Kersey, who published a dictionary of his own between these periods incorporates it simply as a law term, as follows: "Barratry is when the master of a ship cheats the owners or insurers, either by running away with the ship or embezzling their goods." Kersey's Dict. (3d Ed.) 1721. In the succeeding and fuller work of Bailey, it is given as a term in commerce, thus: "Barratry (in commerce) is the master of a ship cheating the owners or insurers, either by running away with the ship, sinking her, or embezzling the cargo." Bailey's Dict., folio, of 1736, and this exposition of its meaning has been substantially followed by the lexicographers to the present time. Webster limits it to a fraudulent breach of duty, a willful act of illegality or breach of trust, with dishonest views, by the master or mariners, to the injury of the owners of the cargo or ship, without the consent of the party insured. Webster's Quarto Dict. 1864. How the word came to express things so distinguishable from each other as strife or quarreling, and deceit or fraud, is explainable by its origin and history. The root, or apparent word, is to be found in Sanskrit. It is "bharat," meaning war. Houghton's Sanskrit Dict. (Lond. 1833). From this was formed in Sanskrit another word, "bharata," meaning an act which is a trespass against morals or justice, or an unjust or immoral action, probably used in its first formation to designate an unjust war, and which afterwards acquired in the Sanskrit a more general signification; both of which words have survived, and are now in use in modern Hindustani, the latter slightly modified in form, "bhaari, barhi, burai," and with other words formed from it, as "bharam, bharamani," but retaining in their various forms the same general signification, which may be illustrated by a word now in very general use in India—"baraket," evil. (Forbes' English & Hindustani Dict.) These two primitive words, "bharat" and "bharata," with significations more or less equivalent, are to be found in some form or other in tongues of all nations of the Indo-European group that derive their language from this parent source. Thus, "barathrum," both in the Greek and in Latin, was the name of the pit into which the condemned criminals were thrown, and, as a word for pit, dungeon, or the infernal regions, became "barathro" in the Spanish and the Portuguese, and "baratro" in the Italian. (Morin, Dict. Etym'y; Paris, 1809.) In all these languages "barat," or some

word formed from it by a change in the termination, meant strife, contention, quarreling, confusion, or disorder, intentional wrong, deceit, cheating, maliciousness, and also bartering and selling. In fact, the curious result of this inquiry is that this word, with its origin so remote, has during the many ages tenaciously adhered to the general signification of the parent words out of which it sprung. It was first used as a marine term in the Basque; at least, the first form of it in that sense which I have been able to discover is in that tongue, now one of the oldest in Europe. In the Basque, "barabaratu" signified delaying a vessel, abandoning her, seizing and giving her over, together with all that followed therefrom; and "baratu-gaidu," stranding, sinking, or scuttling her. (Don Pio De Zuaga Dict., by De Larramendi, San Sebastian, 1858.) In Lockyer v. Offley, 1 Term R. 269, "barratry" is defined as "every species of fraud or knavery in the masters of ships, by which the freighters or owners have been injured." Atkinson v. Great Western Ins. Co. (N. Y.) 4 Daly 1, 16.

"The term 'barratry' is known to the common law, and Cowell's Interpreter refers its origin to a Latin word, which would attach to it the idea of meanness, selfishness, and knavery. Some of our English books, following a French writer (Pasquier sur Emerigon), derive it from 'barat,' an old French or Italian word, which they explain by 'tromperie, fourbe, mensonge.' I should myself derive the word from the Spanish 'baratria, baratero,' which are rendered 'fraus' and 'fraudentus.' But it is worthy of particular notice that writers on maritime law, of the first respectability (I think Emerigon gives six in number), in explaining the marine sense of the word 'barratry,' use the French word 'prévariquez,' which can only be translated into 'acting without due fidelity to their owners.' The best French dictionary we have renders it by 'agir contre les devoirs de son charge,' acting contrary to the duties of his undertaking, and 'trahir la cause ou l'intérêt des personnes qu'on est obligé de défendre,' to betray the cause or interest of those whom we are bound to protect." Patapsco Ins. Co. v. Coulter, 28 U. S. (3 Pet.) 222, 231, 7 L. Ed. 659.

"Barratry" is synonymous with the terms "villainy," "knavery," "cheat," "malversation," "trick," and "deceit," and means the fraud of the master or mariners of a vessel to cheat the owner or freighters. It is any criminal act committed by the master or mariners of a vessel whereby the owner is injured. Hood's Ex'rs v. Nesbit, 2 U. S. (2 Dall.) 137, 138, 1 L. Ed. 821, 1 Am. Dec. 265. See, also, Cook v. Commercial Ins. Co., 11 Johns. 40, 45, 6 Am. Dec. 353; Waters v. Merchants' Louisville Ins. Co. (U. S.) 29 Fed. Cas. 415; Dederer v. Delaware Ins. Co. (U. S.) 7 Fed. Cas. 341, 343; Lawton v. Sun Mut. Ins. Co., 56 Mass. (2 Cush.) 500, 501.

"Barratry," as used in a policy of marine insurance insuring against barratry of the master of the vessel, means a violation on the part of the master of some of the duties and obligations which he owes to the owner of the vessel, by fraud or misconduct, from which a loss ensues, either of vessel or goods. *Wilson v. General Mut. Ins. Co.*, 66 Mass. (12 Cush.) 360, 362, 59 Am. Dec. 188.

Evidence that a cargo was sold, some of it beyond its original price, before it was discharged, before the damage to the vessel was ascertained; that the cost of repairing the vessel was trivial, and occupied only a few days; that the master and part owner failed to notify him either of the damage to or of the sale of the cargo; and that soon after the repair of the vessel he abandoned the voyage and sailed to another distant port—is sufficient to sustain a verdict that the sale was "barratrous," within the provisions of a marine policy insuring against barratry. *Meyer v. Great Western Ins. Co.*, 38 Pac. 82, 84, 104 Cal. 381.

#### **Criminal or fraudulent intent implied.**

It is an essential ingredient in barratry that there should be a criminal act or intent or gross negligence on the part of the master or mariners, tending to their own benefit, and to the injury of the owners or freighters of the ship, and without their privity or consent. *Hood v. Nesbitt*, 1 Yeates, 114, 118, 1 Am. Dec. 265.

Barratry is any willful act on the part of the master or mariners of a vessel whereby the owner is damaged, by whatever motive the act be induced, but accident or negligence does not amount to barratry. *Atkinson v. Great Western Ins. Co.*, 65 N. Y. 531, 538.

Barratry is a fraudulent breach of duty on the part of the master or crew whereby injury results to the owners of a ship, but an act to be barratrous must be done with the fraudulent intent or *ex maleficio*. A loss occasioned by the mere negligence of the master or mariners does not amount to barratry. *Grim v. Phoenix Ins. Co.* (N. Y.) 13 Johns. 451, 457.

Barratry, according to Valin, Pothier, Emerigon, and LeGuilidon, includes every fault of the master by which a loss is occasioned, whether arising from fraud, negligence, unskillfulness, or mere imprudence; but in English law it has a more limited signification, and no fault of the master amounts to barratry unless it proceeds from a fraudulent purpose, and there must be fraud or crime to constitute barratry. *Walden v. New York Firemen Ins. Co.* (N. Y.) 12 Johns. 129, 137.

Barratry is any fraudulent or criminal conduct against the owners of a ship or goods by the master or mariners, in breach of the trust reposed in them, and to the injury of the owners, although it may not be done with

an intent to injure them, or benefit the master and mariners at their expense. *Earle v. Rowcroft*, 8 East, 126, 135.

A mere deviation, without fraudulent intent, does not amount to barratry. *Hood v. Nesbitt's Ex'rs*, 2 U. S. (2 Dall.) 137, 138, 1 L. Ed. 321, 1 Am. Dec. 265.

A jettison of cattle by the master from mere unfounded apprehension during rough weather is not barratry, there being neither intentional fraud, breach of trust, nor willful violation of law, one of which is necessary to constitute barratry. *Compania De Navigacion La Flecha v. Brauer*, 18 Sup. Ct. 12, 17, 168 U. S. 104, 42 L. Ed. 398.

#### **By co-owner.**

Barratry cannot be committed by a master who is owner for the voyage, since he cannot commit a fraud against himself. *Waters v. Merchants' Louisville Ins. Co.* (U. S.) 29 Fed. Cas. 415; *Marcardier v. Chesapeake Ins. Co.*, 12 U. S. (8 Cranch) 89, 49, 3 L. Ed. 481.

"As a person cannot commit fraud upon himself, barratry cannot be committed by a master of a vessel who is part owner thereof." *Wilson v. General Mut. Ins. Co.*, 66 Mass. (12 Cush.) 360, 362.

Though a master of a ship, who is also the sole owner, cannot commit a fraud on himself so as to be guilty of barratry, one who is part owner may be guilty of barratry towards his co-owners. *Hutchins v. Ford*, 19 Atl. 832, 833, 82 Me. 363.

Barratry is a fraud committed by the master or mariners against the owners of a vessel. Though committed by the master and one of the several owners, it is no less a fraud on the part of the master; or if the master, being himself a part owner, commits the barratry, it is equally a fraud on the other part owners. Every fraudulent act on the part of the master is barratry, but such fraudulent act cannot be committed by a master who is sole owner. *Jones v. Nicholson*, 10 Exch. 28, 36.

Where the captain of a vessel intended by his acts to put the vessel with her cargo out of the way, and subject the insurance companies to the payment of their risks, it constituted what is known in marine insurance as the offense of "barratry," and was a crime against the owners of the cargo as well as the underwriters; and that he was himself the owner of an interest in the vessel did not render the crime any the less barratry, though such crime cannot be committed by the master when he is the sole owner of the vessel. *Voisin v. Commercial Mut. Ins. Co.*, 62 Hun. 4, 9, 16 N. Y. Supp. 410.

#### **By sole owner.**

"When the master of a ship is the sole owner, he cannot commit an act of barratry

against himself, for one cannot commit a fraud or other like unlawful act upon or against himself. Upon no sound principle, therefore, can it be made to embrace the case of a mere part owner." *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 303, 56 Am. Rep. 31.

#### **Must be against owner's interest.**

The act of barratry must be to the prejudice of the owners of the vessel, which prejudice may be either direct, intermediate, or consequential. *Cook v. Commercial Ins. Co.* (N. Y.) 11 Johns. 40, 45, 6 Am. Dec. 353.

"Barratry always carries the idea of fraud or crime with it, and to constitute barratry it is essential that the act or acts claimed to be barratrous should not be done with the view to promote the interests of the owners, but to promote that which is diametrically opposite to it; to injure or dispute such interest." *Brown v. Union Ins. Co. (Conn.)* 5 Day, 1, 8, 5 Am. Dec. 123.

"Barratry is an act committed by the master of a vessel, of a criminal nature, without the license or consent of the owner. There must be fraud in the transaction, and a selfish design for the master's own interest, for if the act is done solely to benefit the owner it does not constitute barratry." *Crousilat v. Ball*, 4 U. S. (4 Dall.) 294, 296, 1 L. Ed. 840, 2 Am. Dec. 375.

#### **Need not be to master's interest.**

"It is not essential to constitute the act of barratry that it should be to the interest of the master, but if it be so, that fact is evidence of fraud, as also is gross negligence. If the question turn merely on fraud, it will always be necessary to look at the motives and intention which influenced the act. If the motive were to benefit the owner, it is an honest one, though it may be a mistaken one, and therefore the act cannot be called 'barratrous.' The act of a willful deviation for the benefit of the owners is an example which attests the truth of the principle; but if made for the benefit of the master it would be an act of barratry." *Dederer v. Delaware Ins. Co. (U. S.)* 7 Fed. Cas. 341, 343.

Barratry is a breach of duty on the part of the master or mariners of a vessel, whereby the owner is injured. It is not essential that the act be committed for the benefit of the actor, but it is sufficient if the act was done with a fraudulent intent. *Kendrick v. Delafield* (N. Y.) 2 Caines, 67, 71.

#### **Desertion of crew.**

The desertion of the crew of a captured ship was not barratry. *Messonier v. Union Ins. Co. (S. C.)* 1 Nott & McC. 155, 163.

#### **Going into enemy's settlement.**

"Where a master had general instructions to make the best purchases with dispatch, this would not warrant him in going

into an enemy's settlement to trade (which was permitted by the enemy), though his cargo could be more speedily and cheaply completed there, but such act, in consequence of which the ship was seized and confiscated, is barratrous." *Earle v. Rowcroft*, 8 East, 126, 135.

#### **Leaving porthole open.**

The term "barratry," in a bill of lading exempting the shipowner from liability for loss or damage occasioned by barratry of the master or crew, does not extend to a mere incident of an attempted act of barratry which is not accomplished, and therefore the owner is not exempt from an injury to the goods resulting from a port being left open in an unsuccessful attempt at theft by some of the crew. *Putman v. The Manitoba* (U. S.) 104 Fed. 145-151.

#### **Resisting search by belligerent.**

Resistance by the master and mariners of a neutral vessel to the search of a belligerent is barratry. *Brown v. Union Ins. Co. (Conn.)* 5 Day, 1, 12, 5 Am. Dec. 123.

#### **Sale of appurtenances of vessel.**

The sale and disposal of boats, oars, and other portions of the vessel's appurtenances by the master to obtain money for his own use amounted to barratry. *Lawton v. Sun Mut. Ins. Co.*, 56 Mass. (2 Cush.) 500, 511.

#### **Smuggling.**

Misconduct of the master of a ship in taking on board commodities which subjected the ship to seizure for smuggling, such act being done against the consent of the owner, falls within the general definition of "barratry." *Havelock v. Hancill*, 3 Term R. 277, 278.

## **BARREN.**

See, also, "Impotency"; "Naturally Impotent."

A warranty in the sale of a stallion provided that the same was an average foal-getter, and "should the above-named horse prove to be barren, a horse of equal size and value to be given in his place." Held, that the term "barren" was used in its ordinary acceptation, and meant "incapable of getting offspring." *Davis v. Iverson* (S. D.) 58 N. W. 796, 797.

## **BARREL.**

See "Oil in Barrels."

The term "barrel" does not import or refer to quantity only, but a barrel of turpentine or a barrel of flour, in agricultural and mercantile parlance, means, *prima facie*, not a certain quantity merely, but a certain



state of the article, namely, that it is in a cask. The statute exacts, for example, that every barrel of turpentine shall contain 32 gallons, and be in good and sufficient casks, made of staves of certain dimensions. It is in a degree a term of art in trade and in law, and, when a man says he has so many barrels of turpentine, he is universally understood to mean that number of casks of the statute size, containing turpentine, and consequently that the casks, as well as the turpentine, are his. A barrel of turpentine or flour is thus one thing, constituted by both the cask and its contents, and it is known so to be by that description. Hence, under an indictment for stealing two barrels of turpentine, it must appear that the turpentine was in barrels when it was stolen, and not that it was dipped from the boxes in small quantities from time to time, and then deposited in barrels. *State v. Moore*, 33 N. O. 70, 72.

**As denoting quantity.**

The term "barrel" is not a definite and precise description of a particular article or thing. It is often used to designate a certain quantity, and not the vessel or cask in which an article is contained. *Gardner v. Lane*, 91 Mass. (9 Allen) 492, 501, 85 Am. Dec. 779.

"Barrels of flour" may be a proper description of flour in bags, according to the common usage of the place where the term is used, since the term "barrel of flour" is a certain known quantity of flour of a particular measure, which may be readily computed from flour in sacks. *Fordice v. Rinehart*, 8 Pac. 285, 286 11 Or. 208.

**Half barrel.**

Wherever the term "barrel" or "cask of flour" is used in the chapter relating to inspections, it shall be construed to include a half barrel, unless the same be repugnant to the enactment. Code N. O. 1883, § 3020.

**Of salt.**

An agreement to deliver Salena salt in barrels means the barrels prescribed by Rev. Laws, 249, § 3, providing that all the salt manufactured at salt springs, and which shall be put in casks, shall be packed in good casks, watertight, and that each cask shall contain five bushels. *Clark v. Pinney* (N. Y.) 7 Cow. 681, 684.

**BARREL STAVES.**

"A first-class oil-barrel stave is one that is 35 inches long, not less than 4½ inches wide, ¾ of an inch in thickness, and made of good white oak timber." *Riggs v. Armstrong*, 23 W. Va. 760, 772.

"A second-class oil-barrel stave must have the same dimensions of a first-class stave, except that it may be of less width and

not so easily worked, and may be rougher, so that it would take more staves and more work to make a barrel from staves of the second class than from the first, and consequently they bring a less price in the market." *Riggs v. Armstrong*, 23 W. Va. 760, 772.

**BARRICADE.**

The term "barricade" imports an obstruction; not merely a warning, but an actual impediment to travel. *American Waterworks Co. v. Dougherty*, 37 Neb. 373, 376, 55 N. W. 1051.

**BARRICADED.**

Within the meaning of a city ordinance making it unlawful to exhibit in a "barred or barricaded" house or room, or in any place protected in a manner to make it difficult of access by the police, any cards, dice, or gaming implements whatsoever, the words "barred" and "barricaded," when rightly construed, do not mean an ordinary private residence or room, where doors are sometimes locked or bolted in the ordinary method, but relate to such as are barred against intrusion by officers, and hence the ordinance is not unreasonable. In *re Ah Cheung*, 69 Pac. 492, 493, 136 Cal. 678.

**BARRILLA.**

"Barrilla" is a term given in commerce to impure soda imported from Spain. *Commonwealth v. James*, 18 Mass. (1 Pick.) 375, 381.

**BARRISTER.**

Barristers in England are the highest class of lawyers, who have exclusive audience in all the superior courts. Every barrister must be a member of one of the four ancient societies called "Inns of Court," viz., Lincoln's Inn, the Inner and Middle Temples, and Gray's Inn. Associations of lawyers acquired houses of their own, in which students were educated in the common law. These schools of law are now represented by the inns of court, which still enjoy the exclusive privilege of calling to the bar, and, through their superior order of benchers, control the discipline of the profession. Subject to an appeal to the common-law judges as visitors, they may reject the petition of a student to be called to the bar, or expel from their society and from the profession any barrister or bencher from the inn. The peculiar business of barristers is the advocacy of causes in open court, but a great deal of other business falls into their hands. They are the chief conveyancers, and the pleadings are, in all but the simplest cases, drafted by them. The highest rank among barristers

is that of king's or queen's counsel. They lead the case in court, and give opinions on cases submitted to them, but they do not accept conveyancing or pleading, nor do they admit pupils to their chambers. In re Rick-er, 29 Atl. 559, 563, 66 N. H. 207, 24 L. R. A. 740.

## BARROW.

A barrow is a castrated male hog. State v. Royster, 65 N. C. 539.

"A barrow is an animal of the hog family," so that an indictment charging defendant with unlawfully and needlessly killing a barrow sufficiently informed defendant of the offense he was to answer. State v. Greenlees, 41 Ark. 353, 355.

A barrow is a hog, especially a male hog castrated, so that, where an information for stealing a barrow charged the theft of a male hog, it was not error to refuse to charge that a male hog is one which has not been changed from a boar to a barrow by alteration. Williams v. State, 17 Tex. App. 521, 524.

## BARTER.

A barter is the exchange of goods of one character for goods of another; any sale of one character of merchandise where any transfer of merchandise is taken in exchange instead of money. Guerreiro v. Peile, 3 Barn. & Ald. 616, 617. See, also, Cooper v. State, 37 Ark. 412, 418. It is the exchange of one commodity or article of property for another; exchange of goods; a commutation; transmutation or transfer of goods for other goods. Coker v. State (Ala.) 8 South. 874, 875.

"Barter," as used in Act Feb. 3, 1875, § 1, providing that any person who shall sell, barter or exchange, or otherwise dispose of any property upon which a lien exists by virtue of a mortgage, deed of trust, contract of parties, or operation of law, without the consent of the person in whose favor such lien exists, shall be punished, etc., means the exchange of one commodity or article of property for another, and has about the same meaning as "exchange." Cooper v. State, 37 Ark. 412, 415.

The term "barter" is not applied to contracts concerning land, but only such as relate to goods and chattels. Speigle v. Meredith (U. S.) 22 Fed. Cas. 919, 920.

### Purchase distinguished.

See "Purchase."

### Sale distinguished.

See "Sale."

### Exchange synonymous.

"Barter" and "exchange" are of about the same meaning. "Barter," the exchange of one commodity or article or property for another; "exchange" of goods, a commutation, transmutation, or transfer of goods for other goods, as distinguished from "sale," which is a transfer of goods for money. Meyer v. Rousseau, 2 S. W. 112, 113, 47 Ark. 460.

The terms "exchange" and "sale," used in an order by county commissioners for the election to determine whether or not the sale or exchange or barter of intoxicating liquors shall be prohibited, are not synonymous, and therefore such a use is not warranted by a statute authorizing the commissioners to order an election to determine whether or not the sale of intoxicating liquors shall be prohibited. Ex parte Beaty, 1 S. W. 451, 452, 21 Tex. App. 426.

### BARTER AND SALE.

The phrase "barter and sell," as used in an indictment charging that the defendant did unlawfully "barter and sell" intoxicating liquor, imports a sale, and not a barter, and the word "barter" may be regarded as surplusage. Massey v. State, 74 Ind. 368, 369.

## BASE.

### Adulterated synonymous.

"In common parlance 'base' and 'adulterated' signify the same thing, and there is no repugnancy in charging that a defendant passed 'one piece of base and adulterated coin.'" Gabe v. State, 6 Ark. (1 Eng.) 540, 544.

### In chemistry.

A "base," in chemistry, is defined to be a compound substance which unites with an acid to form a salt. In re Schaeffer, 2 App. Cas. (D. C.) 1, 4.

## BASEBALL.

"Baseball" is a game of ball, so called from the bases or bounds, usually four in number, which designate the circuit which each player must make after striking the ball; and this is a game within the definition of "sporting," as used in Neb. Cr. Code, § 241, providing that any person engaged on Sunday in sporting, etc., shall be fined. State v. O'Rourke, 53 N. W. 591, 592, 35 Neb. 614, 17 L. R. A. 830.

Baseball does not belong to the same class, kind, species, or genus as horse racing, cockfighting, or card playing, so as to be within the term "games" in Rev. St. 1899, § 2242, providing that every person who shall be convicted of horse racing, cockfighting,

or playing at cards or games of any kind on Sunday, shall be deemed guilty of a misdemeanor. Baseball is to America what cricket is to England. It is a sport or athletic exercise, and is commonly called a "game," but it is not a gambling game or productive of immorality. In a qualified sense it is affected by chance, but it is primarily and properly a game of science, of physical skill or trained endurance, and of natural adaptability to athletic skill. It is a game of chance only to the same extent that chance or luck may enter into anything that men may do, but when chance or luck is pitted against skill and science, it is as fair an illustration of what will result as any test that can be applied. *Ex parte Neet*, 57 S. W. 1025, 1027, 157 Mo. 527, 80 Am. St. Rep. 638.

### BASE BULLION.

"Crude" or "base" silver bullion, as the term is understood in Montana, is silver in bars, mixed to a greater or less extent with base materials. *Hope Min. Co. v. Kennon*, 3 Mont. 35, 44.

### BASE FEE.

A "base" or "qualified" fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 94 Ill. 83, 93; *Jordan v. Goldman*, 34 Pac. 371, 376, 1 Okl. 406; *Knight v. Pottgieser*, 52 N. E. 984, 936, 176 Ill. 368.

A qualified, base, or determinable fee is an interest which may continue forever, but the estate is liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent, though the object on which it rests for perpetuity may be transitory or perishable; yet such estates are deemed to be fees because of their possibility of enduring forever. *Connecticut Spiritualist Camp Meeting Ass'n v. East Lyme*, 5 Atl. 849, 850, 54 Conn. 152 (citing 4 Kent, Comm. [5th Ed.] 9); *Jamaica Pond Aqueduct Corp. v. Chandler*, 91 Mass. (9 Allen) 159, 168; *Bartlett v. Baker (Me.)* 5 Atl. 847; *United States Pipe-Line Co. v. Delaware, L. & W. R. Co.*, 41 Atl. 759, 763, 62 N. J. Law, 254, 42 L. R. A. 572 (citing 1 Cruise, Dig. 63; 1 Inst. 27a); *Jordan v. Goldman*, 34 Pac. 371, 376, 1 Okl. 406; *Grout v. Townsend (N. Y.)* 2 Denio, 336, 339 (citing 4 Kent, Comm. 9).

Testator's will provided that at the death of testator's wife the estate should go to and be divided amongst testator's children and their descendants. The interest which vested at the death of testator was not a base or determinable fee, subject to be divested as to any devisee by the death of such devisee, during the continuance of the life estate, without leaving descendants to take

after the death of the widow of the testator. *Knight v. Pottgieser*, 52 N. E. 934, 936, 176 Ill. 368.

The term "base fee" includes the interest acquired by a county in real estate conveyed by a deed providing that the conveyance is for the use of the people of the county as long as the premises shall be used for a county site for the courthouse, jail, and clerk's office, but shall revert to the grantor if the county ceases to use it for such purpose. *Gillespie v. Broas (N. Y.)* 23 Barb. 370, 381.

A base fee was confined to a person as tenant of a particular place. *Paterson v. Ellis' Ex'rs (N. Y.)* 11 Wend. 259, 277.

### Conditional and simple fee distinguished.

A "base fee" is a fee confined to a person as tenant of a particular place. It belongs to the class of limited fees, which includes "qualified" or "base" fees, and "fees conditional at common law," both of which are distinguished from a "fee simple," which is an absolute inheritance, clear of any limitation or condition whatever. It is distinguished from a "conditional fee," which is a fee restrained to particular heirs, as the heirs of a man's body. *Paterson v. Ellis' Ex'rs (N. Y.)* 11 Wend. 258, 277.

Where a tenant in tail, by indenture enrolled, bargains and sells land to another and his heirs, and afterwards levies a fine to the bargainee, the bargainee has a fee in the land, but it is only to endure as long as the tenant in tail has heirs of his body, and is therefore called a "base," as compared with the "pure" fee, which is in the original donor, and which has an absolute perpetuity belonging to it. *Richardson v. Noyes*, 2 Mass. 56, 63, 3 Am. Dec. 24.

### Qualified or determinable fee synonymous.

Kent speaks of "qualified," "base," or "determinable" fees, and uses the terms as interchangeable. A qualified fee confers only a limited power of alienation, entitling the owner to give an interest of the same extent and continuance only in another person that it would be in itself. So that the estate will, notwithstanding the transfer, be determinable, and, into whosoever hands it will come, will cease on a failure of those heirs to whom, on creation of the qualified fee, the limitation is made. An estate devised to heirs, or to one and to the heirs, on the part of such person is a qualified fee. *Baltimore & O. R. Co. v. Patterson*, 13 Atl. 369, 68 Md. 606.

### BASED.

The word "based," as used in an instruction that the jury may assess damages

"based" on the pecuniary loss, if any, resulting from the death of plaintiff's intestate, could not be construed as authorizing the jury to add interest and speculative damages to the pecuniary loss, nor would they be likely to infer such right, and hence the instruction is not objectionable for such reason. *Webster Mfg. Co. v. Mulvanny*, 48 N. E. 168, 169, 168 Ill. 311.

## BASIN.

A basin is a part of the sea inclosed in rocks. *United States v. Morel* (U. S.) 26 Fed. Cas. 1310, 1313.

The terms "rivers," "haven," "creek," "basin," "bay," or "arm of the sea," in Rev. St. U. S. § 5346, providing that an assault committed with a dangerous weapon, or with intent to perpetrate a felony, on board of any vessel belonging in whole or in part to the United States, while in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, are limited to the high seas and other waters connected immediately with them, and do not include the rivers connecting the Great Lakes. *Ex parte Byers* (U. S.) 32 Fed. 404, 406.

## BASIS OF COST.

Plaintiff and defendant, stockholders of a corporation, were liable as joint indorsers on corporation notes, the proceeds of which were used in betterments. Plaintiff also held defendant's notes given by the latter to secure the firm for payment of the latter's stock. Defendant afterwards sold to plaintiff all his stock on the basis of cost. Held, that the term "basis of cost" did not include defendant's liability as a joint indorser of the corporation notes. *Peyton v. Stuart*, 16 S. E. 160, 88 Va. 50.

## BASS.

For the purpose of the chapter relating to fish and fisheries, the term "bass" means the striped bass of the tidal waters. *Rev. St. Me.* 1883, p. 375, c. 40, § 32.

## BASTARD.

"The fundamental definition of the word 'bastard' is a child born out of lawful wedlock." *Timmins v. Lacy*, 30 Tex. 115, 135.

A bastard is a child born out of wedlock, and whose parents do not subsequently intermarry, or a child the issue of adulterous intercourse of the wife during wedlock. *Civ. Code Ga.* 1895, § 2507.

Lord Coke, in his first Institute, in defining "bastard," says: "But we term them all

by the name of 'bastard' who are born out of lawful marriage. By the common law, if the issue be born within a month or a day after marriage between parties of lawful age, the child is legitimate. *Swinney v. Klippert* (Ky.) 50 S. W. 841, 842.

A bastard is one that is not only begotten, but born, out of lawful matrimony. *Ex parte Hayes* (Fla.) 6 South. 64, 65 (citing 1 Blackst. Comm. 454).

A bastard is one that is not only begotten, but born out of lawful matrimony. Where a woman is pregnant at the time of the marriage, and the pregnancy is known at the time to the husband, the husband is conclusively presumed to be the father, and the natural father cannot be held for the child's support. *Miller v. Anderson*, 43 Ohio St. 473, 475, 476.

At common law, a "bastard" is one who is born neither in lawful wedlock nor within a competent time after its termination, or under circumstances which render it impossible that the husband of his mother can be his father. *Parker v. Nothomb* (Neb.) 93 N. W. 851, 852 (citing 5 Cyc. 625).

At common law all illegitimate children were bastards, and a bastard was regarded as the first of his family, nullius filius, and was incapable of either receiving or transmitting an inheritance, except to his own legitimate children. But the civil law, though originally holding to the same rule, became relaxed, and out of this relaxation grew up a distinction between illegitimate children, which gave rise to much uncertainty about what at different periods was the law. "The Roman law distinguished between the offspring of that concubinage which it tolerated as an inferior species of matrimony, and the spurious brood of adultery, prostitution, and incest." 5 Wheat. 262, note to *Stevenson's Heirs v. Sullivant*. A distinction was made between offspring the issue of frailty and prostitution. The offspring of concubines, who resided in the same house with the father, were called naturales, and could be legitimated in one of the various modes provided by law. Care should be taken not to confound the meaning of the different words used. At common law the word "bastard" applied to all illegitimate children. Under the civil law, while it was sometimes loosely so applied, there is quite a distinction. In France a bastard could not inherit at all, unless legitimated by the marriage of his father and mother. *Stevenson's Heirs v. Sullivant*, 18 U. S. (5 Wheat.) 267, 5 L. Ed. 70; 2 Dom. Civ. Law, § 2510. The mode of legitimation by letters patent from the prince was abrogated by the Code Napoleon. As adopted in Spain, the civil law was modified, and provided methods by which natural children could be legitimated so as to inherit from their fathers. In the Spanish civil law the word "bastardo" meant and was applied

to the sons of fathers who could not contract matrimony when the son was begotten. *Salva*, Dicc. in verbo "Bastardo." "Bastards," as thus defined, could not inherit as from the father, nor could they become legitimated. But such as were not "danado," or the offspring of an adulterous, sacrilegious, or incestuous intercourse, were permitted to inherit from the mother. *Pettus v. Dawson*, 17 S. W. 714, 715, 82 Tex. 18 (citing *Escrache*, Dicc. in verbo "Bastardo").

That a bastard is nullius filius applies only in the case of inheritance. A bastard is within the Marriage Act, 26 Geo. II, c. 33, requiring the consent of parent or guardian to the marriage of persons under age who are not married by banns. *King v. Inhabitants of Hodnett*, 1 Term R. 96, 100.

"Bastardy is an unlawful state of birth, which disables the bastard from succeeding to an inheritance." *Davenport v. Caldwell*, 10 S. C. (10 Rich.) 317, 337.

A bastard is, in law, quasi nullius filius; and therefore he is called filius populi, a child of the people. Appeal of *Gibson*, 154 Mass. 378, 381, 28 N. E. 296, 297 (citing Co. Litt. pt. 1, p. 123a).

"Bastard," in Virginia, is not defined as at common law. He is one born out of wedlock, lawful or unlawful, or not within a competent time after the coverture is determined; or, if born out of wedlock, whose parents do not afterwards intermarry, and the father acknowledges the child; or who is born in wedlock when procreation by the husband is for any cause impossible. *Smith v. Perry*, 80 Va. 563, 570.

#### Child of slaves.

Bastards are children born of an illicit connection, begotten and born out of lawful wedlock. The cohabitation between slaves who intended to marry, and did all that they were able to do to carry that intention into effect, was a legal slave marriage. Such a marriage was a marriage good at common law, being a legal natural marriage, *jure divino*. It was not a mere adultery or fornication, and a cohabitation for any illegal or improper purpose. Children born of such a marriage are not bastards, in the absence of a statute making them so, for they are not at common law. *Stikes v. Sawunson*, 44 Ala. 633, 636.

#### BASTARDY.

Adultery distinguished, see "Adultery."  
As crime, see "Crime."

Illicit carnal connection which causes the birth of an illegitimate child is fornication and bastardy. *Dinkey v. Commonwealth*, 17 Pa. (5 Harris) 126, 129, 55 Am. Dec. 542.

#### BASTARDY PROCEEDING.

##### As civil proceeding.

Bastardy proceedings are to be regarded as essentially a civil action, accompanied by the extraordinary remedy of arrest and imprisonment for the purpose of enforcing judgment rendered in the case. In *re Walker*, 86 N. W. 510, 511, 61 Neb. 803; *Rawlings v. People*; 102 Ill. 475, 478; *Maloney v. People*, 38 Ill. 62, 63. See, also, *State v. Carlisle*, 52 N. E. 711, 713, 21 Ind. App. 438.

A bastardy proceeding is of a rather nondescript character. It partakes in its inception, under our statute, very much of the nature of a criminal case, but in its latter stages, when it reaches the circuit court, becomes a civil case. *Bond v. State* (Fla.) 15 South. 591, 592. A bastardy prosecution is a case, and it is not a criminal proceeding. Such a proceeding has been held, though partaking of the nature of a criminal proceeding, to be a civil suit. *Robinson v. Swett*, 26 Me. (13 Shep.) 378, 382 (citing *Wilbur v. Crane*, 30 Mass. [13 Pick.] 284).

A bastardy proceeding is special in character, and is in the nature of a civil proceeding, and hence there is no authority to impose imprisonment as a part of the original judgment in order to compel the judgment debtor to secure the payment of a judgment by executing a bond. In *re Comstock*, 61 Pac. 921, 10 Okl. 299.

A bastardy process, under our statutes, is a civil action, and may be prosecuted before any justice of the peace, without regard to the question whether he is clothed with criminal jurisdiction. Gen. St. c. 72, § 13. It may be observed, though perhaps not necessary to the decision of this case, that, being a civil action, it is not governed by the peculiarly strict rule of criminal proceedings. *Maloney v. Piper*, 105 Mass. 233, 234 (citing *Bailey v. Chesley*, 64 Mass. [10 Cush.] 284).

Proceedings in a case of bastardy may not be considered as penal, but only as means to enforce the discharge of legal obligations. *Steinert v. Sobey*, 44 N. Y. Supp. 146, 148, 14 App. Div. 505.

Where the reputed father of a bastard has given recognition before the justice of the peace to answer to the charge in the circuit court, and fails to appear in that court, the proceeding is not so far a criminal proceeding as to preclude the court from proceeding to a trial of the case in the absence of the defendant. *Baker v. State*, 26 N. W. 107, 108, 65 Wis. 50.

##### As criminal proceeding.

A prosecution under the statute for the support of bastard children is not a civil proceeding, but a criminal proceeding, and cannot be tried at a term of the court which

is restricted to the transaction of civil business only. *Hyde v. Chapin*, 56 Mass. (2 Cush.) 77, 79; *Sweet v. Sherman*, 21 Vt. 23.

## BATHROOMS.

"Bathrooms," as used in an act making it a misdemeanor to carry on barbering on Sunday, and providing in the body thereof that it should be a misdemeanor for any one engaged in the business of a barber to shave, shampoo, cut the hair, or keep open their bathrooms on Sunday, means apartments for bathing, and cannot be construed as included in the term "barbering," which means the act of one whose occupation is to shave the beard and cut and dress the hair of others. "Barbering" and "bathing," and "barber shop" and "bathrooms," are neither synonymous nor convertible terms. *Raglio v. State*, 6 S. W. 401, 86 Tenn. (2 Pickle) 272.

## BATTERY.

A battery is the unlawful beating of another. *Goodrum v. State*, 60 Ga. 509, 511. It is the unlawful striking or beating of another. *Lamb v. State* (Md.) 10 Atl. 208, 209. It is the actual infliction of an injury, however slight it may be. *State v. Lewis* (Del.) 55 Atl. 3, 4. It is the accomplishment of an unlawful attempt to do violence to the person of another. *State v. Harrigan* (Del.) 55 Atl. 5, 6. It is any willful and unlawful use of force or violence upon the person of another. Rev. Codes, § 7142. *State v. Climble* (N. D.) 94 N. W. 574, 575.

A "battery" is defined to be the willful touching of the person of another by the aggressor, or by some substance put in motion by him. *Razor v. Kinsey*, 55 Ill. 605, 614; *Westcott v. Arbuckle*, 12 Ill. App. (12 Bradw.) 577, 580.

### Anger.

At the common law, the least touching of the person of another in anger was a battery. *Hunt v. People*, 53 Ill. App. 111, 112.

The least touching of another's person willfully and in anger constitutes in law a battery. *Johnson v. State*, 17 Tex. 515, 517.

The term "battery" includes the act of touching another in anger, but not the mere act of willfully touching another; and therefore an instruction that the least touching of another person willfully or in anger is a battery is vitiated by the disjunctive "or." *Alston v. State* (Ala.) 20 South. 81, 82.

A battery is any unlawful touching of another, and more especially if done under influence of anger. *Kirland v. State*, 43 Ind. 146, 149, 13 Am. Rep. 386.

Battery consists in the doing in an angry, rude, and revengeful manner of an injury to

another person. *Hendle v. Geller* (Del.) 50 Atl. 632.

### Assault distinguished.

See "Assault."

### Assault included.

A battery is the unlawful use of force or violence on the person of another, and includes an assault, but assault does not include a battery. *People v. Helbing*, 61 Cal. 620, 622.

Battery is an unlawful beating, or other physical violence or constraint, inflicted upon a human being without his consent. An assault is included in every battery. *State v. Cody*, 62 N. W. 702, 703, 94 Iowa, 169.

A battery includes an assault, and is the actual striking, or in any manner touching, another in an insolent, angry, rude, rough, or violent manner. *State v. Mills* (Del.) 52 Atl. 266, 267, 3 Pennewill, 508.

Every battery includes an assault. The offense of an assault, or an assault and battery, is declared criminal by the Code of Iowa; but for the description of the offense, or in order to ascertain what will amount to an assault, or assault and battery, resort to the common-law definition must be had. *State v. Twogood*, 7 Iowa (7 Clarke) 252, 254.

Every battery includes an assault, but an assault does not include a battery; therefore an assault and battery is an offense of a higher grade and of a more serious character than a simple assault. *Furnish v. Commonwealth*, 77 Ky. (14 Bush) 180, 181.

A battery is only an aggravation of the assault, and, when the assault is charged to have been made with a dangerous weapon, it is still a further aggravation; and, where it is charged to have been made with an intention to commit great bodily injury, it is only an offense in a different degree. The assault is still the original offense, and the means, the intent, and the extent to which it is carried, qualify only the aggravation of this original offense, to which additional punishment is often affixed by the statute, which admits that the defendant may be convicted of the offense in a degree lower than that charged in the indictment. *Cokely v. State*, 4 Iowa (4 Clarke) 477, 479.

If facts are stated, in a complaint for assault and battery, showing an actual infliction of violence on the person, this is sufficient for such facts to constitute a battery, which includes an assault. *Greenman v. Smith*, 20 Minn. 418 (Gil. 370, 373).

### As consummated assault.

Battery is not an offense of a higher nature or degree than an assault, nor is it otherwise punished, but is merely a name which the law has given to an assault after

It has reached the person at which it is aimed. *Hardy v. Commonwealth* (Va.) 17 Grat. 592, 601.

A battery is where an attempt to do a corporal hurt to another is carried into effect. *State v. Shields* (Ohio) 1 West. Law J. 118, 119.

A battery is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person. *Sweeden v. State*, 19 Ark. 205, 213 (citing 3 Green, Ev. § 60).

A battery is an attempt carried into execution, to the injury of the person, in an angry, revengeful mood, or insolent manner. *People v. Lee* (N. Y.) 1 Wheel. Cr. Cas. 364, 365. See note 2.

A battery is where an attempt or offer to do violence to the person of another results in the actual infliction of the injury. *Commonwealth v. Ruggles*, 88 Mass. (6 Allen) 588, 591.

An assault is an attempt or offer, with force or violence, to do a corporal hurt to another, and when the assault is consummated it becomes a battery. *List v. Miner*, 49 Atl. 856-858, 74 Conn. 50.

An assault is an attempt to strike; the battery is the consummated act, or the unlawful touch of another person, when a rude, insulting, or angry one, and with the evident intention of injuring or wronging the person struck. *Commonwealth v. Brungess*, 23 Pa. Co. Ct. R. 13-15.

"A battery is committed whenever the menaced violence of an assault is done in the least degree to the person." *Cluff v. Mutual Ben. Life Ins. Co.*, 95 Mass. (3 Allen) 308, 317.

#### Attempt.

As used in the definition of an "assault" as "any attempt to commit a battery," the words "any attempt to commit a battery" mean any attempt to inflict unlawful violence upon the person of another, with intent to injure him. *Hardin v. State*, 46 S. W. 803, 804, 39 Tex. Cr. R. 420.

#### Force.

A battery is any unlawful and willful use of force or violence on the person of another. *People v. Chalmers*, 14 Pac. 131, 132, 5 Utah 201; *People v. Munn*, 3 Pac. 650, 651, 65 Cal. 211.

"A battery is the use of any unlawful violence on the person of another, with intent to injure him, whatever be the means or degree of violence used." *McKay v. State*, 44 Tex. 43, 48.

A battery is merely the laying on of hands, or the infliction of the injury. *State v. Burton* (Del.) 47 Atl. 619, 2 Pennewill, 472.

A battery is committed whenever any wrongful violence is inflicted upon another without his consent. So, pouring of turpentine and pepper on one's person is a battery. *Murdock v. State*, 65 Ala. 520, 522.

A battery is the unlawful application of violence to the person of another. It is not necessarily a forcible striking with the hand, or stick, or the like, but includes every touching or laying hold, however trifling, of another's person or his clothes, in an angry, wrongful, rude, insolent, or hostile manner. *Englehardt v. State* (Ala.) 7 South. 154.

A battery is not necessarily the forcible striking with the hand, or stick, or the like, but includes every touching or laying hold, however trifling, of another person, or his clothes, in an angry, revengeful, rude, insolent, or hostile manner. A man, for instance, throwing a bottle or stone at another, is guilty of battery. The act of one in shooting another with a revolver, with intent to kill and murder him, necessarily constitutes an assault. *State v. Robertson* (La.) 20 South. 296, 298.

A battery is the actual infliction of violence on the person of another. The degree of violence is not regarded in the law, and therefore any touching of the person in an angry, revengeful, rude, or insolent manner, spitting upon the person, jostling him out of the way, pushing another against him, throwing a squib or any missile or water on him, striking the horse he is riding, whereby he is thrown, or taking hold of his clothes in an angry or insolent manner, to detain him, is a battery. A battery is more than an attempt to do a corporal hurt to another, but any injury whatsoever, be it ever so small, being actually done to the person of a man in an angry or revengeful or rude or insolent manner, is a battery in the eye of the law. *Perkins v. Stein*, 22 S. W. 649, 650, 94 Ky. 433, 20 L. R. A. 861.

#### Intent.

A battery is an injury actually inflicted with violence, from malice or wantonness. *Commonwealth v. Ruggles*, 88 Mass. (6 Allen) 588, 590 (citing 1 East P. C. 406).

"A criminal battery is committed whenever one person intentionally and wrongfully inflicts personal injury on another, against his will, by violence." *Scott v. State* (Ala.) 24 South. 414, 415.

"Battery" is the infliction of violence on the person, and its intention is not material. *Greathouse v. Croan* (Ind. T.) 76 S. W. 273, 276.

A "battery" is generally defined to be any injury done to the person of another in a rude, insolent, or unlawful way. Where one, at the request of another, inflicted a whipping on the latter, with the idea of thereby saving him from a prosecution for felony,

it was not battery. Where there is no intention to injure, and no negligence, the offense cannot be imputed. *State v. Beck* (S. C.) 1 Hill, 362, 364, 28 Am. Dec. 190.

A "battery," as distinguished from an "assault," is where the person of a man or woman is actually struck in a violent, angry, insolent, or rude manner. But every laying on of hands is not battery. The party's intention must be considered. To constitute a battery, an intent to injure must concur with the use of unlawful violence upon the person of the assaulted party; but the slightest degree of force suffices to constitute violence, and the intended injury may be to the feelings or mind of the latter, as well as to the corporeal person. *Clayton v. Keeler*, 42 N. Y. Supp. 1051, 1053, 18 Misc. Rep. 488.

The "battery" mentioned in Gen. St. 1878, c. 66, § 8, subd. 1, requiring actions for battery to be brought within two years, is an intentionally administered injury to the person; such an injury as could be made the basis of a criminal prosecution. Personal injury actions, the result of negligence, are not within the statute. *Ott v. Great Northern R. Co.*, 72 N. W. 833, 70 Minn. 50.

#### BATTERY TRANSMITTER.

A "battery transmitter" is one in which a battery or strong current is utilized for the transmission of speech through a telephone, as distinguished from a "magneto transmitter," in which only a feeble current is generated by induction. It requires a battery current to transmit speech a long distance. *American Bell Tel. Co. v. National Tel. Mfg. Co.* (U. S.) 119 Fed. 893.

#### BATTURE.

"Batture" is, according to Richelet and the French Academy, a marine word, and is used to denote a bottom of sound stone or rock, mixed together and rising toward the surface of the water. This etymology is from the verb "battre," to beat, because a batture is beaten by the water. In its grammatical sense as a technical word, and we believe in common parlance, it is then an elevation of the bed of a river under the surface of the water, since it is rising toward it. It is, however, sometimes used to denote the same elevation of the bank when it has arisen above the surface of the water, or is as high as the land on the outside of the bank. *Morgan v. Livingston* (La.) 6 Mart. (O. S.) 19, 111; *Hollingsworth v. Chaffee*, 33 La. Ann. 547, 551.

In its grammatical sense as a technical word, and in common parlance, a "batture" is an elevation of the bed of the river under the surface of the water. It is, however, sometimes used to denote an elevation of the bank when it has arisen along the surface

of the water, or is as high as the land on the outside of the bank. In this latter sense it is synonymous with "alluvion," which is defined to be "an insensible increment brought by the water." It means, in common law, any land formed by accretion. *New Orleans v. Morris* (U. S.) 18 Fed. Cas. 114, 115.

Batture "is an elevation of the bed of a river under the surface of the water, but is sometimes used to signify the same elevation when it has risen above the surface. The term is applied principally to certain portions of the bed of the Mississippi river which are left dry when the river is low, and are covered again, either in whole or in part, by the natural swells." *Heirs of Leonard v. City of Baton Rouge* (La.) 4 South. 241, 243.

Battures are the gradual and imperceptible augmentations of the soil situate on the shore of a river or other stream. *Zeller v. Southern Yacht Club*, 34 La. Ann. 837, 838.

A batture is the accretion formed in front of lands situated on the Mississippi river. *Ferriere v. City of New Orleans*, 35 La. Ann. 209.

#### BAUXITE.

The word "bauxite" alone, when used in trade, indicates the crude ore, which when taken from the mine resembles lumps of coarse earth or clay, and contains iron, silica, titanitic acid, besides other substances. It does not include such a product as hydrate of alumina. As used in Act Oct. 1, 1890, c. 1244, § 2, Free List, par. 501, 26 Stat. 604, placing bauxite on the free list, it does not include the white powder known to the trade as "refined bauxite," which is manufactured from bauxite by removing from the crude ore the impurities of iron, silica, and titanitic acid. In re *Irwin* (U. S.) 62 Fed. 150, 152; *Irwin v. United States* (U. S.) 67 Fed. 232, 233, 14 C. C. A. 381.

#### BAWD.

"A bawd is one who procures opportunities for persons of opposite sexes to cohabit in an illicit manner, and may be, while exercising the trade of a bawd, perfectly innocent of committing in his or her own proper person the crime either of adultery or of fornication." *Dyer v. Morris*, 4 Mo. 214, 216.

#### BAWDY HOUSE.

See "Common Bawdy House."

"A bawdy house is a house kept for the purposes of prostitution, and visited by the public for such purposes." *Davis v. State*, 2 Tex. App. 425, 427 (quoting Gen. Ord. City of Waco, art. 44).



The definition of a "bawdy house" embraces the fact that lewd persons of both sexes resort thereto and commit acts of prostitution therein, and these acts are embraced in the charge of keeping the house. *Nelson v. Territory*, 49 Pac. 920, 5 Okl. 512.

A single act of illicit intercourse in a house is not sufficient to constitute it a "bawdy house," but it must be resorted to for the purpose of prostitution or lewdness, and it must be shown that the inmates are prostitutes, or that the house is the resort of prostitutes. *People v. Gastro*, 42 N. W. 937, 939, 75 Mich. 127.

#### As disorderly house.

"At common law, a bawdy house, in the common sense of the term, is a species of disorderly house, and is indictable as a nuisance." *Hensen v. State*, 62 Md. 231, 232.

#### As house of ill fame.

The term "bawdy house" was said in *State v. Boardman*, 64 Me. 523, to be synonymous with "house of ill fame." *Henson v. State*, 62 Md. 231, 232, 234, 50 Am. Rep. 204.

A bawdy house is a house of ill fame, kept for the resort and convenience of lewd people of both sexes, whether it be kept for pecuniary profit and gain, or for other motives equally bad and more debasing. *State v. Porter*, 38 Ark. 637, 638.

A "bawdy house" and "house of ill fame" are synonymous terms. 1 Bouv. Law Dict. 163. In *State v. Smith*, 12 N. W. 524, 29 Minn. 193, it was said: "The term 'house of ill fame' is no doubt a mere synonym for 'bawdy house,' having no reference to the fame of the place, but denoting the fact." *State v. Lee*, 45 N. W. 545, 547, 80 Iowa, 75, 20 Am. St. Rep. 401.

A bawdy house is a house of ill fame, kept for the resort and convenience of lewd people of both sexes. It is not necessary that more women than one must live or resort together to constitute a bawdy house, and although a person be only a lodger and have a single room, yet if she makes use of it to accommodate people in the way of a bawdy house it will be a keeping of a bawdy house as much as if she occupied the whole house. *People v. Buchanan*, 1 Idaho, 681, 689.

## BAY.

A bay is an opening into the land where the water is shut in on all sides except at the entrance. *United States v. Morel* (U. S.) 26 Fed. Cas. 1310, 1313.

Laws 1846, p. 279, authorizes the Hudson River Railroad to build certain bridges over navigable streams and inlets, and requires the bridges to be so constructed as to provide free passage for vessels and boats that may

pass into the bay that may be crossed by such railroads. It is held that the word "bay" was used to describe an indentation or curve which was not the outlet of a navigable stream. *Tillotson v. Hudson R. R. Co.*, 9 N. Y. (5 Seld.) 575, 580. The word "bay" as so used refers to such bays only as have a general navigation deserving the name of navigation, and the fact that some sort of water craft can at times pass near to the shore of a curve in the stream does not make a bay within the meaning of the statute. *Getty v. Hudson River R. Co.* (N. Y.) 21 Barb. 617, 629.

Rev. St. U. S. § 5346 [U. S. Comp. St. 1901, p. 3630], provides for the punishment of any person who shall on the highways or in any arm of the sea, or in any bay within the admiralty jurisdiction of the United States, commit an assault on another. Held, that the word "bay" means a bay connected with the high seas, and does not include the Great Lakes and their connecting waters. *Ex parte Byers* (U. S.) 32 Fed. 404, 405.

#### In description as high-water mark.

The term "bay," when used in a deed as a boundary of land conveyed, is to be construed to mean bay at the ordinary high-water mark. *Seaman v. Smith*, 24 Ill. (14 Peck) 521, 524.

When the sea or a bay is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails. *United States v. Pacheco*, 69 U. S. (2 Wall.) 587, 590, 17 L. Ed. 865.

Any boundary at tide water, by whatever name, whether sea, harbor, or bay, includes the land below the high-water mark as far as the grantor owns; but a boundary of that land, whether described as shore, beach, or flats, excludes it. *City of Boston v. Richardson*, 95 Mass. (13 Allen) 146, 155.

#### In description as low-water mark.

"Bay," as used in a grant of land described as bounded by a bay, will be construed to mean low-water mark of the bay. *Paine v. Woods*, 108 Mass. 160, 169.

#### River.

A bay is an inlet of the sea, and is not included within the term "river," as used in Code, § 4212, providing for the punishment of a captain or commanding officer of a steamboat who knowingly suffers a game of cards to be played on such boat while navigating any of the rivers of the state, though the river flows into it, for a river is an inland stream. "Where the one begins and the other ends may often be a question of difficulty, yet the two are legally, and in fact essentially, distinct." *Johnson v. State*, 74 Ala. 537, 538.

"A bay is a bending or curving of the shore of a sea or of a lake, and is derived from an Anglo-Saxon word signifying to 'bow'

or 'bend.' For a similar reason the word 'bay' is in Latin termed 'sinus,' which expresses a curvature or recess in the coast; and calling a river a bay will not make it so." *State v. Town of Gilmanton*, 14 N. H. 467, 477.

"Bay" is an arm of the sea distinct from a river, so that a grant bounded by the east side of Delaware Bay does not of itself include the Delaware river. *Attorney General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. (12 C. E. Green) 631, 635.

#### BAY CRAFT.

A statute authorizing "bay or river crafts or other boats" to make fast to private wharves without paying harbor master's fees will be construed to include all vessels propelled by either sail or steam which are constructed and used in the bays and rivers, and not on the open seas, and not to embrace steamboats of 500 tons. *The Wenonah*, 21 Grat. 685, 697.

#### BAY HORSE.

The term "bay" is defined, as applied to horses, to be "red or reddish; inclining to chestnut." *Sparks v. Brown*, 46 Mo. App. 529, 536.

#### BAY RUM.

As intoxicating liquor, see "Intoxicating Liquor."

#### BAY WINDOW.

A bay window, both in the ordinary and technical acceptation of the word, indicates the formation of a bay in the room to which it is attached, and which to that extent enlarges the capacity of the room. *Commonwealth v. Harris* (Pa.) 10 Wkly. Notes Cas. 10, 13.

#### BAYOU.

Under Act Cong. March 3, 1811, § 5, as renewed and continued in force by Act June 15, 1832, provided that every person who owns a tract of land bordering on any river, creek, bayou, or water course in the territory of Orleans and not exceeding a certain depth shall be entitled to a preference in becoming the purchaser of any tract of land adjacent to and back of his own tract not exceeding a certain depth, it was held that "bayou" means a channel through which commerce could be carried on by water; and hence a shallow pond or lagoon 2 or 3 miles long, which drains swamps, and at its greatest width is from 70 to 80 feet from bank to bank, and the channel in parts is some 15 feet deep from the top of its banks, but at no time of the year is a navigable stream, being nearly dry for a greater

portion of the year, having no running water, or water in it except stagnant pools, but is merely an ordinary pond of the Mississippi swamp and of shallow ponds, is not a bayou within the meaning of the act. *Surgett v. Lapice*, 49 U. S. (8 How.) 48, 67, 12 L. Ed. 982.

#### BE—BEING.

See "In Being"; "May be"; "Then Being."

A deed by which the grantor conveyed all his right, title, and interest, the same being a one-half undivided interest, conveys all of grantor's right, title, or interest without regard to whether they exceed a one-half interest or not; the words "being a one-half undivided interest" not limiting the extent of the previous terms of conveyance, or excepting any interest conveyed by the previous terms. *McLennan v. McDonnell*, 20 Pac. 566, 567, 78 Cal. 273.

A bill of sale of a slave which recited that the seller had sold to the buyer a negro woman named "Sarah," age about 30, "being of sound mind and limb, and free from all disease," should be construed as warranting her soundness, and not as merely descriptive. *Cramer v. Bradshaw* (N. Y.) 10 Johns. 484.

"Be offered," as used in an order passed by a city council that a reward be offered to any person giving information so that a person may be convicted of setting fire to a building for the purpose of burning the same, means be notified and presented to the public, to any and all persons, by some suitable and authentic announcement to be published. It does not mean "is hereby offered," so as to constitute an offer without the advertisement. *Freeman v. City of Boston*, 46 Mass. (5 Metc.) 56, 59.

"Being threatened," as used in the exception contained in the statute against carrying concealed weapons, which allows any person to carry a weapon on being threatened or having good reason to apprehend an attack, means only impending threats. *Baker v. State*, 49 Ala. 350, 352.

The words "be and is hereby granted," in a government grant of land to a railroad, import a grant in present, and when the lands are ascertained by fixing the line of the road in the manner prescribed in the act, the title of the grantee relates back to the date of the act, but does not attach to land in which the United States did not have full title at that date, or which were otherwise excepted from the operation of the grant, even though they should afterwards be freed from the claim or possession which excluded them under the terms of the grant. *Southern Pac. R. Co. v. Wood*, 124 Cal. 475, 481, 57 Pac. 388, 390 (citing *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769). See, also, *Denny v. Dodson* (U. S.) 32 Fed. 899, 903.

Where a valid insurance policy was stated as being on "a new bark now being built," it was held that the policy applied to the bark itself as it then lay on the stocks at the time of the insurance, and operated on such materials as should from time to time be put upon and attached to the vessel, so that they might be considered a part thereof. But in the absence of proof of usage, the policy did not attach upon articles made for the vessel, delivered in the shipyards where she was constructing, in a condition and intended to be fitted and attached to her if she had been, or as soon as she might be, ready to receive them. *Mason v. Franklin Fire Ins. Co. (Md.)* 12 Gill & J. 468, 478.

In a proclamation directing a vote of the people for or against issuing bonds to a railroad company, under the stipulation that they should be issued only in the event of such railroad being constructed and running centrally through the county, the words "being constructed" did not mean "fully completed." It was only a proposition whether the county would aid to construct the road. The money was to be paid only in the event of the road being constructed centrally through the county. To aid in constructing the road after it is constructed would be tautology in language; to say they would aid in building the road, and contend that they were only liable after the road was built, is a contradiction in terms. *State v. Bissell (Iowa)* 4 G. Greene, 328, 332.

The term "walking or being on the roadbed of any railroad," in a life policy limiting the amount to be recovered if death results to insured from walking or being on the roadbed of any railroad, includes an attempt to cross the track at a place where it is commonly crossed by the public. *Keene v. New England Mut. Acc. Ass'n*, 41 N. E. 203, 164 Mass. 170.

The phrase "walking or being on a railroad bridge or roadbed," under an exception in an accident policy of liability for injuries or death caused thereby, is not to be construed with absolute literalness. The condition is a warranty by the assured that he will not intrude upon that part of the roadbed which is also a part of the highway or public thoroughfare, and that he will not loiter upon the track; but it does not obligate him not to cross the railroad at the place provided for the public to cross it. And if one crosses a track at a station where the public is accustomed to cross, he is not walking on a railroad bed in any sense as will entitle the insurer to avoid the policy, irrespective of proof of such person's negligence in so crossing. *Payne v. Fraternal Acc. Ass'n*, 93 N. W. 361, 363, 119 Iowa, 342.

As used in an instruction in a prosecution for murder, that "the killing being proved" the burden of proving the circumstances

of mitigation or justification or excuse is on defendant, means that, if the jury find the fact of the killing and that the prisoner did it, then the burden of proving the circumstances which mitigate the offense or justify the killing altogether would devolve on the accused, unless the very evidence itself which proves the killing, and that it was done by the prisoner, also shows that it was manslaughter or justifiable homicide. *Territory v. Manton*, 19 Pac. 387, 392, 8 Mont. 95.

The words "if she be dead," as used by a testatrix in devising property to a sister, "and, if she be dead, to her children," did not refer to the date of the will, it appearing that testatrix thought that her sister was then living, but to the date of the testatrix's death. *Grant v. Mosely (Tenn.)* 52 S. W. 508.

#### As creating a condition precedent.

A proposition submitted to the people to subscribe money to be paid only in the event of the road being constructed through a certain county sufficiently presents the proposition as to whether the people would aid to construct a road through such county. *State v. Bissell (Iowa)* 4 G. Greene, 328, 331.

A covenant to convey one-half of the lands to be bought, the grantees "being" at one-half of the expense, renders payment of the expenses a condition precedent. *Hutcherson v. McNutt's Heirs*, 1 Ohio (1 Ham.) 14, 15, 17.

#### As having.

In the Constitution of Rhode Island, declaring that no person can be a legal voter unless he is possessed in his own right of real estate of the value of \$184 or which shall rent for \$7 per annum, being an estate in fee simple fee tail for the life of any person, or an estate in reversion or remainder which qualifies no other person to vote, the phrase "being an estate in fee simple" evidently means having an estate of this class, so that if a person has an estate in remainder of the value mentioned in his own right, that is, which he holds beneficially for himself, and not simply as trustee or custodian, the provision of the Constitution is satisfied. *In re Horgan*, 18 Atl. 279, 281, 16 R. I. 542.

#### As living.

"Being," as used in the certification by a magistrate as to the cause of taking a deposition saying that the deponent being more than 30 miles from the place of trial, etc., "being" was not equivalent to the word "living." *Barron v. Pettes*, 18 Vt. 385, 387.

#### As indicating past or future.

As used in the acceptance of a draft of a contractor, accepted on condition that the contracts be complied with, will be construed

to mean the subsequent performance of the contractors, and not to acts which they were required to do in the past. *United States v. Bank of Metropolis*, 40 U. S. (15 Pet.) 377, 399, 10 L. Ed. 774.

A guaranty stating that, "In consideration of your being in advance to John Lees & Son in the sum of 10,000 pounds, I hereby give you my guaranty for that amount," the words "being in advance" did not necessarily mean to assert that the party was in advance at the time of giving the guaranty; the terms might have been intended as prospective. *Haigh v. Brooks*, 10 Adol. & E. 309, 310.

The phrase "without being married," in a will providing for the disposition of property if a certain person dies without being married, is capable of two meanings, either "without having been married," or "unmarried at the time of death"; but the natural *prima facie* meaning of the words, taken *per se*, is "without having been married." In *re Norman's Trust*, 17 Eng. Law & Eq. 127, 129; *Bell v. Phyn*, 7 Ves. 453, 458.

**As sufficient statement of character or status.**

A statement in an indictment that certain parties, "being surveyors," performed certain acts, sufficiently alleged the parties "to be surveyors." *Rex v. Boyall*, 2 Burrows, 832, 834.

An averment in a pleading as to N. "being a merchant" is a sufficient averment that he is a merchant, under Bankr. Act 1867, § 39, cl. 9, providing that any person who, "being a banker, merchant, or trader," has fraudulently stopped or suspended, and has not secured payment of his commercial paper within a period of 14 days, shall be deemed to have committed an act of bankruptcy. In *re Nickodemus* (U. S.) 18 Fed. Cas. 222, 223.

While in some cases the expression "being" director, etc., has been assumed to be sufficient to show that the person charged occupied the relation to the bank necessary under a statute punishing bank officials for certain acts, in an indictment for aiding a cashier in making false entries, a description of defendant as "being" then and there a director does not charge him with aiding and abetting in his official capacity. *United States v. French* (U. S.) 57 Fed. 382, 386.

To say that a person, "being" insane, does an act, cannot be construed as an allegation as to the condition of that person, or regarded as presenting an issuable fact or ground for relief, and is not equivalent to an allegation that she was at the time of the act referred to a person of unsound mind. *Valentine v. Lunt*, 22 N. E. 209, 210, 115 N. Y. 496.

"Who being minors," though an awkward way of alleging that defendant sold

liquor to minors, sufficiently sets forth the claim that such persons were minors. *State v. Boncher*, 59 Wis. 477, 481, 18 N. W. 335.

**BE IT ENACTED.**

See "Enact."

**BEING OF COUNSEL.**

See "Counsel."

**BEING OF SUFFICIENT ABILITY.**

See "Sufficient Ability."

**BEACH.**

The word "beach" must be deemed to designate land washed by the sea and its waves, and to be synonymous with "shore." *Littlefield v. Littlefield*, 28 Me. (15 Shep.) 180, 183; *Elliott v. Stewart*, 14 Pac. 410, 417, 15 Or. 259; *Storer v. Freeman*, 6 Mass. 435, 439, 4 Am. Dec. 155; *Coburn v. San Mateo County* (U. S.) 75 Fed. 520, 531.

By a "beach" is to be understood the shore or strand. *Cutts v. Hussey*, 15 Me. (3 Shep.) 237, 241; *Doane v. Willcutt*, 71 Mass. (5 Gray) 328, 335, 66 Am. Dec. 369; *Town of East Hampton v. Kirk* (N. Y.) 6 Hun, 257, 259.

The beach of the sea cannot be construed as including any ground always covered by the sea, for then it would have no definite limit on the seaboard; neither can it include any part of the land for the same reason. It denotes lands washed by the sea. *Town of East Hampton v. Kirk*, 68 N. Y. 459, 463.

**As land between high and low water.**

When used in a conveyance of land bounded on one side by the sea or beach, "beach" has a fixed and definite meaning and comprises the territory lying between the lines of high and low water over which the tide ebbs and flows. *Doane v. Willcutt*, 71 Mass. (5 Gray) 328, 335, 66 Am. Dec. 369; *Niles v. Patch*, 79 Mass. (13 Gray) 254, 257; *Town of East Hampton v. Kirk* (N. Y.) 6 Hun, 257, 259; *Cutts v. Hussey*, 15 Me. (3 Shep.) 237, 239.

In a deed of a lot of land, reserving to a certain person the right to cross to a beach and to take and haul water, stones, gravel, sand, and seaweed, "beach" means the land lying between the lines of high water and low water over which the tide ebbs and flows, when used in reference to places anywhere in the vicinity of the sea or the arms of the sea. *Hodge v. Boothby*, 48 Me. 68, 70.

The word "beach" has no such inflexible meaning that it must denote land between high and low water mark. Where the term

is used in the conveyance, it is competent to show by other parts of the deed, and by the situation and use of the property, and also by parol evidence, that the word was not intended to indicate land between high and low water mark. *Merwin v. Wheeler*, 41 Conn. 14, 28.

The words "beach" or "ocean front," in an act authorizing cities on the ocean to lay out walks thereon, include the entire beach flowed by the ocean tides. *State v. Wright*, 23 Atl. 116, 418, 54 N. J. Law (25 Vroom) 130.

#### As high-water mark.

"Beach," as used in a deed in which land was bounded westerly by the beach, did not include the beach, but merely extended to it. *Niles v. Patch*, 79 Mass. (13 Gray) 254, 257; *Coburn v. San Mateo County* (U. S.) 75 Fed. 520, 531.

"The word 'beach' denotes land washed by the sea, and in the absence of qualifying words a boundary by the sea beach extends to high-water mark." *McRoberts v. Bergman*, 30 N. E. 261, 263, 132 N. Y. 73.

In the expression "back of the beach," "beach" means the high-water land. *Nixon v. Walter*, 3 Atl. 385, 387, 41 N. J. Eq. (14 Stew.) 103.

Any boundary at tide water by whatever name, whether sea, harbor, or bay, includes the land below the high-water mark as far as the grantor owns; but a boundary of that land, whether described as shore, beach, or flats, excludes it. *City of Boston v. Richardson*, 95 Mass. (13 Allen) 146, 155.

#### As shore above high water.

The word "beach," when used in a deed, has no such inflexible meaning that it must necessarily denote land between high and low water mark, but may be construed, in the light of circumstances surrounding the execution of such deed, to mean the sandy shore above high-water mark. *Wakeman v. Glover*, 52 Atl. 622, 75 Conn. 23.

#### BEACH FOR DRIFTWOOD.

A will devising to testator's daughter a certain farm, also one mile in length of his "beach for driftwood and timber," means "that portion of the soil of the beach upon which driftwood will ordinarily come by force of the action of the elements in ordinary seasons." Such a line is usually marked on the shore or upper part of the beach by the row of sea drift there formed. The devise must be limited by that line of shore inward from the sea to which seaweed and driftwood are usually carried by the sea in ordinary seasons by the highest winter floods, but it will not include lands occasionally covered by sea water by extraordinary inunda-

tions. *Brown v. Lakeman*, 34 Mass. (17 Pick.) 444, 445, 28 Am. Dec. 314.

#### BEADS.

Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], fixing a duty on articles composed wholly or in part of beads, does not include metal beads; but they should be assessed under paragraph 193, Schedule C, § 1, c. 11, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], as articles composed wholly or in part of iron, steel, or other metal. *Steinhardt v. United States* (U. S.) 113 Fed. 996.

#### BEADSMAN.

A beadsman is a man employed in praying, generally in praying for another. *Bailey* defines "beadsman" as "a person devoted to prayer, who in a chantry or religious house in popish times said a certain set of prayers for patrons, having an allowance for performing said office. The office in modern times has become a sinecure." *Faulkner v. Boddington*, 3 C. B. 412, 416.

#### BEAM FILLING.

The term "beam filling" is used in maritime language to designate materials used in loading a vessel to fill the spaces between the beams that separate the lower between-decks from the lower hold. *The John A. Briggs* (U. S.) 113 Fed. 948, 950.

#### BEAR.

##### Bear arms.

Section 26 of the Declaration of Rights, declaring that the free white men of this state have a right to "bear arms" for their common defense, is to be construed as having "reference to their military use, and \* \* \* not employed to mean wearing them about the person as a part of the dress." *Aymette v. State*, 21 Tenn. (2 Humph.) 154, 158.

Const. U. S. Amend. 2, providing that the right of the people to "keep and bear arms" shall not be infringed, means "to keep and bear arms of every description, and not such merely as are used by the militia." The right pertains to "the whole people, old and young, men and women and boys, and not militia only." A law prohibiting the carriage of concealed weapons is not a violation of the provision, though a prohibition of carrying visible weapons would be a violation thereof. *Nunn v. State*, 1 Ga. (1 Kelly) 243, 251.

Const. U. S. Amend. 2, which declares that the right of people to "keep and bear arms" shall not be infringed, is not to be so construed as to prevent states from passing laws prohibiting the carrying of concealed weapons. *State v. Jumel*, 13 La. Ann. 399.

The right to "bear arms," in defense of himself and the state, given by the Constitution, does not deprive the Legislature of the power over the subject, and authority to adopt such regulations of police as may be dictated by the safety of the people and the advancement of public morals. *State v. Reid*, 1 Ala. 612, 615, 35 Am. Dec. 44.

The words "bear arms" include the right to load and shoot them, and use them as such things are ordinarily used, so that the people will be fitted for defending the state when it needs aid; and, when the Constitution grants to the General Assembly the right to prescribe the manner in which arms may be borne, it grants the power to regulate the whole subject of using arms, providing the regulation does not infringe on that use of them which is necessary to fit the owners of them for a ready and skillful use of them as militiamen. *Hill v. State*, 53 Ga. 472, 480.

The words are not used in the Constitution alone in the military sense of carrying arms, but in the earlier sense of wearing them in war or in peace. The word "arms" means instruments or weapons of defense, and is not restricted by any means to public warfare. *Andrews v. State*, 50 Tenn. (3 Helsk.) 165, 194, 8 Am. Rep. 8.

The Constitution provides "that the right of the citizens to bear arms in defense of themselves and the state shall not be questioned." To be in conflict with the Constitution, it is not essential that an act should contain a prohibition against bearing arms in every possible form, for whatever restrains the full and complete exercise of that right, though not an entire restriction of it, is forbidden by the Constitution. In accordance with these views an act prohibiting the carrying of concealed weapons is unconstitutional. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 13 Am. Dec. 251.

#### **Bearing date.**

A declaration on a bond, alleging that the action was brought on a bond "bearing date" the 18th day of October, 1823, was no averment that the bond was executed and issued on that day. *Latham's Adm'rs v. Lawrence*, 11 N. J. Law (6 Halst.) 322, 325.

#### **Bear the expenses.**

Where a special contract under which horses were shipped over a railroad provided that the owner should "bear the expenses" of feeding or watering the stock during transportation, such provision varied the common-law duty of the railroad company to the extent of its terms, reasonably construed, but no more. "The extent of the variation in terms is simply that the owner shall bear the expenses of feeding and watering. Certainly there is no reasonable construction of those words, considered alone, which would relieve the railroad company from the duty

of placing the cars where the horses could be unloaded by the person in charge, where the evidence showed that the horses could not be fed or watered while on the cars." *Burns v. Chicago, M. & St. P. Ry. Co.*, 80 N. W. 927, 929, 104 Wis. 646.

#### **Bear interest.**

An agreement that a sum loaned should "bear interest" at a certain per cent. means that such loan should produce or yield such rate of interest; that is, that such rate of interest should be paid by the person to whom the loan was made to the person making the loan. *Slaughter v. Slaughter*, 52 N. E. 994, 996, 21 Ind. App. 641.

#### **BEARER.**

##### **Of challenge.**

St. 1796, providing that, if any person shall by word, message, letter, or any other way challenge another to fight a duel with rapier, small sword, pistol, or other dangerous weapon, or shall knowingly be the bearer of such challenge, means a third person who carries a challenge for his friend, and not the challenger himself. *State v. Gibbons*, 4 N. J. Law (1 South.) 40, 49.

##### **Of negotiable instrument.**

The terms "order" or "bearer" are convenient and expressive to be used, in negotiable instruments, to communicate the quality of negotiability. *Whitney Nat. Bank v. Cannon*, 27 South. 948, 950, 52 La. Ann. 1484.

The words "or order," "or bearer," and "bearer," in notes or bills, are words of negotiability, without which, or other equivalent words, the instrument will not possess that quality; and therefore the use of these expressions by the drawer of a bill indicates his intention that the paper shall be negotiable. *Mechanics' Bank v. Stratton*, 38 How. Prac. 190; *Id.*, (N. Y.) 3 Abb. Dec. 269, 270; *Id.*, \*42 N. Y. (3 Keyes) 365, 5 Abb. Prac. (N. S.) 11.

A receipt was as follows: "On or before the first day of March next, I promise to deliver to L——, or bearer, \$100 worth of hemlock lumber at wholesale price." Held, that the receipt would have been transferable if the phrase "or bearer" had been omitted. *People v. Bradley* (N. Y.) 4 Parker, Cr. R. 245, 247.

The term "holder," when used with reference to negotiable paper, is properly applied to the person having possession of the paper and making the demand, whether in his own right or as an agent for another. "Holder" is a word of the same import as "bearer," and is applied to any one in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it. *Crocker-Wool-*

worth Nat. Bank v. Nevada Bank (Cal.) 73 Pac. 456, 462, 63 L. R. A. 245.

A note payable to bearer is payable to any person who successively owns the note bona fide, and is so payable, not by virtue of any assignment of the promise, but by virtue of the original and direct promise moving from the maker to the bearer. *Town of Thompson v. Perrine*, 1 Sup. Ct. 564, 567, 108 U. S. 589, 27 L. Ed. 298.

A note payable to a named payee, or bearer, passes by delivery, and may be sued for by any person who received it in the course of business, and such suit may be brought in the bearer's own name without notifying the payee, since the promise to pay was as much to the bearer as to the person named. *Bradford v. Jenks* (U. S.) 8 Fed. Cas. 1132, 1133.

The word "bearer," as used in a negotiable instrument reciting that it is payable to "bearer," denotes an intention to make the instrument transferable by delivery. *Porter v. City of Janesville* (U. S.) 3 Fed. 617, 619.

A contract to deliver certain stock on notice to bearer does not mean simply a person having a paper in his individual custody. It means a person apparently exercising individual dominion of the paper as owner. If it appeared that he who had the paper procured it wrongfully from the owner he would not be the "bearer." *Van Orden v. Keene*, 10 N. Y. St. Rep. 460, 461.

The word "bearer," in a bond of a corporation payable to an individual or bearer, includes the holder, whoever he may be. *Hubbard v. New York & H. R. Co.* (N. Y.) 14 Abb. Prac. 275, 278.

"Bearer," as used in the negotiable instruments law, means the person in possession of a bill or note which is payable to bearer. Code Supp. Va. 1898, § 2841a; Rev. Laws Mass. 1902, p. 653, c. 73, § 207; Negotiable Instruments Law N. D. § 191; Rev. Codes 1899, § 1060; Bates' Ann. St. Ohio 1904, § 3178; B. & C. Comp. Or. § 4592.

An instrument, otherwise negotiable in form, payable to a person named, but with the words added "or to his order" or "to bearer," or words equivalent thereto, is in the former case payable to the written order of such person, and in the latter case payable to the bearer. Civ. Code Idaho 1901, § 2867.

## BEARING.

A "bearing," in mechanics, is defined by Webster to be: (a) The part in contact with which a journal moves, as the journal boxes, trusses, etc.; (b) that part of the shaft or axle which is in contact with the supports. To the same effect is Knight's American Mechanical Dictionary, only reversing the order: (a) The portion of an axle or shaft in

contact with its collar or boxing; (b) the portion of the support on which the gudgeon rests and rotates. *Cramer v. Fry* (U. S.) 68 Fed. 201, 209.

## BEAST.

See "Cattle Beast"; "Wild Beast."

### Cow.

As used in Act 1883, c. 9, § 2, providing that any person who shall willfully or maliciously kill or destroy or wound the beast of another shall be fined and imprisoned, the word "beast" is a generic term, and includes a cow. *Taylor v. State*, 25 Tenn. (6 Humph.) 285, 286.

"Beast," as used in a statute prohibiting the malicious and unlawful killing of a beast, includes a cow; and hence, in an indictment for the unlawful killing of a cow, it was not necessary to allege or charge that a beast was killed, as stated in the statute. *Taylor v. State*, 25 Tenn. (6 Humph.) 285, 286.

### Dog.

Rev. St. c. 101, § 39, providing that every person who shall willfully and maliciously kill, maim, or disfigure any horse, cattle, or other beasts of another person shall be punished, etc., is to be construed as including all animals not specified which "have an intrinsic value in the same sense as there is value in horses, oxen, and cows." It does not include animals having in law no value, and hence it does not include a dog. *United States v. Gideon*, 1 Minn. 292, 296 (Gil. 226, 229).

A "beast," as used in Shannon's Code, § 6509, in reference to the killing of beasts, does not include a dog. In deciding the case the court admitted that the term was broad enough to include dogs, but based the decision on a legislative intent not to include dogs within the statute. *State v. Phillips*, 1 Tenn. Cas. 34.

### Hog.

"Beast," as used in Code, § 2678, providing that "if any person maliciously kill, maim, or disfigure any horse, cattle, or other domestic beast of another," etc., includes hogs. *State v. Enslow*, 10 Iowa, 115, 116.

### Horse.

In the statutes exempting work beasts and work horses from execution, the word "beast" means "an animal of the horse kind which may be rendered fit for service, as well as one of mature age and in actual use." It has the same meaning as the words "work horse," as therein used. *Winfrey v. Zimmerman*, 71 Ky. (8 Bush) 587, 588.

A horse is a "beast of the plow," within Laws 1871, c. 30, exempting from execution beasts of the plow; but a wagon or harness

is not included. *Somers v. Emerson*, 58 N. H. 48, 49.

### BEAST GATE.

"Beast gate" is land and common for one beast. *Bennington v. Goodtitle*, 2 Strange, 1084.

### BEAST OF BURDEN.

The phrase "beast of burden" does not include a dog. *People v. Court of Special Sessions* (N. Y.) 4 Hun, 441, 445.

### BEAT.

St. 7 & 8 Geo. IV, c. 29, § 29, declaring that, if any person shall unlawfully beat or wound any person intrusted with the care of deer, he shall be punished, etc., is not satisfied by a mere battery; but the statute contemplates beating in the popular sense of the word. Pulling a man to the ground and holding him there is not a "beating." *Regina v. Hale*, 2 Car. & K. 326, 327.

The word "beat," in an indictment alleging that defendant cruelly beat a certain horse, describes with sufficient certainty the alleged act, and cannot be claimed to refer to a race or some other act of contest. There is no doubt that the beating of a horse by a man refers to the infliction of blows. *Commonwealth v. McClellan*, 101 Mass. 34, 35.

There is no distinction between the meaning to be given the words "unlawful beating" within a statute and that given the word "battery" at common law. The latter word is defined by Blackstone to mean "the unlawful beating of another." *Hunt v. People*, 53 Ill. App. 111, 112.

"Assault or beating," as used in admiralty rule 16, declaring that in all suits for an "assault or beating" on the high seas, the suit shall be in personam only, means any case in which the gravamen of the action is an assault or beating, although the injuries alleged arise, not only from assaults and beatings, but also injuries from every ill treatment and all cases of actionable personal abuse. *Smith v. The Challenger*, 7 Pac. 851, 853, 2 Wash. 447.

A single blow may constitute "beating," within the meaning of the statute relative to wife beating. *State v. Harrigan* (Del.) 55 Atl. 5.

### As subdivision of county.

In 1851 a "beat" in the state was a well-known legal subdivision of a county, corresponding to townships or towns in some other states. *Williams v. Pearson*, 38 Ala. 290, 308.

### BECAME.

The words "became, were, and still are," in an indictment charging that a dam and pond "became, were, and still are" a nuisance to the public, imports a prior and continuing offense, and therefore evidence of the existence of the nuisance at any time within two years prior to the date laid in the indictment is admissible. *State v. Holman*, 10 S. E. 758, 104 N. C. 861.

### BECOME.

An indictment alleging a sale to a person in the habit of becoming intoxicated is the same as charging a sale to a person in the habit of being intoxicated. *State v. Dolan*, 122 Ind. 141, 23 N. E. 761.

#### As relating to future.

Where a fire policy on a building contains a condition invalidating it on the building becoming vacant and unoccupied, the phrase "becoming vacant and unoccupied" has reference to the future. It relates to a change in the condition of the property in this respect after the insurance is effected, and not to a condition existing at the date of the policy. *Bear v. Atlanta Home Ins. Co.*, 70 N. Y. Supp. 581, 583, 34 Misc. Rep. 613.

In 3 How. Ann. St. § 9286, declaring it to be felony to solicit or induce a female to enter a house of ill fame for the purpose of becoming a prostitute, some force must be given to the word "become"; and it is evident that the Legislature did not intend to make the offense complete by the mere soliciting of a female, who was already a prostitute in a house of ill fame, to go from that place into another house of like character. *People v. Cook*, 55 N. W. 980, 981, 96 Mich. 368.

The word "become," as used in the transfer tax law, providing that such tax shall be imposed on any such person or corporation specified as "becomes" beneficially entitled to any property by such transfer, whether made before or after the passage of this act, clearly refers to future, and not past, events. In *re Birdsall's Estate*, 49 N. Y. Supp. 450, 463, 22 Misc. Rep. 180.

The word "become," as used in an assignment for the benefit of creditors, directing the assignee to pay the sums "which are or may become due to them," means nothing more than "be," and the term simply means, by the use of the words "are or may become due," past due debts and existing liabilities to become due. *Read v. Worthington*, 22 N. Y. Super. Ct. (9 Bosw.) 617, 627.

### BECOME AWARE

The bond of a bank teller required that the bank should at once notify the guaranty



company on its becoming aware that the teller was engaged in speculation or gambling. It was held that the obvious meaning of "becoming aware," as used in this bond, was to be informed of, or to be apprised of, or to be put on one's guard in respect to, and that no other meaning is equally admissible under the terms of the instrument; that to be aware is not the same as to have knowledge, and hence it cannot be construed as equivalent to becoming satisfied, though perhaps it may be to having reason to believe. Thus, where the bank officers had information in regard to speculation by its teller, and failed to investigate it or notify the surety company, they could not recover on the bond, though they did not know or were not satisfied that the teller was engaged in speculation. *Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 22 Sup. Ct. 124, 131, 183 U. S. 402, 46 L. Ed. 253.

### BECOME DUE.

An appeal bond, given in an action concerning real property, and conditioned to pay all rent due and to "become due," could only be construed as meaning the intervening rent. *Martin v. Campbell*, 120 Mass. 126, 130.

Rev. St. U. S. § 4747 [U. S. Comp. St. 1901, p. 3279], exempting from execution money "due or to become due to any pensioner," means money due or to become due from the pension department, and has no wider application. *Rozelle v. Rhodes*, 9 Atl. 160, 161, 116 Pa. 129, 2 Am. St. Rep. 591.

Code, § 2975, requiring a garnishee to not pay any debt due or "thereafter to become due," should be construed as meaning a subsisting debt, and does not include any debt which may thereafter originate. A debt which has yet to originate cannot properly be said to be a debt which is to become due. *Thomas v. Gibbons*, 15 N. W. 593, 61 Iowa, 50.

The words "to become due," in Rev. St. § 3719, providing that a garnishee shall be liable to the plaintiff for the amount of his indebtedness to the defendant then due or "to become due," only applies to an absolute debt payable in the future, and not to a debt which may possibly become due upon the performance of a contract by the defendant in attachment. *Foster v. Singer*, 34 N. W. 395, 396, 69 Wis. 392, 2 Am. St. Rep. 745.

A provision of a will was: "I give the several legacies following, which I will shall be paid to the several persons hereinafter named, and that, if any of these persons should die before the same has become due and payable, I will that they or any of them shall not be deemed lapsed legacies." Held, that the words "become due and payable" had the same effect as "was payable," and one of the legacies being to A., the wife of W., and A. having died during the life of the

testatrix, the legacy did not lapse, but was decreed to W. *Sibley v. Cook*, 3 Atk. 572, 573.

### BECOME INCAPABLE OF SERVING.

The words "become incapable of serving," in a statute providing that, if a township officer shall become incapable of serving, his office shall be deemed vacant, refers to a personal incapacity, mental or physical, on the part of the incumbent, and not a supposed incapacity by a change of the township boundary, leaving the incumbent a non-resident of the township. *State v. Riverside Tp.*, 53 Atl. 396, 68 N. J. Law, 571.

### BECOME VOID.

In an act (1 Litt. Comp. Laws, p. 501) requiring that, within 15 days after a caveat is entered, the plaintiff in the caveat shall deliver a certified copy thereof to the clerk of the court in which he intends to prosecute it, and declaring that otherwise the caveat should become void, the phrase "become void" is not convertible with "determine." "Become void," however, differs from "determine" only as a species differs from its genus, and must therefore be included in it; for to say that a thing has become void necessarily implies that it has, in effect, been terminated or brought to an end, but the expression applies only to its end or termination in one specific mode, whereas to say that a thing has been determined, though it clearly imports simply that the thing has been terminated or brought to an end, yet the expression is generic in its nature and comprehends every mode of terminating or bringing a thing to an end. *Sharp v. Curda*, 7 Ky. (4 Bibb) 547, 548.

### BED.

See "River Bed."

Bank distinguished, see "Bank (of Stream or Pond)."

Webster and the Century Dictionary define a "bed" as a layer, a stratum, an extended mass of anything, whether upon the earth or within it, as a bed of sulphur, a bed of sand, or clay; and so the verb "bed," to lay in a stratum, to stratify, to lay in order or flat as bedded clay. This view is well illustrated by the stratum of marl to be seen in the banks of many of our eastern rivers and in the marl pits in the eastern part of the state. *State v. Willis*, 104 N. C. 764, 769, 10 S. E. 764.

In a contract for restoring a pavement, by which one party was to furnish materials and the other should prepare all necessary beds of gravel, sand, or other material that might be required for the paving and to do the paving, the term "beds of gravel" has a

definite and well-known meaning among persons engaged in the work of paving, and does not embrace the putting in or tamping of the coarse material at the bottom, but relates to the thin bed of light material placed at the top to receive the blocks or brick of which the pavement was made. *McDonough v. Jolly*, 30 Atl. 1048, 165 Pa. 542.

## BEDROOM.

Under Liquor Tax Law, § 81, subd. 2, defining a hotel and requiring that it shall have at least ten furnished "bedrooms," it was held that rooms 7 feet 3 inches long, varying in width from 5 feet 8 inches to 7 feet 2 inches, with board partitions one inch thick between, and which do not reach the ceiling, are not "bedrooms," within the meaning of the act. *In re Place*, 50 N. Y. Supp. 640, 645, 27 App. Div. 561.

Prima facie, a bedroom is a private place, and an assembly of 8 or 10 persons in such room by invitation, to which place the public have no right to go for the purpose of participating in the amusements going on or partaking in the social enjoyment, will not constitute such bedroom a public place, within an act forbidding gambling in such place. *Coleman v. State*, 20 Ala. 51, 52.

## BEEF.

"Beef," as used in an indictment charging the theft of a beef, "means an animal of the cow species, denominated in the statute 'cattle,' and not beef prepared for market or for use as meat. 'A beef' or 'one beef' is an expression frequently used to designate an animal fit for use as beef, instead of designating it as a 'steer,' a 'heifer,' or a 'cow.'" *Moore v. State*, 2 Tex. App. 350, 351; *Davis v. State*, 40 Tex. 134, 135.

### As article manufactured.

"Beef," though it comes, like everything else, primitively from the soil, is as much a manufactured article as leather, cloth, or charcoal. The ox is a product of the farm; beef is a product of the slaughterhouse and the shambles; it is manufactured by the professional skill of an artisan, whose business is as distinct from that of a farmer as is that of a flax dresser or a wool comber. When the farmer slaughters his own ox, the beef is not less the product of the slaughterhouse, and is not produce of the farm. *City of Philadelphia v. Davis (Pa.)* 6 Watts & S. 269, 279.

### Bull or cow.

A "beef" may be either a bull, a cow, or an ox; and hence where a master directed his servant to go to a certain place and kill a "beef," and the servant on arriving there found only a bull, which proved to belong to plaintiff, and which he killed, the master

was liable, as the servant was acting within his instructions. *Maier v. Randolph*, 6 Pac. 625, 626, 83 Kan. 340.

The word "beef," according to Webster, includes "the bull, cow, and ox in their full grown state," which is the common acceptance of the term; hence the description of an animal as a "beef"—an animal of the cattle kind—is a sufficient description of an animal stolen, which the testimony proved to have been a cow. *Smith v. State*, 6 S. W. 40, 41, 24 Tex. App. 290.

### Neat stock.

The word "beeves" may include neat stock, but all neat stock are not beeves in common parlance. *Castello v. State*, 30 Tex. 324.

## BEEF CATTLE.

The term "beef cattle," used in a contract of sale thereof, means and includes all steer cattle, over the age of three years, used and intended to be used for beef. *Elliott v. Long*, 14 S. W. 145, 146, 77 Tex. 467.

The term "beef cattle," as used in the chapter relating to weighing live stock, shall not be construed to include veals or lambs. Code Va. 1887, § 1937.

## BEEF STEER.

An indictment charging the theft of a "beef steer" will be understood to indicate a species of cattle. *Robertson v. State*, 1 Tex. App. 311, 313.

## BEER.

See "Dutch Beer"; "Fermented Beer"; "Home-Made Beer"; "Hop Beer"; "Hop Tea"; "Hop-Tea Tonic"; "Lager Beer"; "Strong Beer."

Beer is a spirituous liquor made from any farinaceous grain, but generally from barley, which is first malted and ground, and its fermentable substance extracted by hot water. This extract or infusion is evaporated by boiling in caldrons, and hops or some other plant of an agreeable bitterness added. *Nevin v. Ladue (N. Y.)* 3 Denio, 43, 44; *Myers v. State*, 93 Ind. 251, 252; *Douglas v. State*, 52 N. E. 238, 21 Ind. App. 302; *Welsh v. State*, 25 N. E. 883, 126 Ind. 71, 9 L. R. A. 664; *Briffitt v. State*, 16 N. W. 39, 40, 16 N. W. 39, 46 Am. Rep. 621; *United States v. Ellis (U. S.)* 51 Fed. 808, 812; *Hollender v. Magone (U. S.)* 38 Fed. 912, 913 (citing *McCulloch's Dictionary*).

"Beer," as it is ordinarily understood, and as it is defined in the dictionary, is "a fermented liquor." It is made from malted grain, with hops, or from the extract of roots and other parts of various plants, as spruce,

ginger, sassafras, etc. It is known under various names, and designated as "ale," "porter," "stout," "strong beer," "small beer," "liquor," "spruce beer," etc. The courts take notice that many of the beverages sold under the name of "beer" are not intoxicating, while the stronger kinds, as ale, porter, and strong beer, are of an intoxicating character. *Nevin v. Ladue* (N. Y.) 3 Denio, 437, 450. Under the civil damage act it was error to charge that plaintiff's husband, the night before he committed suicide by hanging, drank "intoxicating liquors," upon proof that at that time he drank beer at defendant's saloon, as the court assumed the fact not proven; the term "beer" including lager beer, which is not to be deemed intoxicating without proof of the fact. *Blatz v. Kohrbach*, 116 N. Y. 450, 451, 22 N. E. 1049, 6 L. R. A. 669.

"Beer" is defined to be "fermented liquor made from grain," and in this country chiefly from barley. Every intelligent person knows that the process of manufacturing lager beer is the same, in all essential particulars, as that of making other kinds of ale and beer from grain, and that the only real difference is, so far as intoxicating properties are concerned, a lesser per cent. of alcohol. *Killip v. McKay*, 13 N. Y. St. Rep. 5, 6.

In Act March 8, 1870 (Laws 1870, p. 437), providing that it shall be unlawful for any person or persons to sell beer except at a regular licensed inn and tavern, "beer" means a certain liquor made from malt, containing a certain percentage of alcohol. *Murphy v. Inhabitants of Montclair Tp.*, 39 N. J. Law (10 Vroom) 673, 675.

Beer is both a fermented and a malt liquor, and generally contains 3.40 to 4.04 per cent. of alcohol. *State v. Schaefer*, 24 Pac. 92, 44 Kan. 90.

Beer is a fermented liquor made from malted grain, with hops or other flavoring matters, and also is a fermented extract of the roots of various parts of other plants, as spruce, ginger, and sassafras. *State v. Oliver*, 26 W. Va. 422, 428, 53 Am. Rep. 79.

"Beer" is a general term, and includes both alcoholic liquors, and a class of nonintoxicants made from the roots or other parts of various plants, such as spruce beer, ginger beer, and the like. Lager beer is a malt liquor. *Johnson v. State* (Tex.) 66 S. W. 552, 553.

#### **As fermented drink.**

See "Fermented."

#### **As an intoxicating liquor.**

Beer is embraced in Act Feb. 12, 1853, prohibiting the manufacture of intoxicating beverages, as such term did not mean merely spirituous liquors, or those which are distilled, but included all drinks of an intoxicat-

ing nature. *People v. Hawley*, 3 Mich. 330, 340.

"Beer," in its ordinary sense, denotes a beverage which is intoxicating, and is within the fair meaning of the words "strong and spirituous liquors," as used in statutes regulating the sale of such liquors. *Maler v. State*, 21 S. W. 974, 976, 2 Tex. Civ. App. 296; *Tompkins County Com'rs v. Taylor*, 21 N. Y. 173, 175; *Nevin v. Ladue* (N. Y.) 3 Denio, 43, 44; *In re McDonough* (U. S.) 49 Fed. 360, 361; *Mullen v. State*, 96 Ind. 304, 306; *Welsh v. State*, 25 N. E. 883, 126 Ind. 71, 9 L. R. A. 664; *Douglas v. State*, 52 N. E. 238, 21 Ind. App. 302; *Myers v. State*, 93 Ind. 251, 252; *Stout v. State*, 96 Ind. 407, 410; *Kurz v. State*, 79 Ind. 488, 490; *Plunkett v. State*, 69 Ind. 68, 69; *Klare v. State*, 43 Ind. 483, 485; *State v. Jenkins*, 4 Pac. 809, 32 Kan. 477; *State v. Spiers*, 73 N. W. 343, 344, 103 Iowa, 711; *State v. Cloughly*, 35 N. W. 652, 653, 73 Iowa, 626.

Beer is defined by Craig in his Dictionary as: "A fermented liquor made from malt and barley, and flavored with hops. It may be called the 'wine of barley.' A variety of kinds are made; those in use at present being distinguished by the names of 'ale,' 'porter' or 'strong beer,' 'pale beer' or 'small beer,' which differ little except in strength and the mode of preparation in their manufacture." Beer, then, is a malt liquor, as much as whisky is spirituous, or port wine is a vinous liquor, and are classed together as intoxicating drinks, within statutes prescribing and regulating the sale thereof. *Kerkow v. Bauer*, 18 N. W. 27, 29, 15 Neb. 150.

As the word is generally used and understood "beer" is a malt liquor, and is intoxicating, though there are, however, some light nonintoxicant preparations sometimes vended under that name, and hence an instruction by the court that "beer" was malt liquor and was intoxicating was not erroneous. *State v. Currie*, 80 N. W. 475, 476, 8 N. D. 545.

Where it was proved that defendant sold "beer" to a minor, such proof was not sufficient to establish an action under a civil damage act for the sale of intoxicating liquors, since beer is not necessarily an intoxicating liquor. From the definitions of the word "beer" it cannot be said that "beer," as the word is thus defined, is necessarily an intoxicating liquor, since the fact is beyond dispute that there are different kinds of beer, some of which are intoxicating and others not, and hence whether beer which may be sold in a given case is a malt or intoxicating beer, or a ginger or root beer, or some other of the various kinds of beer which are known not to be intoxicating, is a question of fact to be proved. *Hansberg v. People*, 8 N. E. 857, 858, 120 Ill. 21, 60 Am. Rep. 549.

Beer is an intoxicating liquor, within the meaning of Gen. St. 1878, c. 16, § 11, relating to intoxicating liquors, and providing that the word shall be understood to mean "spirituous, vinous, malt, and fermented liquor." *State v. Dick*, 50 N. W. 362, 366, 47 Minn. 375.

"Beer" is, in effect, defined as an "intoxicating liquor," by Rev. St. §§ 4593, 4598. *State v. Heinze*, 45 Mo. App. 403, 412.

The word "beer" is a generic term, which is applied indiscriminately to malt beer, as well as to beer which is made from various extracts, and from the roots and other parts of certain plants and the bark of trees; thus it cannot be said, without specific designation of the kind of beer referred to, that it is an intoxicating liquor, the beers manufactured from roots, etc., not being intoxicating. *State v. Sioux Falls Brewing Co.*, 58 N. W. 1, 2, 5 S. D. 89.

In its ordinary sense, "beer" denotes a beverage which is intoxicating, and is within the meaning of the words "strong and spirituous liquors," as used in Rev. St., prohibiting the sale of "strong and spirituous liquors" without a license. The term "beer," when used alone, must be understood as signifying an alcoholic beverage, though some qualifying word, as "molasses," may be used with it to show that an alcoholic beverage is not intended. Evidence that the defendant, indicted for selling strong beer, sold "Dutch beer," is not a material variance, since there is nothing in the ordinary sense of the word "Dutch" to qualify the meaning of the word "beer," so as to show that it was not in fact intoxicating. The term "strong beer" and "Dutch beer," without explanation, must both be understood to mean intoxicating liquors of a similar character, produced from similar materials, and in a like manner. *People v. Wheelock*, 3 Parker, Cr. R. 9, 14.

Beer may be denominated "raw material from which alcohol is made," and science has proved by actual analysis that it is in its very nature inebriating in its consequences when drunk to excess. *Markle v. Town Council of Akron*, 14 Ohio, 588, 592.

"Beer" is a general name, which includes various liquors, some of which are, and some may not be, intoxicating. *Commonwealth v. Gourdier*, 80 Mass. (14 Gray) 390, 391; *Blatz v. Rohrbach*, 22 N. E. 1049, 1050, 116 N. Y. 450, 6 L. R. A. 669.

Act March 8, 1870 (P. L. 1870, p. 436), providing that it shall be unlawful for any persons or person to sell any "ale, porter, beer," or other malt or spirituous liquors as a beverage within said township, etc., each means a certain well-defined liquor made from malt, containing a certain percentage of alcohol, sufficient to render the same intoxi-

cating. *Murphy v. Inhabitants of Montclair Tp.*, 39 N. J. Law (10 Vroom) 673, 676.

The word "beer," as used in an indictment charging one with selling beer, means a fermented and intoxicating liquor. *State v. Besheer*, 69 Mo. App. 72, 75.

#### Judicial notice of intoxicating character.

Beer may be, but is not necessarily, a malt liquor, and may not be intoxicating. It devolves on the state, therefore, to prove that beer sold was either a malt liquor, or that it was in fact intoxicating. Neither of these facts will be assumed or judicially recognized. *Weis v. State*, 33 Ind. 204, 205; *Kurz v. State*, 79 Ind. 488, 490; *Klare v. State*, 43 Ind. 483, 485; *State v. Beswick*, 18 R. I. 211, 220, 43 Am. Rep. 26; *State v. Church*, 60 N. W. 143, 144, 6 S. D. 89.

The word "beer" may mean malt or fermented liquor, or it may mean the unfermented and undistilled extracts of various roots or plants. There is no presumption that the word "beer" means fermented or malt liquor, or that it is intoxicating, and therefore the burden of showing that it is intoxicating, and consequently that a sale thereof is in violation of the liquor tax law, is on the petitioner, in an action to enjoin the sale thereof. *In re Hunter*, 69 N. Y. Supp. 908, 909, 34 Misc. Rep. 389.

As some kinds of beer are not intoxicating, the question whether beer sold was an intoxicating liquor, within the meaning of a statute regulating the sale of intoxicating liquors, is a question for the jury, if there is evidence tending to show that it was intoxicating. *Schlosser v. State*, 55 Ind. 82, 87.

Whether beer is intoxicating is a question of fact for the jury, and the fact that alcohol was discovered in it on a chemical analysis, although competent evidence, does not necessarily prove that the liquor was spirituous within the meaning of the statute. *Commonwealth v. Bloss*, 116 Mass. 56, 58.

When beer is called for at a bar in a saloon or hotel, the bartender would know at once from the common use of the word that strong beer was wanted. When the word "beer" is used in court by a witness, the court will take judicial notice that it means a malt and an intoxicating liquor. In the meaning of the word itself, there is a prima facie proof that it is malt or intoxicating liquor that is meant. *Briffitt v. State*, 16 N. W. 39, 41, 58 Wis. 39, 46 Am. Rep. 621.

Webster defines beer to be "a fermented liquor made from any malted grain, with hops and other bitter flavoring matters." In other words, it is a malt liquor, which the same author declares to be "a liquor prepared for drink by an infusion of malt, as beer, ale, porter, etc." It may therefore be

said that beer is a liquor infused with malt, and prepared by fermentation for use as a beverage. As a consequence, when beer is called for at a place at which intoxicating drinks are sold, the bartender, having in view the primary meaning, as well as the common use of the word, is justified in inferring, and must reasonably infer, that malted and fermented beer is wanted. When, therefore, a witness testifies to the sale or giving away of beer under circumstances which make the sale or giving away of any intoxicating liquor unlawful, the prima facie inference is that the beer was of that malted and fermented quality declared by the statute to be an intoxicating liquor, and the court trying the cause ought to take judicial notice of the inference which thus arises from the use of the word "beer" in its primary and general sense. *Myers v. State*, 93 Ind. 251, 252; *State v. Jenkins*, 4 Pac. 809, 811, 32 Kan. 477; *Dant v. State*, 5 N. E. 870, 871, 106 Ind. 79; *State v. Tisdale*, 55 N. W. 903, 904, 54 Minn. 105.

Testimony that beer was sold in a drinking saloon by one who manufactured it will be taken to mean a sale of the fermented malt liquor commonly sold in such saloons, and not ginger beer, root beer, or the like. *State v. Dick*, 50 N. W. 362, 363, 47 Minn. 375.

In its ordinary sense, "beer" denotes a beverage which is intoxicating, and is within the fair meaning of the words "strong or spirituous liquors," as used in statutes regulating the sale of such liquors. "Its primary signification is that of a malt liquor; and if it is to be understood in a restricted or qualified sense, such as to denote root beer, molasses beer, or persimmon beer, etc., it would be incumbent on the defendant to show that such is the case. There have been a great many decisions on the subject, but the most of them sustained the view that the court will take judicial notice that the word 'beer,' when used in a court by a witness, means a malt and an intoxicating liquor." *Maler v. State*, 21 S. W. 974, 976, 2 Tex. Civ. App. 296; *United States v. Ducournau* (U. S.) 54 Fed. 138, 139 (citing *Tinker v. State*, 90 Ala. 647, 8 South. 855; *Watson v. State*, 55 Ala. 158; *Allred v. State*, 89 Ala. 112, 8 South. 56); *State v. Effinger*, 44 Mo. App. 81, 83; *State v. Teissedre*, 2 Pac. 650, 653, 30 Kan. 476.

The term "beer," when used by witnesses in a liquor prosecution to describe a sale of beer, is not sufficient in itself to show a sale of intoxicants. *Lathrope v. State*, 50 Ind. 555, 556.

Evidence that liquor sold was beer is not sufficient to sustain a conviction for selling intoxicating liquors, for "there are many kinds of beer made and used, such as potato beer, persimmon beer, and other beers which are known to be not intoxicating. There

is also lager beer, which may or may not be judicially known to be intoxicating, the courts differing as to this matter"; and hence, the beer not being shown to be lager beer, it cannot be assumed to be intoxicating. *Du Vall v. City Council of Augusta*, 42 S. E. 265, 115 Ga. 813.

#### As liquor.

See "Liquor."

#### As malt liquor.

See "Malt Liquor."

#### As a spirituous liquor.

Lager beer is not embraced within the term "spirituous liquors" in Code, § 4869, prohibiting the sale of spirituous liquors on Sunday, as spirituous liquors only includes distilled, and not fermented, liquors. *Fritz v. State*, 60 Tenn. (1 Baxt.) 15, 16. See, also, *In re McDonough* (U. S.) 49 Fed. 360, 361; *Sarils v. United States*, 14 Sup. Ct. 720, 722, 152 U. S. 570, 38 L. Ed. 556; *Gnadinger v. Commonwealth*, 4 Ky. Law Rep. 514; *King v. Same*, id. 623.

Beer is a fermented liquor made from malted grain, and has different names, such as "ale," "porter," "brown stout," "lager," and "small beer," according to its strength and other qualities. It is not a spirituous liquor. *State v. Quinlan*, 41 N. W. 299, 300, 40 Minn. 55.

#### As property.

See "Property."

#### As wine.

See "Wine."

#### Rochester Tonic.

See "Rochester Tonic."

### BEES.

As property, see "Property."

### BEE TREE.

An accusation that plaintiff stole "my bee tree" was held not to be actionable *per se*, the words referring to the tree, and not to the bees or honey, and the word "tree," without explanation, meaning a standing tree, and a part of the realty. *Idol v. Jones*, 13 N. C. 162, 164.

The term "bee tree," when used in a charge that another stole a bee tree, relates to the wild, and not to the reclaimed, insect—the insect *feræ naturæ*, and not yet reduced to property; and therefore the charge is not slanderous as importing larceny of bees. A charge that another "stole a bee tree" does not import a larceny, as neither standing lumber nor wild bees are property which are the

subjects of larceny. *Cock v. Weatherby*, 13 Miss. (5 Smedes & M.) 333, 337.

## BEFORE.

See "At or Before"; "Next Before"; "On or Before."

Gen. St. § 23, art. 11, providing that, before the auditor shall issue any certificate of authority to a foreign insurance company to do business in this state, the corporation or its agent shall pay \$50 into the state treasury, means that the money must be paid into the treasury before the corporation shall have the right to a certificate, and hence a certificate issued without such payment is a nullity. *Hartford Fire Ins. Co. v. State*, 9 Kan. 210, 226.

Act March 8, 1875, c. 137, § 8, 18 Stat. 470 [U. S. Comp. St. 1901, p. 510], relating to the removal of causes from state to federal courts, and requiring the petition for removal to be filed in the state court "before or at the term at which the cause could be first tried," means at the time when, by the usual orderly course of practice under the rules of the court, the case could be set down for trial if an action at law, or for a final hearing if a suit in equity. *Wilkerson v. Delaware, L. & W. R. Co.* (U. S.) 22 Fed. 353, 355.

### As excluding time mentioned.

The authorities are uniform that where an act is required to be done a certain number of days or weeks "before" a certain other day, upon which another act is to be done, the whole number of the days or weeks must intervene before the day fixed for doing the second act. *Ward v. Walters*, 63 Wis. 39, 44, 22 N. W. 844.

Where a notice is required to be served "before" a certain day, such day cannot be counted. *Greve v. St. Paul, S. & T. F. R. Co.*, 25 Minn. 327; *Small v. Edrick* (N. Y.) 5 Wend. 137; *Columbia Turnpike Road Co. v. Haywood* (N. Y.) 10 Wend. 422, 423; *Metropolitan Nat. Bank v. Morehead*, 38 N. J. Eq. (11 Stew.) 493, 500; *State v. Weld*, 40 N. W. 561, 562, 39 Minn. 426; *O'Connor v. Towns*, 1 Tex. 107, 116; *Brooklyn Trust Co. v. Town of Hebron*, 51 Conn. 22, 27.

"Before," as used in a statute providing that the sheriff shall give his bond before the first Monday in January in each year, is employed literally, and a bond given on that day is too late. *Alston v. Falconer*, 42 Ark. 114, 116.

In a decree providing for payment "before" a fixed date, the word confers no right to pay on such date, the meaning being "earlier than," "previous thereto." *Hooper v. Young*, 58 Ala. 585, 589.

"Before the first day of July" conveys nearly, if not precisely, the same meaning as

"until the first of July," as used in a statute authorizing the Governor of the state to receive sealed bids for certain property from all persons "until the first of July" in a certain year, and is exclusive in its meaning, thereby excluding the first day of July. *Webster v. French*, 12 Ill. (2 Peck) 302, 304.

The word "before," as used in a stipulation for a stay of sale, and authorizing the debtor to pay the debt "before the 15th day of November," means "earlier than" or "previous to," and it confers no right to pay on the 15th of November. *Hooper v. Young*, 58 Ala. 585, 589.

In *Wag. St. p. 850*, § 20, providing that all appeals taken ten days before the first day of the term of the appellate court shall be determined at such term, "before" is to be construed in its plain, ordinary, and usual sense, as authorizing a computation of the time by including the day on which the appeal was taken, and excluding the first day of the term. *Bailey v. Lubke*, 8 Mo. App. 57, 58.

"Before," as used in the ordinance of the convention defining the qualifications of voters, and requiring that the oath shall be filed in the office of the clerk of the county court "at least five days before the day of election," will not exclude the first day on which the oath was filed, where to do so would cause a forfeiture. *State ex rel. Reitemeyer v. Gasconade County Court*, 83 Mo. 102.

### Before capital.

An agreement to place another party's interest in a mining claim "before capital" means to call the attention of capital to the claim and induce its investment therein. *Baum v. Rainbow Smelting Co.*, 71 Pac. 538, 541, 42 Or. 453.

### Before conviction.

Gen. St. § 183, providing that, if any person lawfully imprisoned on any criminal charge shall break from such imprisonment "before conviction," he shall on conviction be punished by confinement for a term not exceeding two years, includes an escape which was made while the defendant was committed on a criminal offense, though he was thereafter rearrested and tried and acquitted, since the offense cannot be made to depend on some future contingencies; and, if the words are to be construed as not including an escape in case the defendant is subsequently acquitted of the charge for which he is committed, then it would be improper in any case to try a defendant for escape until after his trial and conviction on the original charge. *State v. Lewis*, 19 Kan. 260, 265, 27 Am. Rep. 113.

### Before departure of train.

Laws 1874, c. 68, § 2 (Miller's Code, p. 347), providing that a charge of 10 cents may be added to the fare of any passenger, where the same is paid on the cars, if a ticket might

have been procured within a reasonable time "before the departure of the train," does not require that the ticket office at the station shall remain open up to the instant the train moves off; the question is, might the passenger have procured a ticket within a reasonable time before the departure, and not up to the very moment when the wheels began to move? *Everett v. Chicago, R. I. & P. Ry. Co.*, 28 N. W. 410, 411, 69 Iowa, 15, 58 Am. Rep. 207.

#### **Before delivery.**

The condition of an auction sale that on the purchase something was to be paid "before the delivery" was not the same as "on delivery," but would seem to point out rather that the payment is to be made before the commencement of the act by which the goods are to be handed over to the purchaser. *Pettitt v. Mitchell*, 4 Man. & G. 819, 838.

#### **Before full payment.**

As used in a will leaving certain sums in trust for children, to be paid at the expiration of a certain time, and providing that, if either of the children died before the full payment of his share, such share should be paid to such child's issue, the words "before full payment" meant before the share became payable, and did not include a contingency of delay in making the payment after it became due. *Finley v. Bent*, 95 N. Y. 364, 368.

#### **Before the King.**

A bond requiring the appearance of defendant "before the King," means before the King in his court, and not before him in person. *Jones v. Stordy*, 9 East, 55, 56.

#### **Before other testimony for defense is heard.**

Acts 1887, c. 79, §§ 1, 2, providing that a defendant in a criminal case may testify only on condition that he shall do so "before any other testimony for the defense is heard," means that a defendant must be the first witness for the defense, and not merely that his testimony on any particular subject must be the first induced relative to that subject. *Clemons v. State*, 21 S. W. 525, 92 Tenn. (8 Pickle) 282.

#### **Before next term.**

"Before the next term," as used in a statute requiring the record of the proceedings upon an appeal from the circuit court to be filed before the next term, means before the meeting of the court on the first day of the next term. *Vanlear v. Vanlear (Pa.)* 1 Bin. 76.

Where a bond was conditioned that the defendant should be and appear "before the next term of the district court, to be begun and holden," etc., stating the time and place of holding the court, "and attend from day to day and term to term, then and there to an-

swer the state of Texas," etc., and it was objected that the statute required the bond to be conditioned that the defendant should appear "at the district court of the proper county, at the next term thereof," etc., and that the word "before" in the bond related to time, and that the bond required the defendant to appear before the term, and not at the court itself, it was held that the word "before," in its connection in the bond, referred to place, and that the objection to the bond was not well taken. *Williford v. State*, 17 Tex. 653, 656.

#### **Before said court.**

The words "before said court," in a certificate by the clerk of court to a complaint that it was sworn to "before said court," operates to raise a presumption that the complaint was in fact sworn to before the court. *Tacey v. Noyes*, 9 N. E. 830, 831, 143 Mass. 449.

#### **Before sitting of court.**

St. 1785, c. 69, § 8, provides that no action for divorce or alimony shall be brought before the court unless the libellant shall file the libel in the clerk's office, and shall cause the adverse party, if in the state, to be served with an attested copy of the same, and with a summons to appear in court 14 days at least "before the sitting of the court." It is held that the words "before the sitting of the court" are equivalent to the words "before the first day of the term," and do not extend the time to the opening of the court on any subsequent day in the term to which it might stand adjourned. *Anonymous*, 5 Mass. 197, 198.

#### **Before sheriff and suitors.**

A declaration on a judgment, stating that it was recovered in a court held "before the sheriff and suitors," implied that it was held before the sheriff as judge. *Jones v. Jones*, 5 Mees. & W. 523, 528.

#### **Before term at which cause could be first tried.**

The expression "before the term at which said cause could be first tried," as used in Act Cong. March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 50], providing for the removal of suits from state to federal courts, means the term at which by law the cause could first be tried, and not necessarily the term at which the parties are ready for trial. *Kaelser v. Illinois Cent. R. Co. (U. S.)* 6 Fed. 1, 6. It means, in regard to suits pending at the time of the adoption of the act, the first trial after the right of removal attaches subsequent to the passage of the act. *Hendecker v. Rosenbaum*, Id. 97, 98.

#### **Before trial or final hearing.**

The words "before the trial," as used in Gen. St. 1878, c. 66, § 262, subd. 1, applied to the dismissal of an action, mean "before the

commencement of the trial." *Bettis v. Schreiber*, 31 Minn. 829, 331, 17 N. W. 863, 864.

The federal statute requiring that a petition for removal of a cause from a state court to a federal court, on the ground or legal cause of prejudice, must be filed before the trial or final hearing, means before the trial or hearing of the cause has been in good faith begun in the state court. *Jilkins v. Sweetser*, 102 U. S. 177, 179, 26 L. Ed. 129. It is not made before the trial when it is made after defendant's motion for a continuance has been overruled, and the court has ordered the jury stricken and the trial to proceed, though a half hour's indulgence is given the defendant to enable him to procure counsel. *Fleming v. Fire Ass'n of Philadelphia*, 76 Ga. 678, 681. If the case has been called for trial in its order, and the jury called to try the case, the trial has been begun, even though the jury has not been sworn. The calling of the jury is a part of the trial. *St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co.*, 23 Minn. 186, 188, 23 Am. Rep. 682. Where there has been one trial in the state court, a petition cannot be filed. *Whittier v. Hartford Fire Ins. Co.*, 55 N. H. 141, 144, 20 Am. Rep. 185; *Chandler v. Coe*, 56 N. H. 184, 186, 22 Am. Rep. 437. A petition cannot be filed after a trial on the merits, though such trial resulted in a disagreement of the jury. *Galpin v. Critchlow*, 112 Mass. 339, 341, 17 Am. Rep. 176.

"Before trial," as used in Rev. St. c. 82, § 88, providing that if a party knows any objection to a juror in season to propose it before trial, etc., means before the termination of the trial. *Brown v. Reed*, 16 Atl. 504, 505, 81 Me. 158.

As used in Gross' St. p. 216, requiring all exceptions which go to the form of an indictment merely to be made "before trial," means before plea pleaded, and a motion to dismiss the prosecution for the reason that the name of the prosecutor was not indorsed upon the indictment, and did not purport to have been found upon the information and knowledge of two or more of the grand jury, or the information of some public officer in the discharge of his duty, should have been made at the earliest practicable moment before a plea to the merits. *Winship v. People*, 51 Ill. 296, 298.

Gen. Laws 1839, c. 511, provides that where, in any county, there are two or more municipal courts, the defendant in a civil action may have a change of venue from one to another under the same circumstances and on the same conditions as provided for a change of venue in justices' courts; and Gen. St. 1878, c. 65, § 20, provides that the application for a change of venue must be made "before the trial commences." Held, that the term "before the trial commences" should be construed as meaning before any trial

has been commenced, and that such an application, therefore, comes too late after a trial, though it may have resulted in a disagreement of the trial, or in a verdict which was afterwards set aside. *Lueck v. St. Paul & D. R. Co.*, 58 N. W. 821, 57 Minn. 80.

2 Rev. St. pp. 124, 125, § 389, providing that the defendant may at any term "before the trial" serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs, which if accepted by plaintiff within a certain time, judgment shall be entered accordingly, is applicable only to suits which have been commenced and are pending at the time the offer to confess therein provided for may be made, and cannot be construed to include time before as well as after the commencement of the suit. Without a suit pending, there would be nothing to try. *Horner v. Pilkington*, 11 Ind. 440, 441.

An offer of judgment, pursuant to Gen. St. c. 66, § 241, to be of any effect on the recovery of costs occasioned by the trial, must be made and served 10 days before the commencement of the trial. The plaintiff is entitled to the full period of 10 days in which to accept or reject the offer, and in ascertaining this period the day of service of the offer must be excluded (Gen. St. c. 66, § 68), and the trial must be regarded as a single point of time identical with its commencement. *Mansfield v. Fleck*, 23 Minn. 61.

## BEG.

To "beg" does not necessarily import spoken words. One who, to obtain alms, exhibits his need or infirmities, or attracts attention by signs or conduct to his desire to receive charity, is chargeable with a violation of a statute against begging, as fully as if he had spoken. In *re Haller* (Pa.) 12 Hun, 181, 132.

## BEGET.

To "beget," as defined by Webster, is to procreate as a father or sire; to generate; chiefly used of the father alone, but sometimes of both parents, so that the use of the word "beget" in a clause in a will that if a son should die leaving no heirs of his body by him begotten, indicates that the word "heirs" is to be limited to his own children, and not to include grandchildren. This is evidenced from another clause providing that should the daughter die without leaving any heir of her body by her begotten and delivered, the words "begotten and delivered" both indicate that the word "heir" should be limited to the children and not to the grandchildren. It is said that to "beget" is as strong a term as "child" itself. In a measure the same relation exists be-



tween the word "beget" and the word "child" that does between the word "create" and the word "creation," between cause and effect, and grandchildren and other and more distant descendants are begotten by their own respective fathers, and not by more remote ancestors. *Granger v. Granger*, 44 N. E. 189, 190, 147 Ind. 95, 36 L. R. A. 186, 190.

To beget is to procreate, as a father or sire, so that when used in connection with the word "children" in a deed "to L., wife of E., to her and her children begotten of said E.," indicates that the word "children" is limited to the immediate descendants—those of the first generation. *Downing v. Birney*, 70 N. W. 1006, 1008, 112 Mich. 474.

"Begotten," as used in a will where testator bequeathed certain property to a daughter, and on her death to her children by her lawfully begotten, is to be construed as born. *Barnes v. Provost* (N. Y.) 4 Johns. 61, 64, 4 Am. Dec. 249; *Minnig v. Batdorff*, 5 Pa. (5 Barr) 503, 506.

The words "begotten" and "to be begotten," "procreatis," and "procreandis," have always been held to have the same meaning, unless a contrary intent plainly appears. *Wager v. Wager* (Pa.) 1 Serg. & R. 374, 378.

A devise to G. and "his heirs lawfully begotten, forever," creates in G. an estate tail. *Good v. Good*, 7 El. & Bl. 295, 301.

Testatrix devised to her daughter-in-law and son a life estate, and provided that after their death the land should descend to such heirs as they shall have living at the time of their death, begotten by them, share and share alike. Held, that the words "heirs living at the time of their death begotten by them" was equivalent to lineal descendants, and that on the death of the life tenants all of the lineal descendants of the son and daughter-in-law, both grand and great grandchildren whose parents are living, as well as grandchildren whose parents are dead, took under the testatrix's will, per capita, equal portions of the estate. *Dukes v. Faulk*, 16 S. E. 122, 124, 37 S. C. 255, 34 Am. St. Rep. 745.

## BEGIN.

See, also, "Commencement of Action."

To "begin" is to do the first act, to enter upon. To "begin" an enterprise is to take the first step, the initiatory step, the very commencement of an expedition, under Acts Cong. April 20, 1818 (3 Stat. 440), providing that if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide the means or procure the same for any military expedition to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people, with

whom the United States are at peace, every such person so offending shall be deemed guilty of a high misdemeanor. *United States v. O'Sullivan* (U. S.) 27 Fed. Cas. 380, 381.

In Rev. St. § 5286 [U. S. Comp. St. 1901, p. 3601], making it a misdemeanor for any one within the United States to begin any military enterprise against any foreign prince, state, or people with whom the United States is at peace, "begin a military enterprise" is a phrase of a wide latitude, and means not only the actual starting of an expedition, but the instigation of such enterprise. It brands as such an offense against the government the first effort or proposal by individuals to get up a military enterprise in this country against a foreign one. "The statute does not wait for the project to be consummated by any formal array or organization of forces, but it strikes at the inception of the purpose, in the first incipient step taken with a view to the enterprise." *United States v. Ybanes* (U. S.) 53 Fed. 536, 538 (citing 2 Whart. Cr. Law [5th Ed.] pp. 519-525).

Where an insolvent executed a warrant of attorney to confess judgment, under which judgment was entered up within less than four months of the filing of a petition on which he was adjudged a bankrupt, the proceeding which included such judgment was "begun" within such four months. Such proceeding is deemed begun when the judgment is confessed of record, i. e., when the warrant for its entry is actually delivered to the prothonotary, and not when the warrant was executed. A legal proceeding is not begun when a party empowers an attorney to appear and act for him, but when the attorney, in pursuance of that authority, does appear and act for him. *Ferguson v. Greth*, 45 Atl. 735, 737, 195 Pa. 272, 78 Am. St. Rep. 812.

## BEGINNING.

### Beginning to demolish.

A mob going along and breaking a person's windows is not a "beginning to demolish," under 7 & 8 Geo. IV, c. 30, § 7, even though the frames of the windows should be broken, because the object of the mob in such case is evidently very different. *Rex v. Batt*, 6 C. & P. 329.

To constitute a "beginning to demolish," within the meaning of St. 7 & 8 Geo. IV, c. 30, § 8, it must appear that the ultimate object of the rioters was to demolish the house, and that if they had carried their intention into full effect they would in point of fact have demolished it. *Rex v. Thomas*, 4 Car. & P. 237.

Destroying movable shop shutters is not a "beginning to demolish," within 7 & 8 Geo. IV, c. 30, § 8, prescribing punishment for mobs or rioters who begin to demolish a house. *Regina v. Howell*, 9 Car. & P. 437.

**Beginning to keep house.**

"Beginning to keep house with the intent to delay creditors," as used in a statute providing that a beginning to keep house with the intent to delay creditors should be regarded as an act of insolvency, means "a withdrawing from a part of the house where the debtor had before usually sat, and where there was free access, to a more retired part of the house to avoid personal applications for money, by means whereof his creditors are prevented from importuning him. But if a trader is merely denied when at home to his creditor who demands payment of a debt, but does not ask to see him personally, this is not evidence of a 'beginning to keep house,' so as to constitute an act of bankruptcy." *Dudley v. Vaughan*, 1 Camp. 271.

Closing the doors and shutters of a bank is a "beginning to keep house," although the banker be not domiciled at the house. *Cumming v. Baily*, 6 Bing. 363.

**Beginning of suit.**

"Beginning of suit," within the meaning of the limitation statutes, cannot be construed to mean the time of the filing of an amended complaint, filed for the purpose of restating the cause of action in a more perfect manner. *Chicago City Ry. Co. v. Hackendahl*, 58 N. E. 930, 932, 188 Ill. 300.

**BEGOTTEN.**

See "Beget."

**BEHALF.**

See "In Behalf of"; "On Behalf of."

**BEHAVIOR.**

See "Bad Behavior."

"Behavior," as used in Const. art. 3, § 9, providing that the clerk of court may be removed for breach of good behavior at any time by the judges of the respective courts, is synonymous with the word "conduct." *State v. Roll*, 7 West. Law J. 121, 128, 1 Ohio Dec. 284.

**BEHIND.**

In a will by which testator devised certain estate to a son, his heirs and assigns, forever, but in case he shall happen to die leaving no issue behind him, then the property to go to another son, the term "leaving no issue behind him" necessarily imports that the testator meant at the time of his death. *Porter v. Bradley*, 3 Term R. 143, 146; *Van Mid-dlesworth v. Schenck*, 8 N. J. Law (3 Halst.) 29, 41.

**BEHOOF.**

"Behoof," as used in a deed to a married woman, conveying the land to her and her heirs and assigns, to her proper use, benefit, and behoof in fee simple, means simply use, service, profit, or advantage, but does not, without other words, denote a separate or exclusive use or advantage, and was to the behoof of the husband as well as to the wife, and the property conveyed constituted their common property, and not the separate property of the wife. *Stiles v. Japhet*, 19 S. W. 450, 452, 84 Tex. 91.

**BEING.**

See "Be—Being."

**BELIEF.**

See "Best of His Information and Belief"; "Best of His Knowledge and Belief"; "Firmly Believes"; "Fixed Belief"; "Fully Believe"; "Honest Belief"; "Reasonable Belief."  
Unqualified belief, see "Unqualified."

The meaning of the words "belief" and "knowledge," as defined by lexicographers, will show that there is a distinct and well-defined difference between them. "Believe: To exercise trust or confidence." Webster. "To exercise belief in; to be persuaded upon evidence, arguments, and deductions, or by other circumstances other than personal knowledge." Cent. Dict. "Knowledge: The act or state of knowing; clear perception of fact; that which is or may be known." Webster. "Acquainted with things ascertained or ascertainable; specific information." Cent. Dict. *Ohio Valley Coffin Co. v. Goble*, 62 N. E. 1025, 1027, 28 Ind. App. 362.

"The term 'belief' implies an assent of the mind to the alleged fact, and is not supported by knowledge. One may believe a proposition without making it known, or without possessing any knowledge upon the subject. It is or may be a passive condition of the mind, prompting in neither action nor declaration. One may believe that he has a right to land, without asserting or demanding it." *Grube v. Wells*, 34 Iowa, 148, 151.

Belief is a persuasion of the truth or an assent of the mind to the truth of a declaration, proposition, or alleged fact. *Keller v. State*, 102 Ga. 506, 514, 31 S. E. 92, 95.

Belief admits of all degrees, from the slightest suspicion to the fullest assurance. *State v. Harris*, 97 Iowa, 407, 409, 66 N. W. 728.

The belief of a witness is a conclusion from facts. The witness should state the facts, and the conclusion to be drawn from

them rests with the jury. *Ventress v. Smith*, 35 U. S. (10 Pet.) 161, 171, 9 L. Ed. 382.

A statute provided that, if a complaint be verified, the answer must contain a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof according to his information and belief. Held, that the word "belief" should be taken in its ordinary sense, and means the actual conclusion of the defendant drawn from information. *Humphreys v. McCall*, 9 Cal. 59, 62, 70 Am. Dec. 621.

#### **As conviction beyond reasonable doubt.**

"Belief, in a criminal case, when applied to the guilt of a defendant, is a conviction of the mind to a moral certainty and beyond a reasonable doubt." *People v. Sheldon*, 9 Pac. 457, 460, 68 Cal. 484.

#### **Knowledge distinguished.**

"Belief" is the degree of certainty produced by things which do not make a very deep impression on the memory, and differs from "knowledge" in that the latter is nothing more than a firm belief. The difference is ordinarily merely in the degree. *Hatch v. Carpenter*, 75 Mass. (9 Gray) 271, 274.

"Belief," as used in a statute requiring the answer in an action, in case the complaint be verified, to contain a specific denial of each allegation of the complaint controverted by the defendant, or a denial thereof according to his information and belief, means "an actual conclusion of the defendant drawn from information. Such is its ordinary sense, and there is a clear distinction between positive knowledge and mere belief, and they cannot both exist together. Thus belief may be founded on a statement of others, not competent witnesses, and not under oath, and not therefore legal testimony. In making out his answer he cannot undertake to decide whether the information upon which his belief is founded was legal testimony or otherwise. He must state facts known, and the fact of his belief is the only fact known to him." *Humphreys v. McCall*, 9 Cal. 59, 62, 70 Am. Dec. 621.

"Belief" and "knowledge" are not synonymous, and, where a statute related to patenting mines where a lode was "known" to exist, the court could not use the term "belief" synonymously in its charge with "knowledge." Knowledge may be obtained in various ways which do not involve belief. *Iron Silver Min. Co. v. Reynolds*, 8 Sup. Ct. 598, 603, 124 U. S. 374, 31 L. Ed. 466.

There is no solid distinction between "knowledge" and "belief." Practically and metaphysically, the difference is only in degree of conviction on the evidence of the fact. Belief is the conclusion of the mind as to the existence of a fact. It may be a weak or strong belief. If strong, decided conviction,

we may call it "knowledge," and yet it is only belief. *State v. Berkeley*, 23 S. E. 608, 610, 41 W. Va. 455.

An affidavit of defense stating certain facts to be to the "knowledge and belief" of affiant is insufficient, as it does not mean affiant's actual personal knowledge. *First Nat. Bank v. Gregg*, 79 Pa. (29 P. F. Smith) 884, 887.

The words "knowledge, information, and belief," in the verification of a bill in chancery praying a discovery and the appointment of a receiver by the complainant as being true to the best of his knowledge, information, and belief, are insufficient, as the words "knowledge, information, and belief," upon the construction most favorable to the complainant, mean that the affiant has knowledge that some of the averments of the bill are true; that, while he does not know, he has been informed and believes that others of the averments are true; and that as to yet other averments he has neither knowledge nor information, but, without knowing the facts or ever having been informed of their truth, he believes them to be true. *Burgess v. Martin*, 20 South. 506, 507, 111 Ala. 656.

#### **Opinion synonymous.**

Where the statute requires an affiant to state that in his belief there is reasonable cause for granting a writ, his affidavit that in his opinion there is such ground is sufficient. The nice philological distinctions between the words "opinion" and "belief" are too subtle and refined to form a basis on which to ground sufficient justice. *Day v. Southwell*, 3 Wis. 657, 661.

#### **Presumption distinguished.**

Legal presumptions by which conflicting claims and titles are set at rest are not always founded on the belief that the thing presumed has actually taken place. Instead of belief, which is the foundation of the judgment on a recent transaction, the legal presumption in matters of antiquity holds the place of particular and individual belief. *Worley's Adm'r v. High's Adm'r*, 40 Ala. 171, 177.

#### **As suspicion.**

Mere suspicion is not belief. *Gosser v. Gosser*, 38 Atl. 1014, 1015, 183 Pa. 409.

In a bankrupt act providing that, in order to invalidate as a fraudulent preference a security taken for a debt, the person secured must have had such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, "belief" does not mean that the creditor must have had knowledge of facts which would induce a suspicion of his debtor's insolvency. "It is not enough that a creditor had some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order

to invalidate a security taken for his debt. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for well-grounded belief of the fact. He may be unwilling to trust him for it, he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the act requires may be wanting." *Grant v. First Nat. Bank*, 97 U. S. 80, 81, 24 L. Ed. 971.

As an element of probable cause, belief must rest upon reasonable grounds, and be induced by such a state of facts as would lead a man of ordinary prudence and caution to entertain a strong suspicion that the accused is guilty of the offense charged. *Spalding v. Lowe*, 23 N. W. 46, 56 Mich. 866.

One of the ordinary definitions of "belief" is partial assurance, without positive knowledge or absolute certainty. Webster. By another authority it is defined as a persuasion of the truth of a fact, formed in the way of inference from some other fact. *Burrill's Law Dict.* tit. "Belief." This would certainly be tantamount to, or even a stronger form of expression than, reasonable suspicion on probable grounds, for either may exist and yet no belief be generated in the mind. *State v. Grant*, 76 Mo. 236, 246.

#### **In wills as word of intention or direction.**

The word "belief" as used in a will, according to *Perry on Trusts* (volume 1, c. 4, § 112), in a clause that the testator believes a legatee will make a certain disposition of the fund bequeathed, is a word of intention, which the court will carry into effect as if the testator had used an absolute word of devise in trust, and the court will direct the donee or first taker to hold as a trustee for those whom the donor intended to benefit. *Cockrill v. Armstrong*, 31 Ark. 580, 589.

Where a testator gave to his wife all the rest and residue of his property, adding thereto the words, "believing that she will manage it judiciously and perfectly satisfied that she will make a fair distribution of it among our children at her death," such clause does not limit the estate devised to her, but merely explains his motives for giving the estate absolutely to his wife without making provision for their children. *Cheston v. Cheston*, 43 Atl. 768, 769, 89 Md. 465.

## **BELIEVE**

See "Verily Believes."

A statutory requirement that a verification of a mining claim shall be to the effect that the affiant "believes" the same to be just is satisfied by a verification that the affiant has read the foregoing notice, knows the contents thereof, and that said claim is

just and correct. *Johnston v. Harrington*, 81 Pac. 316, 318, 5 Wash. 73.

A statement concerning another that "I believe he did steal" is equivalent to a charge of larceny, as the word "believe" does not operate to soften the charge, and therefore the language is actionable. *Dottarer v. Bushy*, 16 Pa. (4 Harris) 205, 209.

The words "I believe you took it," when spoken of and to another, are not actionable per se as imputing larceny, but they may be slanderous as having such meaning when considered in connection with extrinsic circumstances. *Alcorn v. Bass*, 46 N. E. 1024, 1025, 17 Ind. App. 500.

#### **As convinced or firmly believe.**

"Believes" is not equivalent to "firmly believes," as used in Act March 20, 1810. § 11, relating to appeals, and providing that the appellant shall swear or affirm that it is not for the purpose of delay such appeal is entered, but because he firmly believes injustice has been done, for all belief is not equal, and "believes" is a weaker term or expressive of a less degree of belief than "firmly believes." For instance, one may have a "firm belief" that the moon revolves around the earth, and may "believe," too, that there are mountains and valleys in the moon, but this belief is not so strong, because the evidence is weaker; hence an affidavit that appellant "believer" injustice has been done is insufficient, as not being a compliance with the statute. *Thompson v. White* (Pa.) 4 Serg. & R. 135, 136.

In a pleading alleging that plaintiff "believes" she will be incapacitated from performing manual labor for life, "believes" is used in the sense of "averred" or "alleged," or that she is convinced of the fact. *McFarland v. City of Muscatine*, 67 N. W. 238, 234, 98 Iowa, 199.

The words "unless you are satisfied from the evidence" are parallel, and may be used interchangeably, with the words "if you believe from the evidence." They imply no more than that, if the jury shall be convinced by the preponderance of evidence of the truth of the basic facts constituting plaintiff's alleged cause of action, they shall find for him. *Braddy v. Kansas City, Ft. S. & M. R. Co.*, 47 Mo. App. 519, 523.

#### **As fear.**

An affidavit for change of venue that the affiant "has reason to fear and does fear" is not equivalent to an affidavit that he "has reason to believe and does believe." They are substantially unlike expressions. *Smith v. Clarke*, 35 N. W. 318, 319, 70 Wis. 137.

#### **Find synonymous.**

"Believe," as used in an instruction that "if you believe from the evidence before you,"

etc., is to be construed as synonymous with the word "find." *State v. O'Hagan*, 38 Iowa, 504, 505; *Spotten v. Keeler* (N. Y.) 12 N. Y. St. Rep. 385, 389, 22 Abb. N. C. 105, 110.

#### **As equivalent to knowledge.**

"Believed" is a sufficient equivalent for "knowledge" in an affidavit in support of a petition where the statute requires an affidavit upon the "knowledge" of the affiant, since information received and believed to be true is knowledge. *Dinkelspiel v. New Albany Woolen Mills*, 15 South. 282, 283, 46 La. Ann. 578.

In a complaint, in an action against a master for injuries to his servant by a defective passageway leading to a building which had been repaired by the master, alleging that when such passageway was repaired the complainant "believed" it was safe, "believed" is not equivalent to an averment of want of knowledge of the defect, either actual or constructive. The meaning of the words "believe" and "knowledge" as defined by lexicographers will show that there is a distinct and well-defined difference between them. Webster says "believe" means to exercise trust or confidence, while the Century Dictionary says it means to exercise belief, not to be persuaded upon evidence, arguments, and deductions, or by other circumstances other than personal knowledge. "Knowledge" is defined by Webster to be the act or state of knowing; clear perception of fact; that which is, or may be, known; and the Century Dictionary defines it as acquaintance with things ascertained or ascertainable; specific information. The Supreme Court of the United States in the case of *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 8 Sup. Ct. 598, 31 L. Ed. 466, said, "Between mere belief and knowledge there is a wide difference." This expression of Mr. Justice Field was used in criticising and holding erroneous an instruction of the United States Circuit Court for the District of Colorado, in which the words "believe" and "knowledge" were used interchangeably as conveying the same meaning, and it was said the court could not make them synonymous in its charge. *Ohio Valley Coffin Co. v. Goble*, 62 N. E. 1025, 1027, 28 Ind. App. 362.

#### **As positive statement of fact.**

A statement that the speaker "believed" a certain person was conspiring with others to cheat him was sufficient to amount to a positive charge of dishonesty, under the rule that the utterance of slanderous words on belief or on information or report is the legal equivalent of their positive statement as facts. *Beehler v. Steever* (Pa.) 2 Whart. 313, 328 (cited and approved in *Booker v. State*, 14 South. 561, 562, 100 Ala. 30).

For a person to say that he "believes" another is guilty of a crime is equivalent

to saying that he has such evidence as convinces him that the person has committed a crime, and is equivalent to a positive charge, since belief is the result of evidence. *Waters v. Jones* (Ala.) 3 Port. 442, 448, 29 Am. Dec. 261.

When used in reference to an existing fact, and not as relating to a matter of belief in religion, morals or science, "belief" is the condition of the mind founded on evidence that a fact exists, that an act is done, or that a statement is true; and when one says he believes that a fact exists, or that an act was done by another, he must be understood to assert that there was present to his mind evidence sufficient to convince him that the fact in reality existed, or that the act was in fact done. To say "I imagine" is not so clear and direct an imputation as to say "I believe." In this case the statement "I believe G. burnt the camp ground" was held to be a direct charge, and hence slanderous. *Giddens v. Mirk*, 4 Ga. 364, 369.

A statement that a person's watch has been stolen, and he has reason to "believe" that a certain person named stole it, is equivalent to a positive averment, for a man only alleges a thing to be so because he has reasons for believing it so. *Miller v. Miller* (N. Y.) 8 Johns. 74, 75.

#### **As presume.**

To "believe" is to put credit or confidence in the veracity or testimony, and differs from "presume," which means to assume a thing to be true without proof. *Hammock v. McBride*, 6 Ga. 178, 183.

#### **As reasonable suspicion.**

An allegation, in an answer in a prosecution for false arrest, that the defendant "believed" that the plaintiff had committed an offense, is "tantamount to or even a stricter form of expression than 'reasonable suspicion' or 'probable grounds,' for either may exist and yet no belief be generated in the mind." *State v. Grant*, 76 Mo. 236, 246.

#### **As suppose.**

"Believed" is substantially the same thing as "supposed," as used in an instruction that if plaintiff in good faith "supposed" he had a cause of action against the defendant on account of personal injuries, and threatened to sue him on account thereof, and defendant executed the note sued on in consideration that the plaintiff would not sue him for such injuries, and which plaintiff accepted in settlement, such compromise and settlement was a good and lawful consideration for the note. The definition of "suppose" is given by Webster in his Unabridged Dictionary as "imagine, to believe, to receive as true," and the same authority gives a definition of "believe" as "to think,

to suppose." *Parker v. Enslow*, 102 Ill. 272, 277, 40 Am. Rep. 588.

#### As suspect.

In the rule that a peace officer has a right to make an arrest if he has reasonable ground to believe that the accused has been guilty of felony, etc., "believe" is equivalent in meaning to the word "suspect," the latter word being generally used in stating the rule. *Jackson v. Knowlton*, 53 N. E. 184, 135, 173 Mass. 94.

Rev. St. c. 142, § 41, provides that when complaint shall be made on oath to any magistrate authorized to issue warrants in criminal cases that personal property has been stolen or embezzled, or gotten by false tokens or pretenses, and that the complainant "believes" that it is concealed in any particular house or place, if he be satisfied that there is reasonable cause for such belief, shall issue a warrant to search for such property. Held, that "believes" cannot be construed to have the same meaning as "suspects," for they have not by the approved use of the language the same meaning. "Suspecting is not believing. That may be a ground for suspicion which will not induce belief." Hence a complaint on oath that the complainant had reasonable cause to suspect and did suspect that certain property was sold, etc., is not a compliance with the requirement of the statute. *Commonwealth v. Lottery Tickets*, 59 Mass. (5 Cush.) 369, 371.

#### As think.

It is said that the expression "I think," as used by a juror in answer to a question as to whether he could render a verdict without reference to a former opinion, is not equivalent to "I believe"; that the former implies conjecture or mere guess, while the latter denotes belief in the ability to properly discharge the duty of a juror, and is a stronger and more definite term. The contention, however, is untenable. The two expressions are substantially equivalent in common language. *People v. Martell*, 83 N. E. 838, 840, 138 N. Y. 599.

### BELLIGERENCY.

Belligerency is a fact, and not a principle. It is a certain degree of force and constancy acquired by any mass of population engaged in war, which entitles that population to be treated as a belligerent through the action of the political department of government by other nations. It is a status or power of community which is at war with another, and which covers the sea with its cruisers or the land with its army. A vessel, under such circumstances, must either be acknowledged as a belligerent or treated as a pirate. *United States v. The Ambrose Light* (U. S.) 25 Fed. 408, 412.

### BELLIGERENT.

A belligerent is a subject of the hostile power, and his character in that regard depends upon that of the community to which he belongs. *Johnson v. Jones*, 44 Ill. 142, 151, 92 Am. Dec. 159.

### BELONG—BELONGING.

See "Thereunto Belonging."

The words "belong to him," in the grant of the right to make a turnpike road to commence on lands that may belong to the grantee, must be construed to be limited to land which belonged to the grantee at the time of the grant, and not such as he obtained thereafter. *Mills v. St. Clair County*, 49 U. S. (8 How.) 569, 580, 12 L. Ed. 1201.

#### As appertaining to.

"Belonging," as used in Pen. Code, § 137, defining and punishing the burning of or setting fire to any kitchen, shop, barn, stable, or other outhouse that is parcel of such dwelling or belonging thereto, is comprehensive, and includes all barns so near a dwelling house on the same premises as to endanger the safety of such house in case of fire. "As farm buildings are constructed, it is seldom the barn adjoins the house. It may not even be a parcel of it, but still it may belong to it within the meaning of the statute." *Hill v. Commonwealth*, 98 Pa. 192, 195.

The word "belonging" may and very often does mean "ownership," but it may also mean that which is connected with a principal or greater thing; an appendage; an appurtenance; and this is its use in the charter of a seminary exempting from taxation property belonging or appertaining to it. *People v. Directors of Chicago Theological Seminary*, 51 N. E. 198, 199, 174 Ill. 177.

"Belonging thereto," as used in a statute authorizing a wife to hold and enjoy the mansion of her deceased husband and the plantation belonging thereto till the assignment of dower, "clearly indicates uniformity of title, as well as contiguity of location and community of use." The widow is not entitled to hold a farm, on which there are no buildings, which adjoins a farm on which the mansion is located, and which was used by the husband in connection with the latter farm. *McKaig v. McKaig*, 25 Atl. 181, 182, 50 N. J. Eq. (5 Dick.) 325.

S. contracted to sell to C. his house, farm, and premises, all the tools belonging to the sawmill, all the apparatus belonging to the gristmill, "together with all the fixtures belonging to the fulling mill and carding machine, together with every article attached to the freehold." Held that the phrase, "fixtures belonging to the fulling mill and carding machine" meant all the machinery

on the farm which had been used in such buildings as fixtures. *Martin v. Cope*, 28 N. Y. 180, 182.

"Belonging with," as used in a fire policy insuring a stable and carriage house belonging with the insured's dwelling house, meant "pertaining" to the dwelling house; and in an action on the policy, there being a question as to whether a certain carriage house was embraced, an instruction to the jury that a building, 189 feet from the dwelling, used in part for other purposes, could not be regarded as a carriage house "belonging with" the dwelling, was error, the question being one for the jury. *Robinson v. Pennsylvania Ins. Co.*, 82 Atl. 996, 997, 87 Me. 399.

The words "belonging to the same," in the sale by a lessee owning buildings on the leased premises of the buildings and the fixtures of every description attached to said buildings, in said buildings and belonging to the same, expressly excludes from the operation of the conveyance all fixtures not procured for or used in connection with the building as a business house. *Stettauer v. Hamlin*, 97 Ill. 312, 319.

#### As claim.

In the disclosure of a garnishee declaring that the property in his hands belongs to certain persons, "belongs to" was not synonymous with the word "claims," as used in Rev. St. § 2767, providing that, when the answer of a garnishee discloses that any other person than defendant claims the indebtedness or property in his hands, the court may order such claimant interpleaded, the term "claims" in the statute being used in the sense of "asks for" or "demands as his due," and not being equivalent to the phrase "has a right to" or "owns." *John R. Davis Lumber Co. v. First Nat. Bank of Milwaukee*, 58 N. W. 743, 744, 87 Wis. 435.

#### As making a direct gift.

"Belong," as used in a will providing that the property shall "belong to my children," operates as a direct gift. *Paget v. Melcher*, 49 N. Y. Supp. 922, 926, 26 App. Div. 12.

Testator, by a clause of his will, after giving a life estate to his wife, provided that "my said effects thus come into the hands of my said daughters, not to be subject to the control of any husband, but the same to belong to my said daughters and their children." It was held that the use of the distributive word "belong," which is a word of ownership, applies to the children as well as to their mothers, the primary definition of the word "belong" being to be the property of, and hence the children must take as purchasers in common with their mothers. *Sumpter v. Carter*, 42 S. E. 324, 329, 115 Ga. 893, 60 L. R. A. 274.

#### As membership.

"Belongs," as applied to membership in a religious society, is difficult of definition, and is incapable of any exact inflexible definition which will fit the cases that may arise, so as to enable it to be said that this man does and this man does not "belong," within the meaning of a statute regulating the qualifications of voters in religious societies. Whether a contested voter "belongs" to the church or congregation, within the meaning of the law, is and must remain principally a question of fact. *People v. Keese* (N. Y.) 27 Hun, 483, 492.

#### As expression of ownership.

It is undoubtedly true that the word "belonging" may mean ownership, and very often does. But that is not its only meaning. Webster's International Dictionary defines it: "(2) That which is connected with a principal or greater thing; an appendage; an appurtenance." And, as used in a charter providing that the property "belonging or pertaining to said" corporation shall be exempt from taxation, the manifest purpose was to exempt property used in immediate connection with the corporation, and not all the property owned by it and used for its purposes. *Chicago Theological Seminary v. People of Illinois*, 23 Sup. Ct. 388, 388, 188 U. S. 662, 47 L. Ed. 641 (citing *People v. Chicago Theological Seminary*, 174 Ill. 177, 51 N. E. 198).

The primary meaning of the words "to belong" is "to be the property of." The word "belonging" is aptly used to express ownership, and, as used in an indictment for larceny, is a sufficient expression of ownership. *State v. Fox*, 45 N. W. 874, 875, 80 Iowa, 312, 20 Am. St. Rep. 425.

The primary meaning of the words "to belong to" is to be the property of, and hence an allegation in an indictment for burglary that the offense was committed in a dwelling house belonging to prosecutor sufficiently charges ownership. *State v. Fox*, 80 Iowa, 312, 313, 45 N. W. 874, 875, 20 Am. St. Rep. 425.

In S. & C. Rev. St. 761, providing that all buildings "belonging" to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustaining, and belonging exclusively to, such institutions, "belonging" means ownership. It is not necessary that the legal title be vested in the institution; if it were held in trust for the sole use and benefit of the institution, the property in such case would be regarded as belonging to the institution. The institution must not only own the property, but it must be so used as to fulfill the requirements of the statute. *Hum-*

*phreys v. Little Sisters of the Poor*, 29 Ohio St. 201, 206.

The primary meaning, and also the common and ordinary meaning, of the word "belong," is to be the property of. Such is its meaning in a will providing that one part of certain property shall "belong" to a school. *Gammon v. Gammon Theological Seminary*, 33 N. E. 890, 891, 153 Ill. 41.

One of the approved definitions of the word "belong" is to be the property of, and "belonging" is being the property of. *Commonwealth v. Hamilton*, 81 Mass. (15 Gray) 480, 482.

The word "belong" implies ownership. An averment in a declaration that there was appraised, and allowed to plaintiff a certain sum as damages "for the taking and appropriating of land belonging to and in the possession of plaintiff," is therefore a sufficient averment of the title to real estate to support a judgment by default. *Bragg v. City of Chicago*, 73 Ill. 152, 154.

The words "belonging to the same owner," in a statute authorizing sale for taxes of lots so owned, do not mean simply the technical owner of the title, but they mean the person in whose name, as owner or occupant, the lots are assessed. *People v. Cady*, 11 N. E. 810, 811, 105 N. Y. 290.

Where a person was not the owner of a wagon nor entitled to the possession of it, it cannot in any just sense be said that the wagon "belonged" to him, though he held a chattel mortgage upon it. *Blauvelt v. Fechtman*, 8 Atl. 728, 729, 48 N. J. Law (19 Vroom) 430.

Where the question as to which one of two persons had title to a piece of land, and the arbitrators found that such piece of land "belonged" to one of them, the word meant that he had the whole interest or estate in the land. *Shelton v. Alcox*, 11 Conn. 240, 248, 249.

Authority to lease mineral lands "belonging to the state" does not apply to lands which have merely been selected by the state, and title to which still remains in the general government. *Baker v. Jamison*, 55 N. W. 749, 751, 54 Minn. 17.

#### **Belong to town.**

A person "belongs" to the town, within the poor laws, where he has a settlement in the town, or derives a settlement from those who do have a settlement therein and are then absent therefrom. *Town of Waterbury v. Town of Bethany*, 18 Conn. 424, 430.

The word "belong" is not often used, in legislation on the subject of proper settlements, to signify a mere established residence. "Where he resides," or "where he dwells and has his home," is usually implied. The provision in the eleventh section of the

general act that it shall be the duty of overseers in their respective towns to provide for the immediate comfort and relief of persons found therein, not "belonging" thereto, means "not having a settlement" therein. In the same sense the word is used in Acts 1821, c. 127, § 1, providing against the spread of contagious diseases, and making it the duty of selectmen to remove people coming from abroad or belonging to the town. *Inhabitants of Kennebunk v. Inhabitants of Alfred*, 19 Me. (1 App.) 221, 223.

"Belonged," in a resolution of the General Assembly in 1842, wherein it was resolved that the town of Westport shall be liable to maintain all the poor of the town of Fairfield that might be absent therefrom, provided such poor belonged to the parish of Green's Farms, meant the place of a person's legal settlement, and not merely his place of residence. *The Town of Reading v. Town of Westport*, 19 Conn. 561, 564.

No one "belongs" to a town who is not one of its settled inhabitants. *Columbia v. Williams*, 3 Conn. 467, 471. The word is descriptive of a status, and, as in the case of infancy, coverture, or citizenship, it is a question of fact what is the status in any such respect of a particular individual. An averment that support furnished to a pauper under certain circumstances is legally chargeable to a certain town does not purport to describe his status. *Connecticut Hospital for Insane v. Town of Brookfield*, 36 Atl. 1017, 1018, 69 Conn. 1.

"Belongs," as used in the statute (title 150, c. 1, § 11) providing that if a slave set at liberty comes to want he shall be relieved by the selectmen of the town to which he belongs, is to be construed as indicating the relation which the individual bears to a town, which is the popular signification of the word. *Columbia v. Williams*, 3 Conn. 467, 471.

In Rev. St. c. 14, § 1, providing that nurses and necessities shall be furnished to an infected person at his charge, if able, otherwise that of the town to which he belongs, "belongs" means at the charge of the town where he has his pauper settlement, and not the town where he might happen to reside at the time. *Inhabitants of Hampden v. Inhabitants of New Burgh*, 67 Me. 370, 371.

"Belongs," as used in a statute relating to the support of paupers, and providing that such support should be furnished to the poor by the overseers of the poor of the town to which such pauper belongs, means resides, and is not equivalent to and synonymous with the expression "legally settled." *Cushing v. Hale*, 8 Vt. 38, 45.

#### **Belonging to any deceased person.**

Rev. St. 1889, c. 3, § 80, provides that if any executor or administrator shall state on



oath that he believes that any person has in his possession, or has concealed or embezzled, any goods, chattels, moneys, or effects, book of account, papers, or any evidences of debt whatever, or titles to land, belonging to any deceased person, the court shall require such person to appear before it, and may examine him on oath. Held, that the phrase "belonging to any deceased person" can only mean belonging to the estate of any deceased person, and refers not merely to goods, chattels, moneys, etc., placed in the hands of the party charged by the deceased in his lifetime, but includes goods, chattels, moneys, etc., which belong to the estate of the deceased, and have come into the hands of the party charged since the death of the deceased. *Blair v. Sennott*, 24 N. E. 969, 970, 134 Ill. 78.

Under a like statute it was held that the goods and money are not limited to such as had remained unchanged and was in specie, but includes property which came to the hands of the person to be charged before the death of the deceased person, and which was converted before or after such death. *Dinsmoor v. Bressler*, 45 N. E. 1086, 1088, 164 Ill. 211.

#### **Belonging to highway.**

"Belonging to a highway," as used in Rev. St. tit. 38, § 3, providing that no person shall acquire title by adverse possession to land belonging to a highway, does not apply to a public landing on a stream, not part of a highway. The words of the statute apply exclusively to such land as is used by the public as a public thoroughfare or highway. *Burrows v. Gallup*, 32 Conn. 493, 87 Am. Dec. 186.

#### **Belonging to railroad.**

A mortgage by a railroad of engines, tenders, and cars, etc., and "all other personal property" in any way belonging or appertaining to the railroad, did not include canal boats used by the railroad company in connection with its transportation line. *Parish v. Wheeler*, 22 N. Y. 494, 513.

The term "belonging," in a statute exempting the property belonging to the Illinois Central Railroad Company from taxation, does not apply to grain warehouses erected by private persons on parts of the right of way or other real estate owned by the railroad for the benefit of the lessees, with the right to remove the building after the expiration of their lease. *Gilkerson v. Brown*, 61 Ill. 486, 488.

St. 1861, c. 100, providing that if the owner of land adjoining a railroad inclose any part of the land belonging to said railroad as located or established, or occupy "any land belonging to or included within the location of any such railroad," no continuance of occupancy shall create in the occupant

any right to the land belonging to the railroad so occupied, should be construed to mean land which the road took or might have taken by right of eminent domain, and not adjacent lands purchased. *Maney v. Providence & W. R. Co.*, 37 N. E. 164, 165, 161 Mass. 283.

#### **Belonging to a slave.**

"Belonging," as used in Rev. St. c. 89, § 24, authorizing wardens of the poor to seize any horses, cattle, etc., belonging to any slave, applied to animals such as the master permitted the slave to raise for his own, and to exercise acts of dominion over them as if they were his own. *McNamara v. Kerns*, 24 N. C. 66, 69.

#### **Belonging to the state.**

One appointed attorney for the state for a county gave a bond as required by the statute, conditioned that he should account for all moneys "belonging to the state," which he might receive as such attorney. Held, that the phrase "belonging to the state" should be construed to embrace all moneys coming into the hands of the officer by virtue of his office; and hence, where all moneys payable by him to the State Treasurer had been properly accounted for, but sums received by him which were payable to the county treasurer had not been, there was a liability on the bond. *Gilbert v. Isham*, 16 Conn. 525, 528.

### **BELOW.**

"Below low-water mark," as used in Rev. St. c. 3, § 63, declaring that no fish weir shall be erected in tide waters below low-water mark in front of another's shore or flats, does not necessarily mean that the soil in which such weir shall be erected, to be contrary to the act, shall be under water at all stages of the tide, but it may become the subject of the penalty if erected on public flats situated beyond or near the middle of the channel and the low-water line of the flats. In the elementary books, and reports of decisions relating to tide waters, the word "below," in the phrase in question, is almost invariably found to be used synonymously with "beyond." *Donnell v. Joy*, 26 Atl. 1017, 1018, 85 Me. 118.

"Below," as used in Rev. St. § 2336, which provides that, when two or more veins of ore unite, the oldest or prior locator shall take the vein below the point of union, has its ordinary and common meaning, and does not mean "beyond." *Lee v. Stahl*, 22 Pac. 436, 438, 13 Colo. 174.

The natural meaning of a statute forbidding the erection of a bridge, or the keeping of a ferry, within a certain distance "above or below" another bridge, would seem to be above or below in the course of the river.

The ordinary meaning of these words in such connection is not that of location, but that of course or direction, and would mean that such distance should be measured on such course. *McLeod v. Burroughs*, 9 Ga. 213, 220.

## BELT PISTOL

A "belt pistol," within the meaning of Acts 1871, c. 90, prohibiting the act of publicly or privately carrying a belt or private pistol or revolver, other than an army pistol, etc., means such a pistol as a man usually carries, or that may be conveniently carried or actually carried, on the person in a belt, other than an army pistol. *Porter v. State*, 66 Tenn. (7 Baxt.) 106, 108.

## BELT RAILROAD.

A "belt railroad" is a railroad encircling a city, or other restricted territory intersected by other railroads, not having a common right of way into the territory, for the purpose of transferring and switching cars from one railroad to another with which it is not otherwise connected, or of transferring cars between such railroads and industrial plants located in the neighborhood of, but not on, such railroads. Such a road does not come within the provision of a deed of a right of way to a railroad that any other railroad running into or through the city shall have the right to run a parallel track along and on the same right of way. *South & N. A. R. Co. v. Highland Ave. & B. R. Co.*, 23 South. 973, 978, 117 Ala. 395.

## BELTER.

A "belter," in reference to machinery, is one whose duty it is, when a belt comes off, to put it on. *Freeberg v. St. Paul Plow Works*, 48 Minn. 99, 107, 50 N. W. 1026, 1027.

## BENCH WARRANT.

A bench warrant is one issued by a judge for the arrest of one accused of a crime by a grand jury. *Pen. Code Ga.* 1895, § 932.

## BENEATH.

"Beneath," as a preposition, means "lower in place, with something directly over or under." *Webster's Dict.* And such is its meaning in a claim for a patent reciting that the footboard is sustained "beneath" the axle by straps, instead of "lower than," "nearer to the ground." *Truman v. Deere Implement Co.* (U. S.) 80 Fed. 109, 116.

## BENEDICTINE.

Benedictine is a cordial or liqueur resembling Chartreuse, distilled at Fecamp in

Normandy. It was originally prepared by the Benedictine Monks, but since the French Revolution has been made by a secular company. *Cent. Dict.* An historical account of the origin of this cordial is given by Judge Taft in the case of *Société Anonyme de la Distillerie de la Benedictine v. Micalovitch, Fletcher & Co.*, 36 Alb. Law J. 364. *A. Bauer & Co. v. La Société Anonyme de la Distillerie de la Liqueur Benedictine de l'Abbaye de Fécamp* (U. S.) 120 Fed. 74, 75, 56 C. C. A. 480.

## BENEFICENCE.

A will giving money for the establishment of a perpetual fund, the income of which was to be devoted perpetually to human "beneficence and charity," means for charitable uses; for "beneficence," which indicates a specific design, being followed by and connected with "charity," is limited by the succeeding word, and imports an intention to provide for acts in their nature charitable. The conjunction between "beneficence" and "charity" may be properly taken as uniting synonyms. "Beneficence" must be understood to refer to the charitable purposes which the testator intended to designate in the clause as a whole. *In re Hinckley's Estate*, 58 Cal. 457, 468.

## BENEFICENT.

"Beneficent" may be distinguished from "benevolent." *Dr. Webster* says: "Etymologically considered, 'benevolent' implied merely wishing well to others; 'beneficent,' doing well; but by degrees the word 'benevolent' has been widened to include not only feelings but actions. Thus we speak of 'benevolent operations,' 'benevolent labors for the public good,' 'benevolent society.' In like manner 'beneficent' is now applied to feelings. Thus we speak of 'beneficent intentions' of a donor. The phrase 'benevolent labors' turns the attention to the sources of these labors—that is, benevolent feeling—while 'beneficent' would simply mark them as productive of good. So 'beneficent intentions' point to the feelings of the donor as bent upon some specific good act, while 'benevolent intentions' would only denote a general wish and design to do good." *In re Hinckley's Estate*, 58 Cal. 457, 508.

## BENEFICIAL.

*Code Civ. Proc.* § 2429, authorizes a dissolution of corporations on the ground that it would be "beneficial to the interests of stockholders." Held, that the words "beneficial to the interests of stockholders" were vague, and seemed not to confer an absolute right on the stockholders to have the corporation dissolved, but to confide a discretionary power in the court to order a dissolution,

if in its opinion the best interests of the stockholders will be subserved thereby. In the exercise of such discretion the court is bound to consider the interests of a minority as well as of a majority, and to guard what will be beneficial to its interests, as well as what would be to the best interests of the majority. *In re Importers' & Grocers' Exchange of New York*, 2 N. Y. Supp. 257.

In reference to the occupation of land, making the occupant thereof liable to the poor rate if the same be beneficial, the term "beneficial" is not synonymous with the word "profitable." *Regina v. Inhabitants of Vange*, 3 Adol. & El. (N. S.) 241, 254.

### BENEFICIAL ASSOCIATIONS.

See "Fraternal Association."  
As charity, see "Charity."

What is known as a "beneficial association" has a wholly different object and purpose in view from an insurance company. The great underlying purpose of the organization is not to indemnify or to secure against loss; its design is to accumulate a fund from the contribution of its members for beneficial or protective purposes, to be used in their own aid or relief in the misfortunes of sickness, injury, or death. The benefits, though secured by contract, and for that reason to a limited extent assimilated to the proceeds of insurance, are not to be so considered. Such societies are rather of a philanthropic or benevolent character, though their beneficial features may be of a narrow or restricted character. *Commonwealth v. Equitable Ben. Ass'n*, 18 Atl. 1112, 1113, 137 Pa. 412.

"The great underlying purpose of a beneficial association is not to indemnify or secure against loss, but its design is to have a fund derived from the contributions of its members for beneficial or protective purposes, to be used in their own aid or relief in the misfortunes of sickness, injury, or death. The benefits, though secured by contract, and for that reason to a limited extent assimilated to the proceeds of insurance, are not so considered. Such societies are rather of a philanthropic kind. The motives of the members may be to some extent selfish, but the principles on which they rest are founded on the considerations mentioned. These benefits, by the rule of their organization, are payable to their own unfortunates out of funds which the members thus contributed for the purpose, not as an indemnity or security against loss, but as a protective relief in case of sickness or injury, or to provide the means of a decent burial in the event of death. Such societies have no capital stock, they yield no profit, and their contracts, though beneficial and protective, altogether exclude the idea of insurance or of indemnity or of security against loss." *Common-*

*wealth v. Equitable Ben. Ass'n*, 18 Atl. 1112, 1113, 137 Pa. 412.

"Beneficial associations," as used in Act May 1, 1876 (P. L. 53, § 54), providing that the act and the act to which it was a supplement should not apply to beneficial associations that provided for the family or heirs of a deceased member, whether issuing policies containing a guaranteed sum of insurance or not, means an association having no fixed capital, which is not bound to pay any fixed sum on the death of a member, but so much only as may voluntarily be paid by the surviving members, which cannot be enforced by law, each person being required to pay a certain fee on his admission as a member, but permitting no assessments to be made for carrying on the business of the association. *Commonwealth v. National Mut. Aid Ass'n*, 94 Pa. 481, 489.

### BENEFICIAL DEVISE.

A devise to a husband is not a beneficial devise to his wife, who is a subscribing witness to the will, so as to render it void. *Sullivan v. Sullivan*, 106 Mass. 474, 475, 8 Am. Rep. 356.

### BENEFICIAL ESTATE.

An estate in expectancy is one where the right to the possession is postponed to a future period, and is beneficial where the devisee takes solely for his own use or benefit, and not as the mere holder of the title for the use of another. *In re Sealman's Estate*, 41 N. E. 401, 403, 147 N. Y. 69.

### BENEFICIAL POWER.

A power is beneficial when no person other than its holder has, by the terms of its creation, any interest in its execution. *Rev. St. 1903, Okl. § 4105; Rev. Codes N. D. 1899, § 3409; Civ. Code S. D. 1903, § 326; Leonard v. American Baptist Home Missionary Soc. (N. Y.) 35 Hun, 290, 293; Syracuse Sav. Bank v. Porter (N. Y.) 36 Hun, 163, 170; Sweeney v. Warren, 40 N. Y. St. Rep. 304, 307; Tilden v. Green, 40 N. Y. St. Rep. 512, 523.*

A "power," as defined by statute, is an authority to do some act in relation to lands, or the creation of estates therein or of charges thereon, which the owner granting or reserving such power might himself lawfully perform. It is not estate or interest in the land, but an authority to create an estate or interest. A power may be given to a person who has an estate in the land, or to a mere stranger. Where no person other than the grantee has by the terms of its creation any interest in the execution of the power, it is termed a "beneficial interest." *Root v. Stuyvesant (N. Y.) 18 Wend. 257, 283.*

"Beneficial," as used in 1 Rev. St. 732, § 79, providing that a power is "beneficial"

when no person other than the grantee has by the terms of its creation any interest in its execution, means that if, by the terms of the creation of the power, no other person than the donee has an interest in its execution, then it is beneficial, or, if the instrument creating the power does not by its terms give an interest in its execution to any one else, the donee is the sole beneficiary. *Cutting v. Cutting* (N. Y.) 20 Hun, 360, 364; *Jennings v. Conboy*, 78 N. Y. 230, 235.

A general or special power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution. Rev. St. Wis. 1898, § 2107.

### BENEFICIAL USE.

"The beneficial use of his property—which is the thing of value for which a man pays a consideration when he buys a parcel of land—extends within the lines of the highway, and embraces the light and air of heaven, and that other something which has been called 'access.'" *Reining v. New York, L. & W. R. Co.*, 18 N. Y. Supp. 238, 240.

### BENEFICIALLY INTERESTED.

A requirement that an application for a writ of review or mandamus must be by the "party beneficially interested" means that the party's interest must be of a nature which is distinguishable from that of the mass of the community. *Ashe v. Supervisors*, 16 Pac. 783, 71 Cal. 236; *Eby v. School Trustees of Red Bank*, 25 Pac. 240, 243, 87 Cal. 166; *Territory v. McPherson*, 50 N. W. 351, 352, 6 Dak. 27.

When the question is one of public right, and the object of the mandamus is to enforce the performance of a public duty, persons who are residents, voters, and taxpayers are persons "beneficially interested" and entitled to sue for the writ. *State v. Grace*, 25 Pac. 382, 383, 20 Or. 154.

A taxpayer within an assessor's district is a "party beneficially interested" in having all the taxable property in the district assessed, and is therefore a proper party to make the affidavit for the issuance of a writ of mandamus to the assessor to compel him to assess property subject to assessment. *Hyatt v. Allen*, 54 Cal. 353, 360.

### In a cause of action.

Code Civ. Proc. § 8247, providing that where an action is brought in the name of another by a transferee of the cause of action, "beneficially interested" therein, the transferee or other person shall be liable for costs, means one who takes an absolute title to the res as transferee, and not a person who merely holds it as collateral security for the payment of a debt. *Thorn v. Beard*, 24 N. Y. Supp. 621, 622, 71 Hun, 112. The pro-

vision cannot be construed to apply to one, having no pecuniary interest in the result of a suit, who suggested to a transferee that he bring an action on an assignment obtained without any action, agreeing to let the transferee have the money to pay his attorneys, believing that the transferee had a good cause of action. *In re Harwood*, 21 N. Y. Supp. 572, 66 Hun, 634.

"Any person beneficially interested," as used in 2 Rev. St. 619, § 44, providing that where an action shall be brought in the name of another by an assignee, or by any person beneficially interested in the recovery in such action, such an assignee or person should be liable for the costs, includes a person who brings and prosecutes a suit in the name of another, under an agreement with the nominal party to carry on the suit at his own expense for a portion of the expected recovery. *Giles v. Halbert*, 12 N. Y. 82, 84.

### In a contract.

The party "beneficially interested" in a contract is prima facie the party who pays the consideration of such contract, and he may maintain an action thereon, though the contract be taken in the name of another party. *Tracy v. Gunn*, 29 Kan. 508, 513.

### Under a will.

The requirement that a will shall be witnessed by three creditable attesting witnesses not "beneficially interested" means those who received a benefit under the will, and not those who are pecuniarily losers by its provisions. The witness "beneficially interested" under the will is one gaining by and under its provisions, but an attesting witness who is called to establish a will by which he is divested of his inheritance can hardly be regarded as "beneficially interested" by it, and so interested to maintain it. *Smalley v. Smalley*, 70 Me. 545, 548, 35 Am. Rep. 853.

The term "beneficially interested" applies to witnesses having or deriving a fixed certain benefit, and not those having a contingent benefit thereunder, and does not disqualify a member of a corporation owning two shares of stock from witnessing a will wherein a legacy is left to the corporation, the bequest to the corporation being for a specific purpose. *In re Marston*, 8 Atl. 87, 97, 79 Me. 25.

A taxpayer of a town was not "beneficially interested" under a will by reason of a bequest to the town, so as to render him an incompetent witness to the instrument. *In re Marston*, 8 Atl. 87, 96, 79 Me. 25.

Where a will gave a legacy to A., and provided that if A. should die prior to testatrix the legacy should go to others, it was held that A. was "beneficially interested."

In re Trinitarian Congregational Church & Society of Castine, 40 Atl. 325-327, 91 Me. 418.

## BENEFICIARY.

See "Cestui Que Trust."

As representative, see "Representative."

Where realty is conveyed in trust to pay the income to a person for life, the remainderman is a "beneficiary" of the trust, within the real property law providing that, on the death of a trustee of an expressed trust, the trust estate, if unexecuted, shall vest in the Supreme Court, and shall be executed by some person appointed by the court, but no person shall be appointed until the beneficiary of the trust shall have been brought into court. In re Welch, 46 N. Y. Supp. 689, 690, 20 App. Div. 412.

The person for whose benefit the trust is created is called the "beneficiary." Civ. Code Cal. 1903, § 2218; Civ. Code, Mont. 1895, § 2953.

The person whose confidence creates a trust is called the "trustor," the person in whom the confidence is imposed is called the "trustee," and the person for whose benefit the trust is created is called the "beneficiary." Rev. Codes N. D. 1899, § 4257.

The "beneficiary" is the person to whom a policy of insurance effected is payable. Rev. St. Tex. 1895, art. 3096a.

## BENEFICIARY HEIR.

"Beneficiary heir," as used in Rev. Civ. Code, art. 1042, providing that the beneficiary heir of age and present shall be preferred to every other person for the office of executor of the estate, means one who may accept the succession, as well as one who may have accepted it. Succession of Gusman, 36 La. Ann. 299.

"Beneficiary heirs" are those who have accepted the succession under the benefit of an inventory regularly made. Civ. Code, La. 1900, art. 883.

## BENEFICIARY UNDER WILL.

Pursuant to the antenuptial release of dower, testator bequeathed to his widow the sum agreed on in lieu of dower, "of any . . . in my personal estate as widow." The residuum was given to the several "beneficiaries under this will, share and share alike," except certain legatees, not including the widow, who was specifically excluded. Held, that the widow was entitled to share in the residue as a "beneficiary under this will." Wood v. Packard, 55 N. E. 315, 174 Mass. 540.

## BENEFIT.

See "Common Benefits"; "Double Benefits"; "General Benefits"; "Immediate Benefit"; "Peculiar Benefits"; "Public Benefit"; "Sole Benefit"; "Special Benefits"; "With Benefit of Survivorship."

Any benefit, see "Any."

The word "benefits," when used unqualifiedly, is a comprehensive term, including direct or special benefits, and indirect or general; but when the connection in which it is used, and the subject-matter to which it is applied, are such as to indicate that it is used in a limited or qualified sense, it is the duty of the court to give it that interpretation. Ferguson v. Borough of Stamford, 60 Conn. 432, 446, 22 Atl. 782, 787.

"Benefit," as used in Code 1849, § 396, authorizing the examination of a person for whose immediate benefit the action is prosecuted or defended, means advantage, profit. Fitch v. Bates (N. Y.) 11 Barb. 471, 473.

"Whatever contributes to promote prosperity; to add value to property; advantage; profit"—is a benefit. Webst. Synod of Dakota v. State, 50 N. W. 632, 635, 2 S. D. 366, 14 L. R. A. 418.

In the by-laws of an incorporated joint-stock association organized to benefit its members by regulating the price of labor and all other matters appertaining to the trade of stone-cutting, and assuming to say who of its members should work and when they should work, and the price per day received, and the number of hours they should work, a member on strike to receive from the association a certain sum per week, article 24, § 3, providing that any member three months in arrears should not be considered in benefit until one month after he was clear on the books, "benefit" means the advantage of constant employment, or indemnity for the loss of time in case of a strike, and the facility of employment which the membership in the association affords. Weiss v. Tenant, 21 N. Y. Supp. 252, 254, 2 Misc. Rep. 1213.

## As increased value.

The "benefit" for which the owner of a lot is taxed for municipal improvements is not the benefit to the public at large, or to any other person whomsoever but the owner of the lot. The phrases "benefits" and "increased value" are convertible terms, and, where the tax is apportioned according to the increased value of the lot, it is the same thing as the value of the benefit which the owner receives from the improvement. Garrett v. City of St. Louis, 25 Mo. 505, 511, 69 Am. Dec. 475.

**As entire beneficial interest or ownership.**

In a will giving to certain persons the benefit of a certain sum of money, "benefit" means more than the income of that sum for a limited time or for life. The word "benefit," unrestricted, means the whole benefit, the entire beneficial interest. Where property is given, granted, or bequeathed to certain individuals, to be used, appropriated, and applied for their benefit, and in such a manner that no other person or persons have or can have any interest in it, they thereby become in effect the absolute owners of it, and may exercise all the rights belonging to them in that relation. *Paine v. Farsaith*, 30 Atl. 11, 12; 86 Me. 357 (citing *Smith v. Harrington*, 86 Mass. [4 Allen] 566).

A conveyance of one-half of certain capital stock, to be in trust for the sole benefit of the wife of C. and her children, and also directing that one-half of the profits arising from the stock be applied by B. for the "benefit" of C.'s wife and children, is sufficient to show an intention to exclude C.'s marital rights to the profits. *Clark v. Maguire*, 16 Mo. 302, 314.

A will bequeathing the use of the testator's realty to his widow during her widowhood, and providing that when she ceased to be his widow the "benefits and profits" of the land should equally be divided between the testator's children, and that when the testator's son S. should arrive at the age of 21 years the real estate should be sold, providing the wife's widowhood shall have ceased before that time, does not show an intention to devise a fee, but was intended to dispose of the use of annual rents and profits of the land for the period that might intervene between the termination of the widow's estate and its sale, whether her estate ceased before or after S. became of age. *Collier v. Grimesey*, 36 Ohio St. 17, 22.

"Benefit," in a conveyance for the benefit of a university, is equivalent to advantage, not to occupation; advantage by occupying, renting, selling, or otherwise. "Benefit" includes "occupation," but is not confined to it. It is a broad word. A devise of the "benefits" of real estate for a term under a will devising the fee elsewhere vests an estate in the land for the term. *Lawe v. Hyde*, 39 Wis. 345, 359.

An undertaking of a benefit society, "intended to benefit the widows, orphans, heirs, and devisees of deceased members," must be an undertaking to pay, after the death of the member, directly to such person, or in such way that they should be the immediate recipients of the money, for the word "benefit" will be assumed to have been used in its legal sense—that of the direct and absolute enjoyment of the money to be paid, or of its use. *Rockhold v. Canton Masonic Mut. Ben. Soc.*, 21 N. E. 794, 795, 129 Ill. 440, 2 L. R. A. 420.

A bequest of personal property to trustees for a married woman, the profits to be applied to her benefit, does not impart to her an interest beyond the control and dominion of her husband. *Nimmo v. Davis*, 7 Tex. 26, 31.

Where a testator by his will leaves his estate to his wife "for her own use and benefit during her natural life," remainder to his heirs, and his executors, under power of sale given by the will, convert the realty into money, the wife is not entitled to the control of the principal for life, but only to the income arising therefrom. It may be that the word conveyed to the testator's mind the notion of an absolute power of disposition on her part. This notion is suggested by the limitation of all that remains after her death by way of remainder, but this is conjecture. On the other hand, the words of limitation, taken by themselves, create a life estate and nothing else. They are perfectly clear and free from doubt. *Lewis v. Shattuck*, 53 N. E. 912, 173 Mass. 486.

**As broader than support.**

"Benefit," as used in a will directing payment of income to one for his own use and benefit of property, is a much broader word than "support," and has no such limited meaning as the word "support." It is thus defined in *Worcester*: "Advantage; gain; profit;" and its manifest signification is anything that works to the advantage or gain of the recipient. *Winthrop County v. Clinton*, 46 Atl. 435, 437, 196 Pa. 472, 79 Am. St. Rep. 729.

A will devising property to a wife for her "benefit" and support meant, using the synonyms for the word, that it was for her advantage, her profit, her gain, her account, her interest. The word "benefit" and its synonyms mean more than simple support. They mean any purpose to which the absolute owner of property can devote it. *Stowell v. Stowell*, 8 Atl. 738, 739, 59 Vt. 494, 59 Am. Rep. 748.

In a will by which testator gave to his wife, during her natural life, all of his property for her proper "use, benefit," support, and maintenance, the expressions "use" and "benefit" are not synonymous with the phrase "for her support and maintenance," but have a more enlarged signification, implying that the devisee was not only to have simply "her support and maintenance" out of the estate, but also a right to employ it for her advantage, gain and profit. "Her right of 'use' and 'benefit' was superadded to 'support and maintenance'; consequently the devisee had such power over and control of the estate devised as was reasonably necessary, not only to secure her support and maintenance, but also to facilitate her proper use and benefit thereof." *Warren v. Webb*, 68 Me. 133, 134.

**Use synonymous.**

In an instruction in a prosecution for larceny regarding the defendant's having received money for the "use and benefit" of a certain person, the addition of the words "and benefit" did not change the evident meaning of the instruction, and did not give a different meaning than that conveyed by the statute, which used only the word "use." If the defendant received money belonging to another for such other's use, it followed that it was for his benefit. *State v. Brooks*, 52 N. W. 240, 242, 85 Iowa, 368.

"Benefit" may be held as synonymous with the word "use," one of the definitions of which is, "in law, the benefit or profits of land and tenements." *Heaston v. Randolph County*, 20 Ind. 398, 403.

**From construction of railroad.**

Benefits accruing from the construction of a railroad to an owner of lands through which it passes may properly and conveniently be divided into two classes, to wit: (1) General benefits, or such as accrue to the community, or the vicinage at large, such as increased facilities for transportation and travel, and the building up of towns, and consequent enhancement of the value of lands and town lots; (2) special benefits, or such as accrue directly and solely to the owner of the lands, from which the right of way is taken, as when the excavation of the railroad track has the effect to drain a morass, and thus to transform what was a worthless swamp into valuable arable land, or to open up and improve a water course. As to the first of these classes, we know from the debates of the convention which formed the Constitution, and from the discussions which preceded and followed the calling of that convention, as well as from the language of the Constitution itself, that it was the express design of the framers of the Constitution to exclude that class of benefits from the consideration of jurors in their assessment of compensation for rights of way appropriated by corporations. In adopting the language that "no right of way shall be appropriated to the use of any corporation until compensation therefor be first made in money or first secured by a deposit of money to the owner irrespective of any benefit from any improvement proposed by such corporation," whether the second class, or special benefits, are included within such provision, has not been decided, and does not arise in this case. *Little Miami R. Co. v. Collett*, 6 Ohio St. 182, 184, 185.

**Of deposits of public funds.**

In an act prohibiting the conversion, loaning, or deposit for the benefit of officers, agents, and servants of public funds, and giving a right of action to municipalities against any such officer, agent, or servant who has contracted for or received any benefits or

advantages because of the deposit of the public funds, the term "benefits or advantages" was clearly intended to include the interest on such deposits. *State v. McFetridge*, 54 N. W. 1, 12, 84 Wis. 473, 20 L. R. A. 223.

**Of the estate.**

An insurance policy providing that it was "for the benefit of the estate of the insured" does not entitle the insured's heirs to the amount due on the policy, to the exclusion of his creditors, but means that such amount shall be used for the payment of the claims against the estate, and that the remainder shall go to the insured's heirs. *Pace v. Pace*, 19 Fla. 438, 442.

**Of grantor.**

"Benefit of the grantor," in 9 Geo. IV, c. 85, § 1, curing omission to enroll deeds in cases where deed of conveyance is made without any power of revocation or agreement whatsoever "for the benefit of the grantor," means something given collusively, and making the deed inconsistent with that which it professes to be. A clause of redemption in a mortgage is not such a condition for the benefit of the grantor. *Graham v. Hawkins*, 2 Q. B. 212, 217.

**Of real estate.**

"Benefits," as used in a will giving testator's wife the benefits of all his real estate till his children became of age to enjoy their possessions, should be construed to include grain growing in the ground at the time of testator's death. *Appeal of McCullough*, 4 Yeates, 23.

**BENEFIT OF CLERGY.**

The plea of "privilegium clericale," or benefit of the clergy, never had any practical operation in the United States, and had it, in the absence of any statutory provision, been claimed as a common-law right in any state, it would have been denied. Blackstone says that it had its origin in the pious regard paid by Christian princes to the church in its infant state, and the ill use which the popish ecclesiastics soon made of that pious regard. 4 Com. 364. At first it was confined in its operation to those persons who were actually in the service of the church and had taken orders, but it was gradually extended until it comprehended all persons who could read, that being in those days of ignorance and superstition a mark of great learning, and the person enjoying this accomplishment was called a "clerk." The probable reason of this exemption being accorded to learned persons was their supposed beneficial influence upon the progress of the realm in civilization and religion, as much as to any sanctity with which the persons of the clergy were invested. It is curious to know how this plea was

made and allowed. After a verdict was rendered of guilty, the prisoner was asked by the court if he had anything to say why judgment should not pass against him. The prisoner then prayed his clergy. This was generally performed on his bended knees. He was then tested by an ordinary, who handed him a psalm to read, and he read the first verse. The judge then put the question to the ordinary, "Legit vel non?" who answered, "Legit." The prisoner was then taken without the bar of the court and branded in the hand. 1 Salk. 61. The psalm usually given to the prisoner to read was the fifty-first, on account of the peculiar appropriateness of the first verse. *State v. Bilansky*, 3 Minn. 246, 253, 254 (Gil. 169, 172, 173).

### BENEFIT OF HERSELF.

"Benefit of herself," as used in Gen. St. p. 417, § 9, enacting that actions may be sustained against a married woman on any causes of action which accrued before her marriage and upon any contract made by her since marriage upon her personal credit for the benefit of herself, her family, or her separate estate, means that a married woman may be compelled to pay for money or other property actually obtained by her personal credit, and does not apply to any contract into which a married woman may enter, entirely removing her common-law disabilities, and hence her contract to convey her land is not within the statute. *Gore v. Carl*, 47 Conn. 291, 292.

### BENEFIT OF INVENTORY.

The "benefit of inventory" is the privilege which the heir obtains of being liable for the charges and debts of the succession, only to the value of the effects of the succession, by causing an inventory of these effects to be made within the time and in the manner prescribed. Civ. Code La. 1900, art. 1032.

### BENEFIT OF LAW.

See "Law."

### BENEFIT OF WHOM IT MAY CONCERN.

See "Whom it may Concern."

### BENEFIT SOCIETY.

As life insurance, see "Life Insurance."

## BENEVOLENCE.

The word "benevolence," as used in a will, shall be taken in its broad sense, unless it is apparent from other directions in the will that the term was used in a stricter and narrower sense, when it is to be construed

as synonymous with "charity." *Kelly v. Nichols*, 25 Atl. 840, 841, 18 R. I. 62, 19 L. R. A. 413.

A will giving a fund to trustees, the whole of the principal or the income to be applied in "aid of objects and purposes of benevolence or charity, public or private," should be construed to mean the general relief of the poor, making the bequest good as one to a charitable use; the word "benevolence" being synonymous with the word "charity" as there used. *Saltonstall v. Sanders*, 93 Mass. (11 Allen) 446, 454.

### Charity distinguished.

"Benevolence" is a word of larger meaning than the word "charity," as it is understood in the law of charitable uses, and therefore, while it includes charitable purposes, it may also include other purposes of mere personal goodness which are not charitable, and, if the word "benevolence" is used in a will in its larger meaning, a bequest for purposes of benevolence cannot be sustained. It does not follow necessarily that the bequest is invalid because such word is used, for the question is a question not of language, but of meaning, and it may appear by the context of the will, or by the will taken as a whole, that, though the word "benevolence" was used, the only thing intended to be denoted by it was "charity." *Pell v. Mercer*, 14 R. I. 412, 443.

There is a difference between "benevolence" and "charity." The word "benevolence," as said by Durfee, O. J., in *Pell v. Mercer*, 14 R. I. 443, is a word of larger meaning than the word "charity," as it is understood in the law of charitable uses, and therefore, while it includes charitable purposes, may also include other purposes of merely personal good will which are not charitable. *Mason v. Perry*, 48 Atl. 671, 674, 22 R. I. 475.

A bequest in trust for such objects of "benevolence and liberality" as the trustee, in his own discretion, should most approve, cannot be supported as a charitable legacy, for, though the trustee might have diverted the whole to purposes charitable within the meaning of the law, he might equally have diverted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, without being charged with maladministration. *Morice v. Bishop of Durham*, 10 Ves. 522 (affirming 9 Ves. 399).

### Gift in return for kindness.

A bequest of property to go to the people who have cared for the testator as a certain person should think best is a "benevolence," and not a charity. It is a kindness to persons who have cared for the donor, not a compensation; it is purely good will, a "benevolence" as much as if that word had been used. It does not relieve suffering or pover-



ty or distress, or go in aid of education or religion, or of any object known to the law as a "charity." *Murdock v. Bridges*, 39 Atl. 475, 477, 91 Me. 124.

## BENEVOLENT.

"Benevolent," as used in Act 1857, § 145, providing for the punishment of any person making a disturbance of an assembly for the promotion of any moral or benevolent object, cannot be construed to include a meeting for culture and improvement in sacred church music. The object of such a meeting is musical education, and not moral training; acquisition of skill, not the dispensation of charities. *State v. Gager*, 28 Conn. 232, 236.

"Benevolent," as used in Pub. St. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465, exempting corporations organized for literary, benevolent, charitable, and scientific purposes from taxation, may include purposes which may be deemed charitable by a court of equity, and it may also include acts dictated by kindness, good will, or a disposition to do good, the objects of which have no relation to the promotion of education, learning, or religion, the relief of the needy, the sick, or the afflicted, the support of public works, or the relief of public burdens, which cannot be deemed charitable in the technical or legal sense. A corporation having for its paramount object the dissemination of theosophical ideas, and the procuring of converts thereto, is not a "benevolent" institution, within the meaning of the statute, because one of its purposes was "forming the nucleus of a universal brotherhood of humanity." *New England Theosophical Corp. v. City of Boston*, 51 N. E. 456, 457, 172 Mass. 60, 42 L. R. A. 281.

### Benevolent distinguished.

Dr. Webster says: "Etymologically considered, 'benevolent' implies merely wishing well to others; 'beneficent,' doing well. But by degrees the word 'benevolent' has been widened to include not only feelings, but actions; thus, we speak of 'benevolent operation,' 'benevolent labors for the public good,' 'benevolent societies.' In like manner 'beneficent' is now applied to feelings; thus, we speak of the 'beneficent intentions' of a donor. Thus, the phrase 'benevolent labors' turns the attention to the sources of these labors—that is, 'benevolent' feelings—while 'beneficent' would simply mark them as productive of good. So 'beneficent intentions' point to the feelings of the donor as bent upon some specific good act, while 'benevolent intentions' would only denote a general wish and design to do good." In re *Hinckley's Estate*, 58 Cal. 457, 507.

### Charitable distinguished.

Trusts having for their object a charity are usually defined by the words "benevolent"

or "charitable." "Benevolent" is a word of much broader signification than "charitable," and may include what are not charities; and the courts invariably inquire into the meaning of the testator or donor, and, if the meaning implies a charity, the trust stands, otherwise not. *Murdock v. Bridges*, 39 Atl. 475, 477, 91 Me. 124.

A will creating a trust for "benevolent" purposes is not restricted to "charitable" purposes. *James v. Allen*, 3 Mer. 17, 18.

"The word 'benevolent' of itself, without anything in the context to qualify or restrict its ordinary meaning, clearly includes not only purposes which are deemed charitable by a court of equity, but also any acts of kindness or good will, or a disposition to do good, the objects of which have no relation to the promotion of education, learning, or religion, the relief of the needy, the sick, or the afflicted, the support of public works, or the relief of public burdens, and cannot be deemed 'charitable' in the technical and legal sense." *Chamberlain v. Stearns*, 111 Mass. 267, 268.

"Benevolent purpose" is not interchangeable with the expression "charitable purpose." While it is true that there is no charitable which is not also a benevolent purpose, yet a converse is not equally true, for there may be a "benevolent" purpose which is not "charitable" in the legal sense of the term. *Adye v. Smith*, 44 Conn. 60, 71, 26 Am. Rep. 424.

"Benevolent" is more definite and of a far wider range than "charitable" or "religious," and includes all gifts prompted by good will or kind feeling towards the recipient, whether an object of charity or not, and it has no legal meaning separate from its usual meaning. *Norris v. Thomson's Ex'rs*, 19 N. J. Eq. (4 C. E. Green) 307, 313.

A will providing that a certain portion of the accumulated income of the estate might be given by the testator's widow to such benevolent, religious, or charitable institutions as she might think proper, is void, since the term "benevolent" is not synonymous with "charitable," and, though many charitable institutions may properly be called "benevolent," it is impossible to say that every object of a man's benevolence is also an object of his charity. *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. (5 C. E. Green) 489, 523.

### Charitable synonymous.

Benevolent is a word of much the same general import and meaning as charitable, benevolence having for its object the general good of mankind, and not comprehending in its common acceptation a gift bestowed for purely private and personal reasons. *Parks' Adm'r v. American Home Missionary Soc.*, 20 Atl. 107, 109, 62 Vt. 19.

In a devise providing that the residue of testator's property should be distributed among his relatives for benevolent objects in such sums as his executors should deem best, "benevolent" is synonymous with "charitable," though it has been held in other jurisdictions that the word "benevolent" itself, without anything in the context to qualify or restrict its ordinary meaning, cannot be deemed "charitable" in the technical and legal sense. *Goodale v. Mooney*, 60 N. H. 528, 535, 49 Am. Rep. 334.

"Benevolent," when used in connection with the word "charitable," is synonymous with it, so that a bequest to "benevolent or charitable" objects is not invalid as being indefinite. *People v. Powers*, 29 N. Y. Supp. 950, 954, 83 Hun, 449, 8 Misc. Rep. 628 (citing *Saltonstall v. Sanders*, 93 Mass. [11 Allen] 446; *Suter v. Hilliard*, 132 Mass. 412, 42 Am. Rep. 444).

In a bequest of the residue of an estate to be divided among such benevolent, charitable, and religious institutions and associations as should be selected by testator's executors, "benevolent" should be construed as synonymous with "charitable." In *re Murphy's Estate*, 39 Atl. 70, 71, 184 Pa. 310, 63 Am. St. Rep. 802.

"Benevolent," as used in the residuary clause of a will giving the property to be used by trustees for benevolent and charitable purposes, was inserted to intensify the word "charitable" rather than otherwise, and the two words may be regarded as equivalent or analogous expressions. The word "benevolence" is used with different meanings according to circumstances. It sometimes signifies "liberality and generosity," and sometimes "charity," in the technical sense of the word. Charity may be benevolence, but all benevolence is not necessarily charity. *Fox v. Gibbs*, 29 Atl. 940, 942, 86 Me. 87.

"Though often used as synonymous with 'charitable,' 'benevolent' may, as applied to objects or purposes, have a broader meaning, and include some not 'charitable' in the legal sense of that word. Acts of kindness, friendship, forethought, or good will may properly be described as 'benevolent.' Where, however, it is used in connection with the term 'charitable,' or other words indicating an intent to limit it to purposes strictly charitable, it will be held to be synonymous with 'charitable.'" *Suter v. Hilliard*, 132 Mass. 412, 413, 42 Am. Rep. 444; In *re Hinckley's Estate*, 53 Cal. 457, 507.

"Benevolent," as used in a devise to a religious society to aid the missionary, educational, and benevolent enterprises to which the society habitually contributed, cannot be construed as having a wider signification than the word "charitable," though intrinsically it includes more than legal charities; but its meaning may be narrowed down by

the context, and the will itself provides a standard by which the word is to be measured, and the fund was not to be used to aid any benevolent enterprise, but only those to which the church was in the habit of contributing. *De Camp v. Dobbins*, 31 N. J. Eq. (4 Stew.) 671, 696; *Id.*, 29 N. J. Eq. (2 Stew.) 36.

The word "benevolent," as used in connection with "charitable," in a statute exempting benevolent, charitable, and scientific institutions from taxation (Rev. St. c. 8, pt. 2), is to be regarded as synonymous with it, and as defining and limiting the nature of the charity intended. *City of Bangor v. Rising Virtue Lodge*, No. 10, 73 Me. 428, 433, 40 Am. Rep. 369.

The word "benevolent," when used in connection with "charitable," has often been construed as synonymous with "charitable." Payment of sickness and funeral benefits for members only out of an income chiefly derived from regular compulsory dues paid by such members is not a use for a benevolent or charitable purpose, within Pub. St. c. 11, § 5, and St. 1889, c. 465, exempting from taxation real estate of societies devoting their entire incomes to benevolent or charitable purposes. *Young Men's Protestant Temperance & Benevolent Soc. v. City of Fall River*, 160 Mass. 409, 411, 412, 36 N. E. 57, 58.

### BENEVOLENT ASSOCIATION.

"Benevolent" means, literally, well-wishing, and has a larger meaning than "charitable"; hence, though many charitable institutions are properly called "benevolent," as used in Rev. St. § 1038, subd. 3, exempting from taxation the personal property of benevolent associations, it is not necessary that the association or institution should be free to all, in order to make it a benevolent association. *St. Joseph's Hospital Ass'n v. Ashland County*, 72 N. W. 43, 96 Wis. 636.

The design of what are known as "benevolent societies," which are purely of a philanthropic or benevolent character, is not to indemnify or secure the members from loss, but from the contribution of members to accumulate a fund to be used in their own aid or relief in the misfortunes of sickness, injury, or death. *State v. Pittsburgh, C., C. & St. L. R. Co.*, 67 N. E. 93, 98, 68 Ohio St. 9, 96 Am. St. Rep. 635 (citing *Commonwealth v. Equitable Beneficial Ass'n*, 137 Pa. 412, 18 Atl. 1112).

The name of an association will not necessarily fix or establish its real legal character. Even if it has adopted the name of a "benevolent association," it would make no difference. The law looks through and behind the names of things, and passes its judgment upon their substance. If the prevalent purpose and nature of an association, of whatever name, be that of insurance, the

benevolent or charitable results to its beneficiaries would not change its legal character. *Bolton v. Bolton*, 73 Me. 299, 303.

#### **Educational institution.**

The act of 1848, providing for the incorporation of benevolent societies, and authorizing five or more persons possessing the qualifications prescribed by the act to associate themselves for benevolent purposes, cannot be construed to include a society for the purpose of carrying on medical or other colleges, or any institution whatever which is primarily and exclusively educational, and especially one in which a compensation is demanded for the instruction furnished. An institution of the latter kind could hardly be regarded as a "benevolent" institution within the ordinary meaning of those terms. *People v. Cothran*, 27 Hun, 344, 345.

#### **Insurance company distinguished.**

The great underlying principle of benevolent associations is not to indemnify or secure against loss; its design is to accumulate a fund from the contributions of its members for beneficial and protective purposes, to be used for their own aid or relief in the misfortunes of sickness, injury, and death. The benefits, although secured by contracts, and for that reason to a limited extent assimilated to the proceeds of insurance, are not so considered. Such societies are rather of a philanthropic or benevolent character. Such societies have no capital stock, they yield no profit, and their contracts, although beneficial and protective, altogether exclude the idea of insurance, or indemnity or security against loss. Such an organization is not an insurance company. *Dickinson v. Grand Lodge A. O. U. W. of Pennsylvania*, 28 Atl. 293, 294, 159 Pa. 258. See, also, *Northwestern Masonic Aid Ass'n v. Jones*, 26 Atl. 253, 254, 154 Pa. 99, 35 Am. St. Rep. 810; *National Mut. Aid Soc. v. Lupold*, 101 Pa. 111, 119; *Pennsylvania Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co. (U. S.)* 72 Fed. 413, 420, 19 C. C. A. 286, 38 L. R. A. 83, 70.

#### **Mutual aid association.**

Mutual aid associations, which are primarily for social and charitable purposes, and for securing efficient mutual aid among their members, are not usually described as "insurance companies," but belong to the distinctly recognized class of organizations known as "benevolent associations." *Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co. (U. S.)* 72 Fed. 413, 420, 19 C. C. A. 286, 38 L. R. A. 83, 70.

Mutual associations for the purpose of securing, inter alia, sick benefit and burial expenses, are "benevolent institutions" in the strictest sense of the term. *State v. Taylor*, 27 Atl. 797, 798, 56 N. J. Law (27 Vroom) 49.

Payment of sickness and funeral benefits for members only, out of an income chiefly derived from regular compulsory dues paid by such members, is not a use for a "benevolent" or "charitable" purpose, within Pub. St. c. 11, § 5, cl. 3, exempting from taxation real estate of societies devoting their entire incomes to benevolent, charitable, and other purposes. *Young Men's Protestant Temperance & Benevolent Soc. v. City of Fall River*, 36 N. E. 57, 160 Mass. 409.

A corporation organized for a purpose where pecuniary profit is not an object, but having a fund made up by fees, fines, and assessments of its members, under the control of the association, to be used for benevolent purposes, and in aiding and sustaining those of its members who become sick or distressed, is a benevolent association. *Peyre v. Mutual Relief Soc. of French Zouaves*, 27 Pac. 181, 192, 90 Cal. 240.

#### **Mutual fire insurance company.**

The benefits of a mutual fire insurance order are restricted to those who become members, and who agree to do just what they require to be done for themselves upon loss by fire. They all contract for a benefit to themselves in certain contingencies, and pay their money for it. The order is not a "benevolent" or "charitable" institution, but an insurance company; and its secretary, whose duty it is to interest himself in behalf of the order by seeking members, and otherwise, to examine buildings on which protection is sought, and see that all questions are answered by the applicant, and present the application to the chairman of the board, collect the membership fee and examination fees, is an insurance agent, and, as such, liable to the payment of the privilege tax exacted of insurance agents. *Co-operative Fire Ins. Order v. Lewis*, 80 Tenn. (12 Lea) 136, 140, 141.

#### **Mutual life insurance association.**

A company organized to insure lives on the plan of assessments upon surviving members, without other restrictions than that policy holders shall have an interest in the lives of members, is not a "beneficial association," and entitled to the privileges of such organizations, which privileges are extended on account of the limited nature of the life insurance they are authorized to assume, it being confined to insurance for the benefit of the families and heirs of the members. *State v. Moore*, 38 Ohio St. 7, 10.

#### **Organization to endow marrying members.**

Gen. St. 1878, c. 34, § 166, authorizing the incorporation of benevolent societies, does not include an association of single men, the object of which is to endow the wife of a member marrying with as many dollars as there are members of the society.

to be raised by assessment on them. *State v. Critchett*, 82 N. W. 787, 37 Minn. 18.

#### **Savings and loan association.**

A society organized for the purpose of lending money probably to its own members, however excellent the motives of the associates may be, is not an association within the statute authorizing organizations for benevolent purposes. *McMorris v. Simpson* (N. Y.) 21 Wend. 610.

A benevolent or charitable association must be one whose leading purpose is benevolence or charity, and not the pecuniary advantage of its members. The fact that a savings association formed for the pecuniary profit of its stockholders will, if well managed, promote economy and providence, is a mere incident to its characteristic purposes, and does not render it a benevolent association, since it is carried on for a pecuniary profit, and not for benevolence. *Sheren v. Mendenhall*, 23 Minn. 92, 98.

#### **BENEVOLENT INSTITUTION.**

See "Benevolent Association."

#### **BENEVOLENT SOCIETY.**

See "Benevolent Association."

#### **BENZINE.**

Naphtha, "benzine" or benzol, and kerosene are all refined coal or earth oils, not differing in their nature, but only in the degree of inflammability, kerosene being much less inflammable than either of the others. *Morse v. Buffalo Fire & Marine Ins. Co.*, 30 Wis. 534, 536, 11 Am. Rep. 587.

In an action involving the construction of a clause of a fire policy authorizing the keeping of benzine on the insured premises, the court says that it was proven at the trial that benzine is a product from the distillation of coal oil or petroleum, the most volatile of which is called "gasoline"; that benzine is inflammable and explosive when in contact with the atmosphere, and vaporizes from agitation. *Maryland Fire Ins. Co. v. Whiteford*, 81 Md. 219, 224, 100 Am. Rep. 45.

Benzine is a liquid, consisting mainly of the lighter and more volatile hydrocarbons of petroleum or kerosene oil, used as a solvent and for cleansing soiled fabrics. Benzine is included under the general head of "Drugs and Chemicals," as used in a fire policy insuring a stock of goods of that nature. *Phoenix Ins. Co. v. Flemming*, 44 S. W. 464, 465, 65 Ark. 54, 39 L. R. A. 789, 67 Am. St. Rep. 900. See, also, *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418, 426, 88 Am. Rep. 687.

#### **BEQUEATH.**

See, also, "Give and Bequeath."

"Bequeath" signifies a disposition by will. *Jordan v. Jordan's Adm'r*, 65 Ala. 301, 307.

The word "bequeath" implies an intention to grant an interest in the person named, and not to make him a mere trustee for another. *McMullin v. Leslie*, 29 Pa. (5 Casey) 314, 315.

The words "bequeath to," as used in a will devising one-half of testator's realty to his daughter during her natural life, then after her decease "to bequeath to" her son, his heirs and assigns, forever, mean "to go to," and are intended to express the testator's direct devise to, the son. *Nelson v. Combs*, 15 N. J. Law (3 Har.) 27, 30.

#### **Devise synonymous.**

The popular sense of the word "bequeath" includes "devise." Indeed, the terms are used as synonymous or equivalent by the lexicographers. *Ogle v. Tayloe*, 49 Md. 158, 175.

In the construction of statutes the words "bequeath" and "devise" shall be held to mean the same thing. *Ky. St. 1903*, § 467.

Whether the word "bequeath" means the same as "devise," when used in a will, is to be determined by the connection in which it is found. *Dow v. Dow*, 36 Me. 211, 216.

The term "bequeath" is the proper term to be used in a will to denote a gift of personal property, but when the context shows that it is used by the testator in a different sense, it will be construed to include real estate, and to be synonymous with the term "devise." *Borgner v. Brown*, 33 N. E. 92, 94, 133 Ind. 391; *In re Hoover's Estate*, 7 N. Y. Supp. 283, 54 Hun. 106; *Lasher v. Lasher* (N. Y.) 13 Barb. 106, 109; *Shumate v. Bailey*, 20 S. W. 178, 179, 110 Mo. 411; *Cramer v. Cramer*, 71 N. Y. Supp. 60, 61, 35 Misc. Rep. 17.

Gen. St. § 2269, authorizes a married woman to make a will, but provides that "she shall not bequeath away from her husband more than one-half of her property, both personal and real, without his consent in writing." Held, that the word "bequeath," as used in such section by the legislators, was not used in its legal and technical sense, which is limited to gifts of personalty only, but was used in its popular sense, and as so used was referable to both personalty and realty. *Logan v. Logan*, 17 Pac. 99, 101, 11 Colo. 44.

As used in Gen. St. 394, § 35, providing that no man while married shall bequeath away from his wife more than one-half his property, nor shall any woman while married bequeath away from her husband more

than one-half of her property, "bequeath" means "devise and bequeath." *Barry v. Barry*, 15 Kan. 587, 590.

It is not essential to the validity of a bequest that a testator should use the word "give" or "bequeath," or other expression of similar signification. In *re Thompson*, 5 Dem. Sur. 393, 396.

#### As limited to personalty.

"Bequeath" is properly applied to gifts by will of personal property, and not realty. *Logan v. Logan*, 17 Pac. 99, 100, 11 Colo. 44; *Delafield v. Barlow*, 14 N. E. 498, 500, 107 N. Y. 535; *Haug v. Schumacher*, 60 N. E. 245, 246, 166 N. Y. 506; *Rountree v. Pursel*, 39 N. E. 747, 749, 11 Ind. App. 522; *Borgner v. Brown*, 33 N. E. 92, 94, 133 Ind. 391; *Lasher v. Lasher* (N. Y.) 13 Barb. 106, 109; In *re Hoover's Estate*, 7 N. Y. Supp. 283, 54 Hun, 106.

"Where a testator uses the word 'bequeathed' instead of the words 'bequeath and devise,' in the disposition of property stated in the will to have been 'bequeathed' to her, it shows an intention to confine the operation of the will to personal property only." *Laing v. Barbour*, 119 Mass. 523, 525.

The word "bequeath" is commonly used with reference to the disposition of personal property, so that, as used in a statute which provides that no nuncupative will shall be good when the estate bequeathed shall exceed in value \$150—that is, not proved as therein prescribed—the estate which may be bequeathed by a nuncupative will is thereby limited to personal estate. And such a will bequeathing real estate is of no effect. In *re Davis' Will*, 79 N. W. 761, 762, 103 Wis. 455.

The word "bequeath" is more properly used in a will to designate a mere gift of personal property, while the word "devise" should be added to the other words if real estate is also included in the gift.—*Scholle v. Scholle*, 21 N. E. 84, 85, 113 N. Y. 261.

Gen. St. 1886, c. 69, §§ 2, 3, relating to bequests to married women, has reference to both real and personal property. *Leighton v. Sheldon*, 16 Minn. 243, 247 (Gil. 214, 219).

#### BEQUEATH ABSOLUTELY.

It was said in *Yocum v. Siler*, 160 Mo. 281, 289, 61 S. W. 208, 212: "By the words 'bequeath absolutely,' testator unquestionably intended to devise to his son his whole estate in said lands. These words are ample for that purpose in a will, and it is unnecessary to cite precedents to establish that it has been often so held." *Roth v. Rauschenbusch*, 73 S. W. 664, 665, 173 Mo. 582, 61 L. R. A. 455.

#### BEQUEATHMENT.

"Bequeathments," as used in a will providing that a testator's plantation should be equally divided between his two sons, and that, if the testator's wife should remain his widow and should live until his sons came to their plantation, then the sons should have the testator's stock and farming utensils, and that, if any of the testator's children or his present wife should die without lawful issue, the "bequeathments" to them should descend to the survivors, must be limited to the personal bequest made to the testator's children by his last wife, and hence J. and N. take the estates in fee simple. *Blackwell v. Blackwell*, 15 N. J. Law (3 J. S. Green) 386, 392.

#### BEQUEST.

See "Conditional Bequest"; "Contingent Bequest"; "Executory Bequest."  
As contract, see "Contract."  
Charitable bequest, see "Charity."

The word "bequest" is a word appropriated to a testamentary disposition of personalty. In *re Fetrow's Estate*, 58 Pa. (8 P. F. Smith) 424, 427; *Still v. Spear*, 45 Pa. (9 Wright) 168, 171.

"Bequest" technically means a testamentary disposition of personalty, and is not accurately applied to a testamentary disposition of land. *Fetrow's Estate*, 58 Pa. (8 P. F. Smith) 424, 427.

It is not essential to the validity of a bequest that a testator should use the word "give" or "bequeath," or other expression of similar signification. In *re Thompson*, 5 Dem. Sur. 393, 396.

A bequest is a gift by will of personal property, but, in order to favor the manifest intention of the testator as shown by the context of his will, the courts often construe the word "bequest" to mean devise, and the word "devise" to mean bequest. *Rountree v. Pursel*, 39 N. E. 747, 749, 11 Ind. App. 522; *Ladd v. Harvey*, 21 N. H. (1 Fost.) 514, 528; In *re Stumpenhousen's Estate*, 79 N. W. 376, 377, 108 Iowa, 555.

Where a codicil revoking the devise of a house and lot uses the word "bequest" instead of "devise," "bequest" is to be construed as synonymous with "devise." *Thompson v. Gaut*, 82 Tenn. (14 Lea) 310, 313.

The word "bequest" may mean any gift by will, whether it consists of personal or real property. As used in Dower Act 1845, authorizing the widow to elect whether to renounce the benefit of a devise or bequest and take dower and her distributive share of the husband's personal estate, it is a controvertible term with "devise," and includes a gift by will of land, and interest therein.

as well as personal property. *Evans v. Price*, 8 N. E. 854, 857, 118 Ill. 593.

The word "bequest," if so intended in a will, will pass real estate. *Wyman v. Woodbury*, 33 N. Y. Supp. 217, 220, 86 Hun, 277.

#### Legacy synonyms.

In the construction of statutes, the words "bequest" and "legacy" shall be held to mean the same thing, and to embrace and include either real or personal estate or both. *Ky. St. 1903*, § 467.

### BEREFT OF REASON.

One is "bereft of reason," so as to be excusable for failure to give notice of a personal injury, where he was mentally disqualified so to do. *Whitney v. Town of Londonderry*, 54 Vt. 41.

A statute exempting such persons as are injured on the highway from giving notice of such injuries, if thereby they are bereft of reason, does not mean that one who by slight injuries is temporarily deprived of his reason, or who by reason of the faintness or concussion from a sudden fall is left insensible for a short time, but when reaction takes place the mind resumes its natural and normal state, is bereft of reason, within the meaning of the statute. But if, after the primary effects of the injury have subsided, and time and opportunity are given for the mind and reason to resume their functions, and they cannot perform them, not from mere pain or weakness, but because their functions are deranged, disordered, or abated, and the party is then left in such a state that he is incapable of exercising his reasoning powers so as to understand simple matters of business, like giving a notice in such case, and that continued for 20 days or more, then his state and condition was that of one bereft of his reason. But if the injured person, after the primary effects of the injury have passed, and the physical system has the time and opportunity to resume its normal condition, is still left in a state of insanity, insensibility, or otherwise deprived of his reason, and that condition is, in character, fixed, then, if never, or in a longer or shorter time, his reason may return to him, the fact is established that by the injury he was bereft of his reason. *Gonyeau v. Town of Milton*, 48 Vt. 172, 174.

### BERME BANK.

The berme bank of a canal is the bank opposite the towpath; is a hitching place for boats when not in motion; forms a place for boatmen and canal repairers to walk along the canal; is a place to load and unload cargoes; is a place to pass to and from, to keep the canal in repair when necessary. *Morris Canal & Banking Co. v. Fagin*, 22 N. J. Eq. (7 C. E. Green) 430, 437.

### BERRIES.

Tariff Act 1842, exempting from duty berries or vegetables used principally in dyeing or composing dyes, applies to the berries in their native state, and not after they are transmuted by manufacture into a substance which takes a different denomination in commerce. *Schneider v. Lawrence* (U. S.) 21 Fed. Cas. 715, 716.

The expression "berries edible in their natural condition," in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 262, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1851], means berries which are in their natural condition as imported, and are edible either in that state or cooked; and foxberries, imported in casks filled with water—the function of the water not being to chemically change the berries or to act as a preservative, but to furnish a cushion against the injuries incident to transportation, similar to that furnished by sawdust in the transportation of grapes—are in their natural condition, and are dutiable under said provision, and not under paragraph 559 of said act, § 2, Free list, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1679], relating to "berries green, ripe or dried, not provided for." *Boak v. United States* (U. S.) 125 Fed. 599, 600, 60 C. C. A. 335.

### BESIDES.

Testator's will recited, "I leave and bequeath to my niece all the money I die possessed of besides all I bequeathed to her in my former will." Held, that the word "besides" meant in addition to, over and above, outside of, and the language was sufficiently certain to transfer to the niece whatever money the testator had at his death. In re *Beckett's Will*, 103 N. Y. 167, 177, 8 N. E. 506, 508.

### BESOT.

To "besot" is to stupify; to make dull or senseless; to make to dote; and "to dote" is to be delirious, silly, or insane. Such is the meaning of the word in an offer in a libel case to prove that defendant's mind at the time of speaking the words complained of was so besotted by a long course of dissipation that no one would believe him. It is error not to admit such evidence in mitigation of damages and to disprove malice. *Gates v. Meredith*, 7 Ind. 440, 441.

### BEST.

See "Deemed Best"; "Think Best."

The use of the word "best" in a provision in a will authorizing the trustee to pay to testator's granddaughter such portion of the income from a trust fund amounting to \$60,000 a year as he might consider best, dur-

ing her natural life, does not show that the bequest was for her maintenance, as it did not oblige the trustee to pay her any amount, and he might at any time withhold the entire income. *Bartlett v. Slater*, 22 Atl. 678, 679, 53 Conn. 102, 55 Am. Rep. 73.

A contract to erect a building of "the best lumber" construed to mean the best lumber of which buildings were ordinarily constructed at that place. *McIntire v. Barnes*, 4 Colo. 285.

A letter from an agent for one piano, in which he had spoken of selling a certain piano for the "best," is not to be construed as meaning that such piano is superior to all others. "Things may be best, in the sense of ranking in the very first class, without being superior to each other; and one piano may be best for one purpose, and another for another." *Whittemore v. Weiss*, 33 Mich. 348, 354.

The use of the word "Best," in a certain arrangement, held to constitute a colorable imitation of complainant's mark on packages of flour. *Pillsbury v. Pillsbury-Washburn Flourmills Co.* (U. S.) 64 Fed. 841, 847, 12 C. C. A. 432.

#### BEST BIDDER.

*Bates' Ann. St. Ohio*, § 2435-7, giving a board of public officers authority to make a contract with the "lowest and best bidder," confers upon the board a discretion with respect to awarding the contract, which cannot be controlled by mandamus. *State v. Hermann*, 59 N. E. 104, 63 Ohio St. 440.

#### BEST EVIDENCE.

The "best evidence" means the best evidence which can be adduced in the nature of the case. *Scott v. State*, 3 Tex. App. 103, 104.

The term "best evidence," as used in the statement of the rule that, where the "best evidence" the nature of the case will admit of cannot be had, the "best evidence" that can be had shall be allowed, means that, if the best legal evidence cannot be produced, the best legal evidence that can be had should be admitted. *Gray v. Pentland* (Pa.) 2 Serg. & R. 23, 34.

Within the rule in the production of evidence which requires the best evidence of which the case is susceptible, the term "best evidence" does not demand the greatest amount of evidence which can possibly be given of any fact, but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the parties. Thus a title by deed must be proved by the production of the deed itself, if it is within

the power of the party, for this is the best evidence of which the case is susceptible. *Manhattan Malting Co. v. Sweteland*, 36 Pac. 84, 14 Mont. 269.

The rule requiring the production of the best evidence of which the case is susceptible does not demand the greatest amount of evidence which can be given on the litigated fact. Its design is to prevent the introduction of any where the law presumes or the proof shows that better evidence is in the possession or under the control of the party. The rule only excludes that evidence which indicates the existence of more original sources of information, and the term is confined to cases where there exists, or is presumed to exist, primary as well as secondary evidence. *United States Sugar Refinery v. E. P. Allis Co.*, 9 U. S. App. 550, 554, 6 C. C. A. 121, 56 Fed. 786.

Nothing more is intended by the rule that the "best evidence" is required than that evidence which is merely substitutionary in its nature shall not be received so long as the original evidence can be supplied. "It does not allow secondary evidence to be substituted for that such is primary. It will not permit the contents of a deed or other written instrument to be proved by parol when the instrument itself can be produced. It has nothing to do with the choice of witnesses. It never excludes a witness upon the ground that another is more credible or reliable." Hence the testimony of one who was present and heard a witness testify in a former trial as to what such witness testified to is not objectionable on the ground that it is not the best evidence, and that the legally appointed stenographer who took notes of the testimony could give better evidence. *State v. McDonald*, 65 Me. 466, 467.

"The term 'best evidence' is confined to cases where the law has divided testimony into primary and secondary. And there are no degrees of evidence, except where some document or other instrument exists, the contents of which should be proved by an original, rather than by other testimony, which is open to danger of inaccuracy. But where living witnesses are placed on the stand, one is, in law, on the same footing with another. If he can testify at all, he can testify in the presence as well as in the absence of those who may be supposed wiser or more reliable." *Elliott v. Van Buren*, 23 Mich. 49, 53, 20 Am. Rep. 668.

#### BEST HE CAN.

Where defendant employed cotton brokers to buy for him certain cotton, not to exceed a certain price, the instructions to the broker being "the best you can," the phrase "the best you can" meant that they were to have the largest possible discretion to buy as opportunity should offer at prices

not exceeding the prescribed limit. *Marland v. Stanwood*, 101 Mass. 470, 477.

An agent authorized to sell certain personality, doing the "best he can" with it, and treating it as it were his own, has authority to ship the property to another market than that in which he resides, where such shipments are common, and seem to the agent to be for the best interests of all the parties. *McMorris v. Simpson* (N. Y.) 21 Wend. 610.

A statute requiring the tax lister to ascertain, "as best he can," the property owned by a person failing to make an inventory of his taxable property, is to be construed as giving the lister the right to use all lawful means in ascertaining the amount of property belonging to such person. *Taylor v. Moore*, 21 Atl. 919, 921, 63 Vt. 60.

#### **BEST HORSE IN THE WORLD.**

A statement in negotiations leading to the sale of a horse that it is the best horse in the world does not constitute a false representation, even though known to be false by the maker, but is a mere puffing of the value of the horse. *State v. Hefner*, 84 N. C. 751, 753.

#### **BEST INFORMATION.**

An assessor required to act upon the best information he can obtain, on failure of taxpayer to furnish any report as to the property, may act upon the information obtained by inquiring of those likely to know, and from his own judgment upon the general facts of the case, and it is sufficient if he ascertains enough to found upon it an honest belief that the taxpayer has taxable property which he keeps back from taxation. *Town of Hartford v. Champion*, 54 Conn. 436, 7 Atl. 721.

#### **BEST KNOWN APPLIANCES.**

"The phrase 'best known appliances' is susceptible of different interpretations. It may be taken to mean the best appliances known, or the best approved or acknowledged appliances, or those appliances which are best known." As used in an instruction that a railroad company was required to use such appliances, it was held to mean such appliances as the progress of science and improvement had shown, by experience, to be the best, and which had become generally known. It was error to use the phrase without defining its meaning. *Hagan v. Chicago, D. & C. G. T. J. R. Co.*, 49 N. W. 509, 511, 86 Mich. 615.

#### **BEST OF ABILITY.**

The words "to the best of my ability," in the oath of an officer to so perform the duties

of his office, are not a compliance with the statute requiring an oath to fully and impartially discharge such duties. *Hayter v. Benner*, 52 Atl. 351, 352, 67 N. J. Law, 359.

The official bond of a treasurer of a school district was conditioned that he would well and truly fulfill the duties of his office, "to the best of his ability and according to law." Held, that the words "to the best of his ability" were insufficient to constitute a condition, and therefore did not limit the treasurer's obligation; the court saying, "The words 'best of his ability' cannot be construed as a condition exempting the officer from performance of his duty on account of accident, on the ground that he was not possessed of the requisite ability." The moneys in said treasurer's care being accidentally consumed by fire, "without want of care and diligence on his part," he was to be held liable, as though the words "best of his ability" did not occur in the bonds; these words expressing no condition restricting the defendant's liability. *Union Dist. Tp. v. Smith*, 39 Iowa, 9, 12, 18 Am. Rep. 39.

#### **BEST OF HIS INFORMATION AND BELIEF.**

An affidavit that an information is true, according to the best of the affiant's information and belief, will be construed to be a verification upon information and belief, as required by Comp. Laws, § 1879. *State v. Whisner*, 10 Pac. 852, 857, 35 Kan. 271.

#### **BEST OF HIS KNOWLEDGE AND BELIEF.**

The phrase "to the best of deponent's knowledge and belief" is of judicial origin, and its import is the same as the phrase "so far as the deponent knows, and as he verily believes." Both imply that the deponent has information or evidence of the facts asserted, which, though it may not amount to certain knowledge, is, in his judgment, sufficient to justify a conclusion of the facts to which he swears. *Diehl v. Perle* (Pa.) 2 Miles, 47, 49.

An affidavit of defense, stating certain facts to be to the best of the "knowledge and belief" of affiant is insufficient, as it does not mean affiant's actual personal knowledge. *First Nat. Bank of Clarion v. Gregg*, 79 Pa. (29 P. F. Smith) 384, 387.

#### **BEST OF THEIR JUDGMENT.**

The words "impartially and according to the best of their judgment" in Act June 13, 1836, which requires the taking of an oath by persons selected to assess damages, to perform their duties impartially and according to the best of their judgment, has not the same meaning as the words "faithfully to discharge their duties," and therefore an oath in the latter words is insufficient. *In re Nicetown Lane* (Pa.) 32 Leg. Int. 28.



**BEST ROUTE.**

The laying out of the most feasible road between two fixed bounds is not necessarily equivalent to the laying out of the best route for the accommodation of public travel between the same bounds. In the one case the test is arbitrary and unyielding. In the other it is governed by a reasonable public necessity. *Spaulding v. Town of Groton*, 44 Atl. 88, 89, 68 N. H. 77.

**BESTIALITY.**

As buggery, see "Buggery."

Bestiality is sexual connection between a human being and a brute of the opposite sex. *Ausman v. Veal*, 10 Ind. 355, 356, 71 Am. Dec. 331.

**BESTOW.**

"Bestowed" means used or placed, and never means performed, so that, as used in Code Civ. Proc. Cal. § 1183, providing that certain persons shall have a lien upon property upon which they have bestowed labor, it does not require the person to labor personally, but gives a lien to one who has caused his employés to perform labor. *Macomber v. Bigelow*, 58 Pac. 312, 314, 126 Cal. 9.

To "bestow" is to give, confer, impart, so that a direction in a will giving the residue of the estate, to be bestowed as he may wisely direct, indicates a gift to some one other than the trustee. In *re Foley's Will*, 10 N. Y. Supp. 12, 13, 2 Con. Sur. 298.

**BET.**

A bet is ordinarily an agreement between two or more persons that a sum of money or some valuable thing, in contributing which all agree to take part, shall become the property of one or more of them on the happening in the future of an event, at the present uncertain, or upon the ascertainment of a fact in dispute. *Rich v. State*, 38 Tex. Cr. R. 198, 200, 42 S. W. 291, 38 L. R. A. 719.

It is difficult to give a legal definition of a "bet." In ordinary acceptance, a bet is a placing of something valuable belonging in part to each of two individuals in such a position that it is to become the sole property of one on the result of some unsettled question. Each of the parties risks something which he may lose, and each may gain something beyond what he risks, and it does not apply to a case where a physician performs a service for which he is entitled to compensation, but which he agrees to relinquish, on it being shown that the person for whom he renders the service was not a pauper having

a settlement in the town in which the service was rendered. *Edson v. Town of Pawlet*, 22 Vt. 291, 293.

"A bet is a promise upon the part of each of the betting parties to pay to the other party the amount of his debt if he loses." *McGrath v. Kennedy*, 2 Atl. 438, 439, 15 R. L. 209.

A bet is where each party contributes money or some valuable thing, termed the "stake," getting a chance to gain a portion or all of that constituting the stake, and taking a chance to lose his own contribution. *Harris v. White*, 81 N. Y. 532, 539.

The words "wagering," "playing," "gaming," and "betting," though each have a meaning more or less different from the other, are often used one for the other. *Thrower v. State*, 45 S. E. 126, 127, 117 Ga. 753.

The mere statement that a defendant bet at a pool table, without more, is insufficient proof of the fact that he bet anything of value other than what is charged for the use of the table. *Bone v. State*, 63 Ala. 185, 186.

**Gaming distinguished.**

In common usage the term "betting" may sometimes be employed interchangeably with gaming, but not always. If two persons play at cards for money they are said to be gambling or gaming; but they are gaming because they lay a wager, or make a bet on the result of the game; and therefore to say they are betting is equally appropriate. If two persons lay a wager on the result of a pending election it will be said that they are betting, but not that they are gaming. There is no gaming in which the element of the wager is wanting, but there is betting which the term "gaming" is not commonly used to express. *People v. Weithoff*, 16 N. W. 442, 445, 51 Mich. 203, 47 Am. Rep. 557. See, also, *Thrower v. State*, 45 S. E. 126, 127, 117 Ga. 753.

**As hazard on uncertain event.**

A "wager" or "bet" is a contract by which two or more persons agree that a certain sum of money, or other thing, shall be paid or delivered to one of them on the happening, or not happening, of an uncertain event. *Jacobus v. Hazlett*, 78 Ill. App. 233, 241.

Code, § 1129, forbidding an adult to "bet" money or anything of value with a minor, means to hazard a sum ascertained or something of value upon the future happening of some event then uncertain. *Martin v. State* (Miss.) 14 South. 530.

"Betting" commonly means the putting of a certain sum of money or valuable thing at stake on the happening or not happening

of some uncertain event. *Shaw v. Clark*, 13 N. W. 788, 787, 49 Mich. 884, 43 Am. Rep. 474.

A bet is a mutual agreement, a tender of a gift of something valuable, which is to belong to the one or the other of the contending parties according to the result of a trial of chance or skill, or both combined. *Long v. State*, 2 S. W. 541, 22 Tex. App. 194, 58 Am. Rep. 633.

A bet or wager is ordinarily an agreement between two or more that a sum of money, in contributing which all agreeing take part, shall become the property of one of them on the happening in the future of an event at present uncertain. *People v. Fallon*, 39 N. Y. Supp. 865, 869, 4 App. Div. 82.

A bet is usually executory on both sides, isolated and determined by events independent of any action of the parties; and thus a game in which a price is paid for a chance of a prize, and it is determined by a mechanical device worked by the manager of the game, according to the scheme held out to the public, whether he who pays the money is to have the prize or nothing, is not a wager, but a lottery. *Commonwealth v. Wright*, 137 Mass. 250, 251, 50 Am. Dec. 306.

Any contract or agreement for the purchase, sale, loan, payment, or use of any property, real or personal, the terms of which are made to depend upon or are to be varied and affected by any uncertain event in which the parties have no interest, except that created by such contract or agreement, shall be deemed a bet or a wager. *Pub. St. N. H.* 1901, p. 818, c. 270, § 18.

#### **Premium, purse, or award distinguished.**

"A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them on the happening in the future of an event at present uncertain. There must be two or more contracting parties having mutual rights in respect to the money or other thing wagered or staked, and each of the parties necessarily risks something, and has a chance of making something, on the happening or not happening of an uncertain event. A purse or prize offered by a party, and to be awarded to the successful competitor in a contest in which such party does not engage nor has any chance of gaining, but only perhaps of losing, is without the elements of a chance of gain or a risk of loss, and hence is not a bet or wager." *Misner v. Knapp*, 9 Pac. 65, 66, 18 Or. 135, 57 Am. Rep. 6.

"The distinction between a bet or wager and a premium or purse is thus given in *Harris v. White*, 81 N. Y. 532: A bet or wager is ordinarily an agreement between two or

more that a sum of money, or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some one of them on the happening in the future of an event at the present uncertain, and the stake is the money or thing thus put on the chance. There is in that this element that does not enter into a modern purse, prize, or premium, viz., that each party to the former gets a chance of gain from the others, and takes a risk of loss of his own to them. The purse, prize, or premium is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered, and if he abide by his offer that he must lose it and give it over to some of those contending for it is reasonably certain." Competing for premiums offered by an association of horse races is not competing for bets or wagers, and therefore an agreement between two owners of horses to pool all premiums and stake moneys awarded on their horses and to divide the same equally is valid. *Hankins v. Ottinger*, 47 Pac. 254, 255, 115 Cal. 454, 40 L. R. A. 76; *Porter v. Day*, 37 N. W. 259, 261, 71 Wis. 296; *Morrison v. Bennett*, 52 Pac. 553, 557, 20 Mont. 560, 40 L. R. A. 158; *Porter v. Day*, 37 N. W. 259, 261, 71 Wis. 296.

In a wager or a bet there must be two parties, and it is known, before the chance or uncertain event on which it is laid is accomplished, who are the parties who must either lose or win. In a premium or reward there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake on an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known until after the event. *Alvord v. Smith*, 63 Ind. 58, 62; *People v. Fallon*, 39 N. Y. Supp. 865, 869; *Hankins v. Ottinger* (Cal.) 47 Pac. 254, 255, 40 L. R. A. 76; *Treacy v. Chinn*, 79 Mo. App. 648, 651; *Alvord v. Smith*, 63 Ind. 58, 59; *Dellier v. Plymouth Agricultural Soc.*, 10 N. W. 872, 874, 57 Iowa, 481.

#### **Purchase of options.**

The essential elements of an ordinary wagering contract are (1) an agreement by one party to pay another a sum of money, or give something of value, if a certain event happens; (2) a reciprocal agreement by the second party to pay the first a sum of money, or give something of value, if a certain contrary event happens; and (3) that the events contemplated in the agreement shall be something other than the passing of a consideration between the parties. In a wagering contract upon the price of stock both parties assume the risk of either gaining or losing. In a legitimate transaction through an agent or broker, the agent or broker assumes no risk,

except that the principal may not be able to carry out his agreement. In *Wagner v. Hildebrand*, 41 Atl. 84, 36, 187 Pa. 136, the court says: "A purchase of stock on margin for speculation is not necessarily a gambling transaction. If it is the intention of the parties that a real purchase shall be made by the broker, although the delivery may be postponed or made to depend upon future conditions the transaction is legal." *Windward v. Lincoln*, 51 Atl. 106, 112, 23 R. I. 476.

"Betting," in common speech, means the putting of a certain sum of money or other valuable thing at stake on the happening or not happening of some uncertain event. A purchase of options is not betting, in this sense, though it resembles it in the fact that risks are taken on uncertain events, and that the tendency to those engaged in it is demoralizing. *Shaw v. Clark*, 13 N. W. 786, 787, 49 Mich. 384, 43 Am. Rep. 474.

#### As a wager.

"Bet" is synonymous with "wager." It implies risk, but does not necessarily imply risk in both parties. "There must be between them a chance of gain and a chance of loss, but it does not follow that each of the parties to the bet must have both these chances. If from the terms of the engagement one of the parties may gain but cannot lose, and the other may lose but cannot gain, and there must be either a gain by the one and a loss by the other according to the benefit of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and loss." *Shumate v. Commonwealth* (Va.) 15 Grat. 653, 660.

A bet as a wager. *Cassard v. Hinman*, 14 N. Y. Super. Ct. (1 Bosw.) 207, 213.

"A bet is a wager or stake laid upon the result of a game or upon a certain result arising from other things than games. 'Bet' and 'wager' are synonymous terms, and are applied both to the contract of betting and wagering and to the thing or sum bet or wagered. For example, one bets or wagers, or lays a bet or wager, of so much upon a certain result, but these terms cannot properly be applied to the act to be done or event to happen upon which the bet or wager is laid. Bets or wagers may be laid upon acts to be done, events to happen, or facts existing or to exist. Bets or wagers may be illegal, and the acts, events, or facts upon which they the laid may not be." *Woodcock v. McQueen*, 11 Ind. 14, 16.

A bet is a wager, and the betting is complete when the offer to bet is accepted. *State v. Welch* (Ala.) 7 Port. 463, 465.

A wager is something hazarded on the issue of an uncertain event. A bet is a wager, though a wager is not necessarily a bet. *Cassard v. Hinman*, 14 N. Y. Super. Ct. (1 Bosw.) 207, 212.

#### Bet at a gaming bank.

A statute providing a punishment for the offense of "betting at a gaming bank," exhibited for the purpose of gaming, means the betting by some one other than the exhibitor or dealer of the game. Where the exhibitor and dealer of the game known as monte made a bet with one of the persons betting at such game that such person had made a bad bet, "it was a bet by the gaming bank against a player, the same as any other bet between the bank and those playing against it. A gaming bank does not bet against itself, but against those who bet at it. Defendant could not exhibit the game and at the same time bet at it." *Askey v. State*, 20 Tex. App. 443, 444.

The phrase "keeping a gaming table or bank" correctly describes one who stands behind a table and throws dice, taking the bids of all others thereon, and therefore such a person cannot be convicted of betting on such a game. *Shaw v. State* (Tex.) 83 S. W. 1078.

To furnish another with money to set up a faro bank and receive a part of the winnings is not a betting. *O'Blennis v. State*, 12 Mo. 311, 312.

The term "betting," within the meaning of a statute prohibiting betting at any gaming table, includes playing pool with a tacit understanding that the loser is to pay the table rent. *Hall v. State* (Tex.) 84 S. W. 122.

#### Bet on an election.

A statute making it criminal to "bet on an election" is to be construed as including a bet that one candidate will beat another. *Commonwealth v. Pash*, 39 Ky. (9 Dana) 31.

To "bet on" an election is in effect to bet on the result of an election, and is an apt phrase to designate a bet upon the success or defeat of a candidate. *Commonwealth v. Avery*, 77 Ky. (14 Bush) 625, 633, 29 Am. Rep. 429.

In the statute making it an offense to bet on an election the words "bet on election" mean bet on the result. *State v. Griggs*, 11 S. E. 740, 741, 34 W. Va. 78.

Betting on the result of an election after it has been held is not betting on an election. *State v. McLelland*, 36 Tenn. (4 Sneed) 437, 438.

The term "election," within the meaning of a statute prohibiting betting on an election, applies as well to an election which has been held, but before the result is known, as to an election to be held in the future. *Terrall v. Adams*, 23 Miss. (1 Cushm.) 570, 571.

The term "bet on an election," within the meaning of a statute making such an act criminal, includes a bet upon the vote of a

county in a general election, or of a precinct in a district or county election. *Commonwealth v. Kennedy*, 54 Ky. (15 B. Mon.) 531, 533.

St. Law, 478, declares that if any person shall wager or bet any sum of money, or other thing, on the election of any officers (among whom are members of the general assembly), within six months before election, he shall forfeit and pay the sum of \$100, to be recovered by indictment. Held, that "on the election" did not necessarily mean only a bet or wager on the succession of either party, but embraces a bet or wager on or about the "election" to be held in any form by which undue exertions might be stimulated to operate upon, influence, or control the free and unblinded exercise of the right of voting. *Commonwealth v. Kirk*, 48 Ky. (4 B. Mon.) 1, 2.

The terms "bet," "hazard," and "wager," applied to the result of an election, include the act of selling property for more than its value, payable or not upon the contingency of the result of the election. *Somers v. State*, 87 Tenn. (5 Sneed) 438, 439.

Where defendant proposed to bet \$25 on an election, and the other party put up \$5, and defendant put up the \$25 with the agreement that the \$5 was to be forfeited unless the other \$20 was put up within a specified time, and the \$5 was forfeited to defendant, it did not constitute a betting on an election. *Rich v. State*, 38 Tex. Cr. R. 198, 200, 42 S. W. 291, 88 L. R. A. 718.

#### **Bet on a game.**

"Betting on a game" is the mutual agreement and tender of a gift or something valuable, which is to belong to the one or to the other of the contending parties, according to the result of such trial. The ordinary rules of the game constitute the terms of the agreement, and define the contingency on which one or the other is to receive the gift. The staking of the money or other property is an ostensible adoption or sanction of such agreement, and also a conditional tender. When the trial is accomplished, the result tells who is the winner. *Stearnes v. State*, 21 Tex. 692, 694.

It is betting where parties enter into a game of cards with the understanding that the loser shall pay the bill of the company, or for liquor used by the party. *Bachelor v. State*, 10 Tex. 258, 262.

The term "betting on a game," within the meaning of a statute prohibiting betting on games, includes wagering drinks, cigars, or anything of value on a game. *Humphreys v. State*, 30 S. W. 1066, 34 Tex. Cr. R. 434.

#### **Bet on a horse race.**

The term does not include betting on horse races. *Morrison v. Bennett*, 52 Pac. 553, 557, 20 Mont. 560, 40 L. R. A. 158.

## **BETTER.**

The fourth section of the act of 1823, declaring what should be evidence in certain cases, provided that the certificate of any register of any United States land office of the entry of any tract of land within his district should be deemed evidence of title in the party who made such entry, etc., "unless a better legal and paramount title be exhibited for the same." Held, that the words "better legal and paramount title" did not mean any title which might remain in the United States, but referred to cases where the United States had not the title at the time of the sale and issuing of the certificate, as, for example, land covered by British and French grants, some of which the government recognized. *McConnell v. Wilcox*, 2 Ill. (1 Scam.) 344, 376.

## **BETTERMENT.**

"Betterments" is a term used to designate improvements, etc., on real estate by which the property is increased in value. *French v. City of New York*, 16 How. Prac. 220; *Ohase v. City of Sioux City*, 58 N. W. 333, 334, 86 Iowa, 608.

All buildings are better for being repaired, but "betterment" means something more than mere repairs, and may be said to mean improvements upon the building itself, or so near to it as to enhance its value. Any addition or alteration made to the building, or expense incurred for draining or paving for warehouse, whether temporary or permanent, for the special accommodation of tenants, such as engines, boilers, furnaces for heating, elevators, gas engines, asphalt pavement, opening and widening streets adjacent to the property, are to be classed as betterments. *Abell v. Brady*, 28 Atl. 817, 820, 79 Md. 94.

## **BETTERMENT STATUTES.**

Statutes which provide that a bona fide occupant making lasting improvements in good faith shall have a lien upon the estate recovered by the real owner to the extent that his improvements have increased the value of the land are called "betterment" or "occupant" statutes. *Jones v. Great Southern Fireproof Hotel Co.* (U. S.) 86 Fed. 370, 386, 30 C. C. A. 108.

## **BETWEEN.**

The word "between," in a plea stating that on a certain day an account in writing was made up and stated "between" two certain parties, is insufficient to show that both parties to the settlement were present when the account was made out and stated, or that both of them saw and examined it. *Meeker v. Marsh*, 1 N. J. Eq. (Saxt. Ch.) 198, 203.

Where a way extends across a piece of land, and between two dwellings, and in a grant of the way it is spoken of as "between the dwellings," and also in another portion of the grant as extending the entire length of the lot, the phrase "between the dwellings" is to be construed not as limiting the extent of the way to that portion of it between the dwellings, but as a description of the thing granted. *Dunn v. English*, 23 N. J. Law (3 Zab.) 126, 129.

The term "between and at," in a mortgage of a railroad, between certain termini, operates to prevent the mortgage from being construed to include part of the railroad lying outside such termini. *Chapman v. Pittsburg & S. R. Co.*, 26 W. Va. 299, 308.

#### As exclusive of day.

The word "between," when used in speaking of the period of time "between" two certain days, generally excludes the days designated as the commencement and termination of such period. *People v. Hornbeck*, 61 N. Y. Supp. 978, 30 Misc. Rep. 212; *Kendall v. Kingsley*, 120 Mass. 94, 95; *Weir v. Thomas*, 62 N. W. 871, 872, 44 Neb. 507, 48 Am. St. Rep. 741.

When the word "between" is used with reference to a period of time, bounded by two other specified periods of time, such as between two days named, the days or other periods of time named as boundaries are excluded. A summons issued by a justice of the peace, and made returnable at 8 o'clock a. m. on the day set for the trial, is a sufficient compliance with the statute requiring such process to be returnable between the hours of 8 o'clock a. m. and 4 o'clock p. m., since 8 o'clock is not a period of time, like a day, capable of measurement, and forming a definite period as a boundary, but it is a mere instant of time so minute as to be incapable of being measured and excluded from the time prescribed within which the jurisdiction of the justice can attach. *Wilans v. Thorp*, 87 Ill. App. 297, 298.

Under a contract whereby merchandise is to be delivered between the date of the contract and a subsequent specified date, each of such days is to be excluded. *Fowler v. Rigney* (N. Y.) 5 Abb. Prac. (N. S.) 182, 184; *Cook v. Gray*, 6 Ind. 335, 337.

A contract requiring the payment of a certain sum "between now and the first day of September" should be construed to require such payment before the 1st day of September, and not to include such day. *Richardson v. Ford*, 14 Ill. 332, 333.

Where a statute requires that a certain thing shall be done between one day and another, each of such days is to be excluded. *Bunce v. Reed* (N. Y.) 16 Barb. 347, 352; *Robinson v. Foster*, 12 Iowa, 186, 188.

Between, as used in a policy of insurance on goods to be shipped "between" February 1st and July 15th, means an intermediate space of time, and excludes both the 1st day of February and the 15th of July. "The most common use of the word is to denote an intermediate space of time or place, although it is not always so used. We speak of a battle between two armies, a combat, a controversy, or a suit at law between two or more parties; but the word thus used refers to the action of the parties, and does not denote locality or time. If all the land between two buildings or between two other lots of land be granted, then only the intermediate land between the two lots of land or the two buildings would pass by the grant, and the word 'between' has the same meaning when it refers to a period of time from one day, month, or year to another." *Atkins v. Boylston Fire & Marine Ins. Co.*, 46 Mass. (5 Metc.) 439, 440, 39 Am. Dec. 692.

#### As exclusive of place.

The use of "between" in Act March 22, 1865, authorizing the extension of a street railway between Montgomery and Germantown road, in Philadelphia, with the right to connect the same on any street between such two points, indicated intermediate space which excluded that to which it referred, and hence the corporation had no authority to occupy any part of Germantown road. *City of Philadelphia v. Citizens' Pass. Ry. Co.*, 24 Atl. 1099, 1102, 151 Pa. 128.

The use of "between" in a charter of a railroad company, wherein the road was authorized to locate new lines, when additional tracks should be required at any point or points "between" two cities which were the termini of the road, did not mean that such cities were excluded. *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. Law (2 Vroom) 205, 206, 213.

Where a deed conveyed a water right through any gates "between the slitting mill and the forged dam," the words of the description were necessarily exclusive of the termini, and hence any gates existing at either terminus could not be used by the grantee. *Revere v. Leonard*, 1 Mass. 91, 93.

"Between" indicates an intermediate space, which excludes and cannot include that to which it refers; and that which lies between one given place and another is something distinct from the place given on either side. Hence if land is granted between one town and another both are excluded from the grant, or if land is conveyed lying between lot No. 1 and lot No. 3 it cannot be pretended that either of these lots passed by the deed. *State v. Godfrey* (3 FairL.) 12 Me. 361, 366.

"Between," as used in Act 1854, relating to a railroad company, and declared to be for

the purpose of fully protecting business of a company from competition between the cities of New York and Philadelphia, meant from city to city, and did not mean "in the intermediate space," without regard to distance. *Delaware & R. Canal Co. v. Raritan & D. B. R. Co.*, 16 N. J. Eq. (1 O. E. Green) 321, 368.

#### **As inclusive of day.**

In Rev. St. § 3331, providing that if labor or services were done or performed between the 1st day of November and the 1st day of May following the claim for a lien shall be filed, etc., the word "between" is used inclusively. *McGinley v. Laycock*, 68 N. W. 871, 872, 94 Wis. 205.

#### **In devises, as by classes.**

In *Senger v. Senger's Ex'r*, 81 Va. 687, the court, in discussing the various significations of the prepositions "between" and "among," said: "When they follow the verb 'divide' their general signification is very similar, and in popular use they are considered as synonymous, though 'among' denotes a collection, and is never followed by two of a sort, while 'between' may be followed by any plural number, and seems to denote rather the individuals of the class than the class itself generically." As applied to persons and things, the word "between" primarily refers to two, though Webster gives "among" as a synonym, and in a large number of cases the word is used in wills where a per capita devise or legacy was to more than two. In *re Morrison's Estate*, 71 Pac. 453, 138 Cal. 401.

"Between," as used in a will providing that the residue of the estate should be divided between testatrix's husband's grandchildren and the children of a certain other person, refers properly to two, and not more. It is true that it is not unfrequently used, especially by the uneducated and colloquially in the sense of among, as referring to more than two objects, but that admittedly is not its correct use. In *re Ihrie's Estate*, 29 Atl. 750, 751, 162 Pa. 369.

In a will reading, "The balance of my property and money I want equally divided between the heirs of William Field and James Field, deceased," the meaning of the clause is that the property is to be equally divided between the heirs of James Field and the heirs of William Field. The word unquestionably conveyed the thought of parts—a distribution with reference to two parts, one part to the heirs of James and the other part to the heirs of William. Not only is this the natural and ordinary meaning of the words, "equally divided between the heirs of William and the heirs of James," but this is also the true etymological signification of the word "between." Webster's Dict. The Century Dict. says: "'Between' is literally

applicable only to two objects, but it may be and commonly is used of more than two where they are spoken of distributively, or so that they can be thought of as divided into two parts or categories, or in reference to the action or being of each individually as compared with that of any other or of all the others. Where more than two objects are spoken of collectively or individually, 'among' is the proper word." *Records v. Fields*, 55 S. W. 1021, 1022, 155 Mo. 314.

The use of "between" in a will providing that certain property was to be equally divided "between" children of two families indicated a division between the two, and not "among" the individuals. The word "between" is commonly used in reference to two only. *Stoutenburgh v. Moore*, 37 N. J. Eq. (10 Stew.) 63, 69.

The use of "between" in a will providing that property should be equally divided "between" the children of a certain person, naming such children, rhetorically construed is more applicable to two classes than to a greater number of individuals. While this is not necessarily controlling, yet it is not without weight in a case where other considerations are equally poised, and will have the greater weight if the circumstances aside from that are such as to induce the belief that the word is used in its accurate sense. *Appeal of Lockwood*, 10 Atl. 517, 518, 55 Conn. 157.

#### **Same—Creating tenancy in common.**

A devise to two or more persons "between" them makes them tenants in common. *Lashbrook v. Cock*, 2 Mer. 70; *Stetson v. Eastman*, 4 Atl. 868, 870.

#### **Same—As per capita.**

Strictly speaking, "between" implies a division between two parties or classes, but the reference may often be between more than two parties; so that when the words "between" and "among" follow the word "divide" their general signification is very similar, and in popular use they are synonyms, though "among" denotes a collection, and is never followed by two of any sort, while "between" may be followed by any plural number, and seems to refer to individuals of a class rather than to the class itself. *Senger v. Senger's Ex'r*, 81 Va. 698; *Ward v. Tompkins*, 30 N. J. Eq. (3 Stew.) 3, 4; *Lord v. Moore*, 20 Conn. 122; *Myres v. Myres*, 23 How. Prac. 410. And hence "between," used in a will dividing property between my sisters and my wife's sisters and brothers, divides the property per capita, and not per stirpes. *Kling v. Schellbecker*, 78 N. W. 673, 107 Iowa, 636.

Testatrix's will declared that she left all the residuum of her estate to G. and the children of G., to be divided between said G. and the children. Held, that the word "be-

tween" meant "among"; that the children and mother took per capita, and not by moieties, between the mother on the one hand and the children as a class on the other. *Graves v. Graves*, 8 N. Y. Supp. 284, 5 Hun, 58.

The use of "between" in a devise to the children of D., of which there were two, to be equally divided between them as they should, respectively, come to the age of 21 years, is not sufficient to exclude a child born to D. after the testator's death, as "between" does not necessarily mean between two, but may be treated as "among," and such child was entitled to an equal share with the two children which were born to D. prior to the testator's death. *Ward v. Tompkins*, 30 N. J. Eq. (3 Stew.) 3, 4.

The use of "between" in a will providing that the trustees should divide a certain estate equally between wife and children did not mean that the wife should have a share equal to that of all the children, but only an equal share with one of the children. *Lord v. Moore*, 20 Conn. 122, 128.

In a will in which the testator directed that a certain fund should be divided between certain heirs, "between" imports a division of the fund into parts to be given to the devisees per capita. The word "between" is often used as synonymous with "among," especially when employed to convey the idea of division or separate ownership of property held in common. It is quite as appropriate to say that property is to be divided "between" A., B., and C. as "among" A., B., and C. Webster says: "We observe that the word 'between' is not restricted to two, thus: 'Twenty proprietors owned a tract of land between them.'" And in *Lord v. Moore*, 20 Conn. 122, the testator, leaving a wife and four children, gave the income of the residue of his estate to be equally divided between his wife and children, and it was held that the wife took a share of the income equal only to that of one of the children. Therefore the word "between," used in that sense, imports a division of the fund into as many equal parts as there are beneficiaries, each beneficiary being entitled to one part per capita. *Myres v. Myres* (N. Y.) 23 How. Prac. 410, 415.

The prepositions "among" and "between" are often capable of different meaning, according to their collocation and connection, as the same are differently used and placed to express different ideas. But when the prepositions "between" and "among" follow the verb "divide" their general signification is very similar, and in popular use are considered synonymous, though "among" denotes a collection and is never followed by two of any sort, whilst "between" may be followed by any plural number, and seems to denote rather the individuals of the class than the class itself generically; but, what-

ever importance may be attached to such philological refinements, it is certain that the general rule is that where a bequest is made to several persons in general terms, indicating that they are to take equally as tenants in common, each individual will take the same share, or, in other words, the legatees will take per capita. *Senger v. Senger's Ex'r*, 81 Va. 687, 698.

#### **Same—As requiring distribution to all.**

A will directing a testator's widow to divide his real estate between his children to the best advantage, as she sees fit and proper, does not give the widow a right to exclude any of them in the division of the estate. *Faloon v. Flannery*, 76 N. W. 954, 955, 74 Minn. 38.

#### **Between high and low water marks.**

The term "between high and low water marks," as used in connection with a river which is not a tidal stream, has reference to the difference between the river at floods and at its ordinary stage. *Mobile Transp. Co. v. Mobile*, 23 Sup. Ct. 170, 173, 187 U. S. 479, 47 L. Ed. 286.

#### **Between two particular ports.**

The words, "between New Orleans and any port in the West Indies or the United States," in a marine policy insuring a vessel journeying between New Orleans and any port in the West Indies or the United States, imports that New Orleans is to be one of the termini of the vessels insured, and therefore the policy does not cover a vessel while on a voyage from a port of the West Indies to a port of the United States. *Lippincott v. Louisiana Ins. Co.*, 2 La. 399, 400.

#### **Between two rivers.**

The territory lying "between" two rivers is the whole country from their sources to their mouths, and, if no fork of either has acquired the name in exclusion to the other, the main branch to its source must be considered as the true river. Any other rule would be arbitrary, depending on caprice, and not on principle. *Doddridge v. Thompson*, 22 U. S. (9 Wheat.) 469, 470, 473, 6 L. Ed. 137.

#### **Between two streets.**

The word "between" has different meanings, according to the use to which it is applied. In measuring streets it excludes the objects which bound it. Webster describes it as "the immediate space intervening, without regard to distance," and gives as an instance the phrase, "New York is between Boston and Philadelphia." Also, "Pennsylvania is between New Jersey and Ohio," and "the Delaware River is between Pennsylvania and New Jersey, but neither is a part of the other." A street railway company, authorized by its charter to lay its

track on two streets, with a right to lay a connecting track on any street between two intersecting streets which are known as the termini of its tracks, does not thereby acquire a right to lay a connecting track on either of the intersecting streets known as the termini. The word "between" excludes the termini. *Philadelphia v. Citizens' Pass. Ry. Co.*, 10 Pa. Co. Ct. R. 16, 20.

#### Between 11 p. m. and 5 a. m.

A statute prohibiting the sale of liquor "between the hours of 11 o'clock p. m. and 5 o'clock a. m." means "the period intervening between 11 o'clock at night and 5 o'clock in the morning of the succeeding day. The statute contemplates reckoning forward the usual and natural way from 11 o'clock post meridian until 5 o'clock ante meridian, and this period necessarily begins in the night and terminates in the morning." *Hedderick v. State*, 1 N. E. 47, 51, 101 Ind. 564, 51 Am. Rep. 768.

### BEVER.

The word "bever," which is the root of the word "beverage," means "a little repast between meals." In *re Breslin* (N. Y.) 45 Hun, 210, 217.

### BEVERAGE.

See "Intoxicating Beverages."  
Other beverages, see "Other."

Lexicographers give the primary meaning of the word "beverage" as "liquor to be drunk"; "drink"; and, though there are other meanings, all involve the proposition that it is a drink. In *re Breslin* (N. Y.) 45 Hun, 210, 213.

The use of liquor as a beverage does not mean simply that the same is to be drunk, but the word "beverage" is used to distinguish the act of drinking liquor for the mere pleasure of drinking from its use for medicinal purposes. *Commonwealth v. Mandeville*, 8 N. E. 827, 142 Mass. 469.

Webster's International Dictionary defines a "beverage," as a liquid for drinking; drink; usually applied to drink artificially prepared and of an agreeable flavor. Specifically, a name applied to various kinds of drink. For the judge, in charging the jury, to use the word "beverage," is in no sense an expression of opinion that the drink referred to is intoxicating. It is as proper to apply the word "beverage" to a cup of coffee or a glass of lemonade as to a glass of beer or whisky. *Maddox v. State*, 44 S. E. 822, 823, 118 Ga. 69.

Worcester defines "beverage" as "liquor to be drank; drink." Webster defines the word as "liquor for drinking." Hence an information charging the sale of whisky as a

"beverage" is sufficient, under a statute making criminal such a sale "to be used as a beverage." The expression used implies a sale of the whisky to be drank; that is, to be used as a drink. *People v. Hichman*, 42 N. W. 1006, 1007, 75 Mich. 587, 4 L. R. A. 707.

In a statute providing that cider, when kept or deposited, with the intent to sell the same for tippling purposes, or "as a beverage," is intoxicating liquor, the expression "as a beverage" is synonymous with the words "tippling purposes," as commonly understood; but the phrase "tippling purposes," by its use in legislative enactments, has acquired a legal meaning restricting it to sales to be drunk on the premises, while the phrase "as a beverage," has no such restricted meaning, and must be construed as prohibiting the sale of cider as a beverage, whether sold to be used on the premises or elsewhere. *State v. Roach*, 75 Me. 123, 125.

### BEYOND.

Under a statute providing that it shall not be lawful to fill in the waters of the port "beyond the bulkhead line," the authority is given to fill up to, but not beyond, such line. *Williams v. City of New York*, 105 N. Y. 419, 11 N. E. 829, 832.

### BEYOND THE CAPE OF GOOD HOPE.

The words "beyond the Cape of Good Hope," as used in Act July 14, 1862, providing for the levy of a certain ad valorem duty on all manufactures of the growth or product of countries beyond the Cape of Good Hope, "when imported from places this side of the Cape of Good Hope," are employed as descriptive of the locality of certain countries, not of their relative position with respect to the port of import. They are used to avoid the necessity of designating the countries which lie east of the cape. "Beyond the cape" and "east of the cape" are often used in the acts of Congress as equivalent expressions. They indicate the locality of certain countries with reference to the position of the lawmakers at the national capital. *Hadden v. Barney*, 72 U. S. (5 Wall.) 107, 113, 18 L. Ed. 518.

### BEYOND THE CAUSE.

There is a distinction between the action of a court in a cause which the court has no right to take, unless all the parties are before it, and the action of the court "beyond" the cause. If any parties to the suit have died, the cause must be revived, before the court can take any action in the cause. By "action beyond the cause" is meant those measures which are necessary for the execution of a decree which has been pronounced, and which are properly to be



regarded as adopted, not in, but beyond, the cause, as founded on the decree itself, without respect to the relief to which the party was primarily entitled on the merits of the case. *Crislip v. Cain*, 19 W. Va. 438, 458.

### BEYOND THE LIFE OF THE OFFENDER.

"Beyond the life of the offender," as used in Act 1862, providing for the confiscation of enemies' property, and declaring that no proceedings under the act should be so construed as to work a forfeiture of his real estate beyond the life of the offender, means that the proceedings for the condemnation and sale shall not affect the ownership of the property after the termination of the offender's natural life. After his death the land shall pass or be owned as if it had not been forfeited. It is not a forfeiture of the life estate only, or of the possession and enjoyment of the property for life. *Wallach v. Van Riswick*, 92 U. S. 202, 208, 23 L. Ed. 473.

### BEYOND A REASONABLE DOUBT.

See "Reasonable Doubt."

The phrase "proof beyond a reasonable doubt" is synonymous with the term "moral certainty." *Woodruff v. State* (Fla.) 12 South. 653, 658; *Taylor v. Pegram* (Ill.) 37 N. E. 837, 839 (citing *Commonwealth v. Costley*, 118 Mass. 1); *Jones v. State* (Ala.) 14 South. 772, 773; *State v. Johnson*, 91 Mo. 439, 442, 3 S. W. 868, 869.

### BEYOND SEAS.

The term "beyond the seas," as used in statutes of limitation containing an exception in favor of persons "beyond the seas," has been held to mean "beyond or without the United States." *Davie v. Briggs*, 97 U. S. 628, 639, 24 L. Ed. 1086; *Thurston v. Fisher* (Pa.) 9 Serg. & R. 288, 291; *Darling v. Meachun* (Iowa) 2 G. Greene, 602, 603; *Marvin v. Bates*, 13 Mo. 217, 220; *Fackler v. Fackler*, 14 Mo. 432, 433; *Ward v. Hallam* (Pa.) 2 Dall. 217, 1 L. Ed. 355; *Kline v. Kline*, 20 Pa. (8 Harris) 503, 509; *Keeton's Heirs v. Keeton's Adm'r*, 20 Mo. 530, 543. A like construction was given to the term as used in the statute of wills. *Mason v. Johnson*, 24 Ill. (14 Peck) 159, 160, 76 Am. Dec. 740. The term does not include a person who, though without the state, is a resident of another state. *Ward v. Hallam* (Pa.) 1 Yeates, 829, 831; *Ward v. Hallam* (Pa.) 2 Dall. 217, 1 L. Ed. 355; *Earle v. Dickson*, 12 N. C. 16, 17; *Whitlocke v. Walton*, 6 N. C. 23, 24; *Thurston v. Fisher* (Pa.) 9 Serg. & R. 288; *Pike v. Greene*, 9 Tenn. (1 Yerg.) 465, 466. By another line of decisions, however, the term has been held to mean "out of the state." *Richardson's Adm'r's v. Rich-*

*ardson's Adm'r's*, 6 Ohio (6 Ham.) 125, 126, 25 Am. Dec. 745; *West v. Pickesimer*, 7 Ohio (7 Ham.) 235, pt. 2; *Denham v. Holeman*, 26 Ga. 182, 183, 71 Am. Dec. 198; *Murray's Lessee v. Baker*, 16 U. S. (3 Wheat.) 541, 545, 4 L. Ed. 454. Or "beyond or without the limits of the state." *Whitney's Lessee v. Webb*, 10 Ohio, 513, 516; *Smith v. Bartram*, 11 Ohio St. 690, 691; *Galusha v. Cobleigh*, 13 N. H. 79, 87; *Faw v. Roberdeau's Ex'r*, 7 U. S. (3 Cranch) 174, 177, 2 L. Ed. 402; *Stephenson v. Wait* (Ind.) 8 Blackf. 508, 515, 46 Am. Dec. 489; *Shelby v. Guy*, 24 U. S. (11 Wheat.) 381, 386, 6 L. Ed. 495; *Hulburt v. Merriam*, 3 Mich. 144, 151; *Shreve v. Whittlesey*, 7 Mo. 473, 474; *Mason v. Baltimore & O. R. Co.*, 32 Atl. 311, 313, 81 Md. 446, 29 L. R. A. 273, 48 Am. St. Rep. 524; *Forbes' Adm'r v. Foot's Adm'r* (S. C.) 2 McCord, 331, 332, 13 Am. Dec. 732. Or "beyond or without the jurisdiction of the state." *Wakefield v. Smart*, 8 Ark. (3 Eng.) 488, 489; *Field v. Dickinson*, 3 Ark. (3 Pike) 409, 414, 36 Am. Dec. 458; *Bedford v. Bradford*, 3 Mo. 223, 234; *Bank of Alexandria v. Dyer*, 39 U. S. (14 Pet.) 141, 145, 10 L. Ed. 391.

The term "beyond the sea," as understood by the judges of England, law writers, and Parliament, meant, prior to the union of the crowns of England and Scotland, out of the realm of England, and, after such union, signified out of the realm of Great Britain, including England and Scotland. *Pancoast's Lessee v. Addison* (Md.) 1 Har. & J. 350, 353, 2 Am. Dec. 520; *Lane v. Bennett*, 1 Mees. & W. 70, 75.

As used in St. 1821, c. 22, § 2, providing a penalty for transporting a minor out of the state to parts "beyond the sea" without the consent of his parent, master, or guardian, the term "beyond the sea" means some foreign port or place, and not merely another state. *Campbell v. Rankins*, 11 Me. (2 Fairf.) 103, 106.

The Massachusetts statute of limitations provided that the statute should not run against one "beyond sea, without any of the United States." It is held that a citizen of another state, who had never been within the commonwealth, was not a person "beyond sea, without any of the United States," as the words did not point out two distinct disabilities—one that of being beyond sea, and another that of being without the United States. *Whitney v. Goddard*, 37 Mass. (20 Pick.) 304, 308, 32 Am. Dec. 216.

### BIAS.

Actual bias, see "Actual Bias."

Bias, according to Webster, is a leaning of the mind; propensity or prepossession toward an object or view, not leaving the mind indifferent; bent; inclination. *Mitchell v.*

State, 36 S. W. 456, 464, 36 Tex. Cr. R. 278; Gulf, C. & S. F. Ry. Co. v. Gilvin (Tex.) 55 S. W. 985, 986. The term is so used in Code Cr. Proc. Tex. art. 636, subd. 12, providing that a bias in favor of a defendant is as much a cause for challenge as a prejudice against him. Withers v. State, 17 S. W. 936, 30 Tex. App. 393. And in Comp. Laws S. D. § 5040, referring to "bias" as a disqualification of a juror. Haugen v. Chicago, M. & St. P. Ry. Co., 53 N. W. 769, 771, 3 S. D. 394.

Anderson says, "Bias in a juror is being under an influence which so sways his mind to one side as to prevent his deciding the cause according to the evidence." Haugen v. Chicago, M. & St. P. Ry. Co., 53 N. W. 769, 771, 3 S. D. 394.

Bias is that which sways the mind toward one opinion rather than another. Olive v. State, 11 Neb. 1, 23, 7 N. W. 444, 450. It is "anything which turns a man to a particular course, propensity, inclination." One whose opinion is preconceived and expressed is inclined to that side, and some evidence is necessary before these impressions can be removed and his mind restored to the straight line of indifference. Thus, though a juror may have no ill will toward the accused, if he has formed and expressed an opinion as to his guilt, his mind has a bias resting on it. Hudgins v. State, 2 Ga. (2 Kelly) 173, 176.

A juror who has a fixed opinion as to the guilt of an accused, though formed from hearsay, is incompetent to try the case, on the ground of bias. Maddox v. State, 32 Ga. 581, 587, 79 Am. Dec. 307.

A juror who testified on his voir dire, "It is a fact that I have a feeling in this case; would go into the jury box with a feeling towards one of the parties to the suit;" and explained what he meant by "feeling" by saying, "Well, it is a kind of friendly feeling I have towards a man; a kind of sympathy I have; something like that; I suppose"—was disqualified, within the meaning of Rev. St. art. 3141, providing that a person shall be disqualified in any case to serve on the jury who has a bias or prejudice in favor of or against either of the parties. Gulf, C. & S. F. Ry. Co. v. Gilvin (Tex.) 55 S. W. 985, 986.

The word "bias," as used in Code Cr. Proc. art. 636, prescribing as cause for the challenge of a juror that the juror has a bias in favor or against defendant, means a leaning of the mind, not leaving the mind indifferent. A juror who testified that he had known defendant and had had business transactions with him for years past, and that he liked defendant, and would dislike very much to find him guilty, showed bias in favor of defendant, warranting the court in excluding him as a juror. Pierson v. State, 18 Tex. App. 524, 558.

As to the question of bias the court instructed the jury as follows: "'Bias' means a leaning or inclination towards or against the accused. You will be asked whether or not your mind is perfectly impartial between the state and the accused; that is, whether the juror is perfectly perpendicular between the state and the accused—whether he is in such a condition as to be swayed the one way or the other by the testimony." Hinkle v. State, 21 S. E. 595, 601, 94 Ga. 595.

#### Prejudice distinguished.

"Bias" and "prejudice" are not synonymous terms. "Prejudice" is defined by Webster as to prepossess with unexamined opinions, or opinions formed without due knowledge of the facts and circumstances attending the question; to bias the mind by hasty and incorrect notions, and to give it an unreasonable bent to one side or other of a cause. Bias is the leaning of the mind, inclination, prepossession, propensity towards some person or object, not leaving the mind indifferent. If the opinion formed by a juror be such as to bias or prejudice his mind, he should not be sworn. State v. Barton, 71 Mo. 288, 296.

"Bias" is a particular influential power which sways the judgment—the inclination of the mind toward a particular object—and is not synonymous with "prejudice." A man cannot be prejudiced against another without being biased against him, but he may be biased without being prejudiced. Willis v. State, 12 Ga. 444, 449.

#### BICYCLE.

Bicycles were invented as early as 1819. The form in which they were first made resembles their general appearance to-day, the material differences being in the manner of propulsion. At first they were driven by striking the feet of the rider against the ground. Now they are propelled by the action of the feet of the rider upon pedals attached to a crank over which a chain runs, connecting the rear wheel. In 1869 the present principle of locomotion was adopted. At that time the relative size of the two wheels was changed, so that one was many times larger than the other. Now, however, the change in the size of the wheels has been abandoned, and the original equality in that respect restored. When first used they were termed "velocipedes." Shortly afterwards the term "bicycle" was universally adopted. Both terms are treated as convertible by the lexicographers, and are defined as a light vehicle or carriage. State ex rel. Bettis v. Missouri Pac. Ry. Co., 71 Mo. App. 385, 390.

A bicycle is a vehicle now used very extensively for convenience, recreation, pleasure, and business, and the riding of one on a public highway in the ordinary manner, as the same is now done, is neither unlawful

nor prohibited; nor can a person whose horse is frightened by one object to their use on the street because they are not ancient vehicles, nor used in the Garden of Eden by Adam and Eve. *Thompson v. Dodge*, 60 N. W. 545, 546, 58 Minn. 555, 28 L. R. A. 608, 49 Am. St. Rep. 533.

The terms "bicycle" and "tricycle," as used in the section relating to bicycle riding, shall be deemed to include all vehicles propelled by the person riding the same by foot or hand power. Gen. St. Conn. 1902, § 2061; Rev. Laws Mass. 1902, p. 531, c. 52, § 12.

The terms "bicycle" and "tricycle," as used in the act regulating the use of highways, etc., shall be deemed to include all vehicles propelled by the person riding the same, either wholly or in part. Pub. St. N. H. 1901, p. 256, c. 93, § 2.

The word "bicycles," as used in an act relating to bicycle paths, shall be deemed to include bicycles, tandems, quads, etc. A bicycle is a vehicle propelled by a rider by foot power. Ann. Codes & St. Or. 1901, § 4876.

#### **As a carriage or vehicle.**

See "Carriage"; "Vehicle."

#### **As a tool.**

See "Tools—Tools of Trade."

#### **Tricycle included.**

A tricycle, not being a bicycle, or known by the general term "bicycle," does not come within the provisions of an ordinance prohibiting the use of sidewalks by all varieties of vehicles known by the term of "bicycle." *Wheeler v. City of Boone*, 78 N. W. 909, 910, 108 Iowa, 235, 44 L. R. A. 821.

#### **BICYCLE PATH.**

A bicycle path is a highway for bicyclists and pedestrians. *Ellis v. Frazier*, 63 Pac. 642, 644, 38 Or. 462.

#### **BID.**

See "Unbalanced Bid"; "Upset Bid."

Where a bond guaranties the carrying out by a third party of his "bid" for carrying the mail, the word "bid" means contract. *Carr's Ex'r v. Wyley*, 23 Ala. 821, 825.

#### **As offer to purchase.**

"A 'bid' means an offering of so much money for the property exposed for sale, not the mere verbal saying of the party that he will give so much." *State v. Johnston*, 2 N. C. 293, 294.

"A bid at an auction is but an offer to purchase." It does not constitute a contract

until it is accepted, and hence may be withdrawn before such acceptance. *United States v. Vestal* (U. S.) 12 Fed. 59.

At auction a bid is nothing more than an offer on one side, which is not binding on either side until it is assented to. The bid does not complete the contract, because the party selling is not bound by the bid, but may, in case of a higher bid, sell to another; and, where there is no acceptance by one of the parties, the contract is not complete. *Paine v. Cave*, 3 Term R. 148, 149.

In its comprehensive sense, bidding is making an offer, but in its more ordinary acceptation it signifies the making of an offer at an auction. Bouv. Law Dict. One is said to bid off a thing when he bids at an auction, and the thing is knocked down to him in immediate succession to the bid, and as a consequence of it. The expression "bidding off" a contract at public letting would manifestly be perverted in using it for the description of a transaction in which proposals were made and privately passed on, uncontrolled by the consideration of the lowest bid. If a private gentleman should advertise for proposals to do a work, and, after receiving the proposals, should, in the exercise of his discretion, award the contract to one of the proposers, no one would say that the contract had been bid off at a public letting. *Eppes v. Mississippi, G. & T. R. Co.*, 35 Ala. 33, 56.

#### **Sale implied.**

Under a statute requiring the commissioners of a school fund to sell forfeited mortgaged premises to the highest bidder, and requiring the commissioners, if no one will bid the full amount, to bid on the same on account of such fund, the word "bid" seems to imply that there is to be a sale; and the object requiring the commissioners to bid is to enable them in all cases to make a sale, and thus cut off the mortgagor's equity of redemption. *Krebs v. Dodge*, 9 Wis. 1, 11.

#### **BID OFF.**

One is said to bid off a thing when he bids it in at auction, and the thing is knocked down to him in immediate succession to the bid, and as a consequence of it. *Eppes v. Mississippi, G. & T. R. Co.*, 35 Ala. 33, 56.

The bidding off of property at a tax sale by the treasurer in the name of the county and for the county is a sale. The county, when it bids off property at a tax sale, becomes a purchaser, and does not simply bid off the property and hold it until some one pays the taxes and penalties thereon, and takes an assignment of the bid from the county. *Doudna v. Harlan*, 25 Pac. 883, 885, 45 Kan. 484.

## BIDDER.

See "Best Bidder"; "Highest Bidder"; "Lowest Bidder"; "Lowest Responsible Bidder"; "Responsible Bidder."

Under a statute providing for the sale of certain property to the highest bidder making sealed proposals, persons filing proposals offering to pay a fixed sum over and above the highest bid of the highest responsible bidder are not within the meaning of the act. *Webster v. French*, 11 Ill. (1 Peck) 254.

## BIENES.

The term "bienes" appears to be of comprehensive import, and includes all things, not being persons, which may serve for the uses of man. It may perhaps be rendered by the word "property," and, as used in an order reciting "los bienes pertenentes a las misiones," would seem to refer to those cultivated lands, orchards, etc., and other appurtenances, such as houses, workshops, utensils, etc., belonging to the missionaries. *Larkin v. United States* (U. S.) 14 Fed. Cas. 1150, 1154.

### BIENES COMUNES.

"Bienes comunes are those things which, not being as to property of any, pertain to all as to their use—as the air, rain, water, the sea, and its beaches. *Escrache*." *Lux v. Haggin*, 69 Cal. 255, 315, 10 Pac. 674, 707.

### BIENES GANANCIALES.

"Bienes gananciales" is the term under which *Escrache*, in his dictionary, treats of the respective rights of the husband and wife in the property held by them; and he says that among bienes gananciales are not considered those which the consorts had at the time of contracting the marriage. *Welder v. Lambert*, 44 S. W. 281, 284, 91 Tex. 510.

### BIENES PUBLICOS.

"Bienes publicos are those which, as to property, pertain to the people or nation, and, as to their use, to the individuals of the territory or district, such as rivers, shores, ports, and public roads. *Escrache*." *Lux v. Haggin*, 69 Cal. 255, 315, 10 Pac. 674, 707.

## BIENNIAL.

"The word 'biennial' is derived from the Latin words 'bis,' twice, and 'annus,' year, meaning the happening or taking place of anything once in two years." *State ex rel. Shields v. Smith*, 42 Mo. 506, 507.

### BIENNIALLY.

Where a mayor is required to biennially appoint certain ministerial officers which are

named, the word "biennially" evidently and beyond any question has reference to the time of the appointment, and signifies that the mayor then and there, immediately on his accession to office, shall make the appointment. *People v. Kilbourn*, 68 N. Y. 479, 482; *Same v. Tremain* (N. Y.) 9 Hun, 573, 576 (affirmed 68 N. Y. 628).

## BIENS.

The Norman French term "biens" is said to include property of every description, except estates of freehold. Lord Coke says "goods, biens, bona, includes all chattels as well as real and personal." *McCaffrey v. Woodin*, 65 N. Y. 459, 469, 22 Am. Rep. 644 (citing Co. Litt. 118b).

*Bouvier*, in his Law Dictionary, defines the French word "biens" to mean "property of every description, except estates of freehold and inheritance." But this is evidently the strict meaning which it has as it is defined by the common-law writers, because, immediately after this definition, he adds these words: "In the French law this term includes all kinds of property, real and personal. Biens are divided into biens meubles, movable property, and biens immeubles, immovable property." It would thus appear that the word, as used in the French language, has a meaning in the civil law which includes both real and personal property. In a note to section 13, *Story, Conf. Laws* (8th Ed.), it is said: "The term 'biens,' in the sense of civilians and continental jurists, comprehends not merely goods and chattels, as in the common law, but real estate." It is also said in a note to section 146 of the same work: "Foreign jurists, commonly, in the term 'biens,' include all sorts of property, movable and immovable, in their discussions on this subject" *Adams v. Akerlund*, 168 Ill. 632, 639, 48 N. E. 454, 457 (citing *Bouv. Law Dict.*).

## BIGAMY.

The word "bigamy" signifies, as its derivation clearly indicates, being twice married. According to the canonists, bigamy consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow. By a corruption of the meaning of the term bigamy is now understood, in law, to be the state of a man who has two wives, or of a woman who has two husbands, living at the same time. *Commonwealth v. McNerny* (Pa.) 10 Phila. 206, 207, 31 Leg. Int. 172.

It is said in *Bacon's Abridgment* that "bigamy" is the having a plurality of wives, and that the offense consists of marrying a second wife, the first being alive. *Bouvier* defines it to be the state of a man who has two wives, or of a woman who has two hus-

bands, living at the same time. Blackstone says, "It is the having a plurality of wives at once." Act March 31, § 34 (P. L. 392), defines "bigamy" as, "If any person shall have two wives or two husbands at one and the same time." *Glise v. Commonwealth* (Pa.) 2 Wkly. Notes Cas. 589; *Glise v. Commonwealth*, 81 Pa. (31 P. F. Smith) 428, 430. It is a statutory, and not a common-law, crime. It was not an offense at common law to marry a second time during the life of the first husband or wife, but it was a canonical offense. "Bigamy," says Horton in his work on Criminal Law, "is committed by a party who, when legally married to one person, marries another." *Niece v. Territory*, 60 Pac. 300, 302, 9 Okl. 535.

Bigamy is the marrying by a person who has a husband or wife living. *Scoggins v. State*, 32 Ark. 205, 213. It is the having of two wives or two husbands at the same time. *Commonwealth v. Grise* (Pa.) 11 Phila. 655. As defined by the Code, it is knowingly having a plurality of husbands or wives at the same time. *Nelms v. State*, 10 S. E. 1087, 84 Ga. 466, 20 Am. St. Rep. 377.

The one who contracts a second marriage before the dissolution of the first is guilty of bigamy, and hence an indictment charging that defendant was married, and, while married and undivorced, knowingly and unlawfully married one named in the indictment, the indictment sufficiently charges the offense of bigamy, though it was not named in the indictment. And the word "bigamy," as used in the statute denouncing the offense, is used in its universally understood meaning, so that a description of the offense would not express more than the word itself. *State v. Hayes*, 29 South. 937, 938, 105 La. 352.

#### **Sexual intercourse.**

Bigamy is the marrying by one person who has a husband or wife. The offense is completed at the time of the marriage, without any subsequent cohabitation. *Beggs v. State*, 55 Ala. 108, 111.

Under Cr. Code 1896, § 4406, providing that, if any person having a former husband or wife living marries another, or continues to cohabit with such second husband or wife in this state, he or she shall be guilty of bigamy, the crime is committed by living under the same roof and acknowledging each other as husband and wife, though the parties may be physically incapable of having sexual intercourse. *Cox v. State*, 23 South. 806, 117 Ala. 103, 41 L. R. A. 760, 67 Am. St. Rep. 166.

#### **BIGAMIST.**

Any man is a polygamist or bigamist, who, having previously married one wife, still living, and having another at the time

when he presented himself to claim registration as a voter, still maintains that relation to a plurality of wives, although from the date of the passage of the act of March 22, 1882, c. 47, 22 Stat. 30 [U. S. Comp. St. 1901, p. 3633], until the day he offers to register and vote, he may not, in fact, have cohabited with more than one woman. *Cannon v. United States*, 6 Sup. Ct. 278, 287, 116 U. S. 55, 29 L. Ed. 561 (citing *Murphy v. Ramsey*, 114 U. S. 15, 5 Sup. Ct. 747, 29 L. Ed. 47).

#### **BIGAMOUS COHABITATION.**

The bigamous cohabitation prohibited by the Edmunds act for the prevention of bigamy in Utah is the pretending or making show to the outside world of keeping up the polygamous or bigamous relations. *United States v. Snow*, 9 Pac. 686, 687, 4 Utah, 295.

#### **BIG WITH CHILD.**

"Big with child" is equivalent to "quick with child." *State v. Cooper*, 22 N. J. Law (2 Zab.) 52, 55, 51 Am. Dec. 248.

#### **BIJOU.**

"The term 'bijou' which seems to be very nearly analogous to the English word 'jewelry,' is defined to be a little work of ornament, valuable for its workmanship or by its material." *Commonwealth v. Stephens*, 31 Mass. (14 Pick.) 370, 373 (quoting *Dict. de l'Acad.*).

#### **BILATERAL.**

Having two sides; arranged upon two sides; affecting two sides or parties. Webster.

#### **BILATERAL CONTRACT.**

A "bilateral contract" consists of mutual promises to do some future act. If the consideration for a promise is another promise, the whole agreement may be contingent, to come into effect only at the will of one of the parties. *Montpeller Seminary v. Smith's Estate*, 38 Atl. 66, 69 Vt. 382.

#### **BILATERAL RECORD.**

A record is bilateral when introduced between parties and privies, and, when so, cannot be disputed. *Colligan v. Cooney*, 64 S. W. 31, 33, 107 Tenn. 214.

#### **BILGE.**

A vessel is bilged, in the nautical sense of the phrase, as well as in the opinion of lexicographers, where the water is freely admitted through holes and breaches made in

the planks of the bottom, occasioned by the injuries, whether the ship's timbers are broken or not. *Peele v. Merchants' Ins. Co.* (U. S.) 19 Fed. Cas. 98, 103.

"Bilging," as used in a policy of marine insurance providing that the assurers are not liable for any partial loss unless the damage happens by straining or "bilging," means a breach in the vessel. Where a vessel was very much strained, and her seams opened and let in water, but there was no actual breach of a plank in the ship, there was not a bilging. *Ellery v. Merchants' Ins. Co.*, 20 Mass. (3 Pick.) 46, 47.

## BILL

All bills, see "All."

The word "bills," in Kingston City Charter (Laws 1872) c. 152, § 34, providing that it shall be the duty of the mayor to approve or disapprove all bills, orders, resolutions, or ordinances, etc., does not refer to the claim or claims against the city for services rendered or materials furnished, but refers to something in the nature of a legislative act, and therefore the mayor has no authority to veto a part or a single item of a resolution of the city approving and auditing money claims against it. "If the construction contended for by the learned corporation counsel is correct, and the word 'bills' relates to claims against the city, the veto or disapproval of the mayor would be a finality, as the common council has nowhere authority to reconsider the action of the mayor in disapproving bills; so that a bill against the city, disapproved of by the mayor, would stay disapproved of, so far as the common council are concerned. It cannot, I think, be successfully contended that the Legislature ever intended to thus submit honest claims against a municipality to the pique, prejudice, or honest mistake of any mayor." *Cloonan v. City of Kingston*, 75 N. Y. Supp. 425, 426, 37 Misc. Rep. 322.

### In commercial law.

See "Duebill"; "Freight Bill"; "Hand-bill."

"Bill," as used in a contract for the sale of coffees, providing that the sellers agree to "bill" cordova coffee at the same price f. o. b. Pittsburg as certain other companies, is not synonymous with "deliver." *Dannemiller v. Kirkpatrick*, 50 Atl. 928, 929, 201 Pa. 218.

### Same—As an account.

"Bills," as used in Pub. Laws, providing that the amount received from the sale of certain scrip is appropriated for the payment of bills audited by a certain board, and the state auditor is authorized to draw his order upon the general treasurer for the payment

of all bills out of the amount so received, should be construed in its primary signification of an account for goods sold, services rendered, or work done, with the prices or charges annexed, though it is doubtless applied often in public speech to the statement of a claim in gross as well as by items. In *re Statehouse Bills*, 35 Atl. 212, 19 R. I. 390; In *re State House Commission* (R. I.) 33 Atl. 453, 454.

The word "bill," as used in Rev. St. § 833, relating to the forgery of a bill and bill of exchange, is not used in the sense employed by lexicographers, as conveying an account of charges and particular indebtedness by the creditor to his debtor. The word "bill" is qualified by the words "of exchange." *State v. Murphy*, 46 La. Ann. 415, 419, 14 South. 920.

### Same—As bank bill or note.

The word "bills," when used as a subject or medium of payment, means bank notes of some description. *Jones v. Fales*, 4 Mass. 245, 252.

A note payable in "York State bills or specie" is the same thing as being made payable in lawful current money of the state, for the bills mentioned mean bank paper, which is here, in conformity with common usage and common understanding, regarded as cash. *Keith v. Jones* (N. Y.) 9 Johns. 120, 121.

A bank bill or currency bill, when spoken of as money, is usually called a "bill," without adding the words "bank bill" or "United States currency bill." Thus, when the words "one \$5 bill in money" are used to designate it, we understand that a paper bill of the denomination and of the value of \$5, a circulation medium which passes as money, is meant. An indictment charging the theft of a \$5 bill in money is a sufficient description of the stolen property, without reciting that it is a bank bill or paper currency money of the United States. *Green v. State*, 13 S. W. 784, 785, 28 Tex. App. 493.

### Same—As bill of exchange or single bond.

A bill is a common engagement for money, given by one man to another, being sometimes with a penalty, called a "penal bill," and sometimes without a penalty, then called a "single bill," although the latter is most frequently used. By a "bill" we ordinarily understand a single bond without a condition. *Tracy v. Talmage* (N. Y.) 18 Barb. 456, 462; *Tracy v. Tallmadge* (N. Y.) 9 How. Prac. 530, 536; *Briscoe v. Bank of Kentucky*, 36 U. S. (11 Pet.) 257, 328, 9 L. Ed. 709; *Tracey v. North American Trust & Banking Co.*, 12 N. Y. Leg. Obs. 303, 306.

A "bill" is an order drawn by one person on another to pay a certain sum of money absolutely and at all events. The order can-

not be paid out of a particular fund, but must be drawn on the general credit of the drawer, though it is no objection, when so drawn, that a particular fund is specified from which the drawee may reimburse himself. *Munger v. Shannon*, 61 N. Y. 251, 255 (cited and approved in *Schmittler v. Simon*, 5 N. E. 452, 454, 101 N. Y. 534, 54 Am. Rep. 737).

*Swan's St. 1877*, entitled "An act for the relief of sureties and bail in certain cases," provides that when any person shall become bound as surety by bond, bill, or note for the payment of money or other valuable thing, and shall apprehend that the principal debtor is likely to become insolvent or remove from the state, such surety, if a cause of action shall have accrued, may forthwith put such bond, bill, or note in suit, and that, unless the creditor within a reasonable time commence an action on the bond, bill, or note, the surety shall be released from liability. Held, that the word "bill" means bill of exchange and not a single bond. *Ohio Life Ins. & Trust Co. v. McCague*, 18 Ohio, 54, 66.

As used in the negotiable instruments law, "bill" means bill of exchange. N. D. Negotiable Instruments Law, § 191; Rev. Codes N. D. 1899, § 1060. The word "bill," as used in the negotiable instruments act, means bill of exchange. Ann. Codes & St. Or. 1901, § 4592. The term "bill," as used in the negotiable instrument law, means bill of exchange. Rev. Laws Mass. 1902, p. 653, c. 73, § 207. "Bill," as used in the negotiable instruments law, means bill of exchange. Code Supp. Va. 1898, § 2841a. As used in the chapter relating to negotiable instruments, "bill" means a bill of exchange. *Bates' Ann. St. Ohio 1904*, § 3178.

#### Same—Bond.

Instruments issued by a corporation by which it declares itself to be held and firmly bound to pay W. M. or his assigns, on a day certain, a specified sum, with interest payable semiannually on the presentation and delivery of certain warrants therefor, which were annexed to the obligation, and provided that, upon complying with certain conditions therein specified, the holder of the instrument should become entitled, in lieu of such sum, to a specified amount of the capital stock of the company, are not bills or notes within the meaning of the safety fund act, prohibiting moneyed corporations from issuing any bills or notes unless the same should be made payable on demand and without interest. *Leavitt v. Blatchford*, 17 N. Y. 521, 539.

#### Same—Draft.

The words "bill or note," in a statute providing that no banking association shall issue or put in circulation any bill or note, etc., mean any circulating bill or note, deposited and likely to be used as a substitute

for money. The terms do not include a draft, not payable by its terms to order or bearer, although expressed in dollars and not in foreign coin, and drawn on a domestic, and not a foreign, place. *Curtis v. Leavitt*, 17 Barb. 309, 341.

A postdated draft taking effect by delivery is a time draft, and within the meaning and intent of the statute against like bills and notes, declaring that no banking association or individual banker, as such, shall issue or put in circulation any "bill or note" of such association or individual banker, unless the same shall be made payable on demand and without interest. *Oneida Bank v. Ontario Bank*, 21 N. Y. 490, 494.

#### Same—Thing in action.

See "Thing in Action."

#### In legislation.

See "Money Bill"; "Omnibus Bill"; "Skeleton Bill."

Local bill, see "Local Law."

Private bill, see "Private Act."

Perhaps as accurate a definition of a "bill" as can be found is that given in Webster's dictionary: "A form or draft of a law presented to a legislature, but not yet enacted, or before it is enacted; a proposed or rejected law." "In some cases, statutes are called 'bills'; but usually they are qualified by some description, as a 'bill of attainder.' 'Bills' and 'acts' are sometimes used as synonymous terms." Cushing, § 2025. The definition of a bill as given by Webster is that usually accepted and acted upon. The idea conveyed by the word "bill" is different from that conveyed by the word "resolution." Bills may originate in either house, except revenue bills. Const. § 17. A bill must be read by sections on three different days, etc. Const. § 18. A joint resolution of different sections, doubtless, may be passed on one reading. *May v. Rice*, 91 Ind. 546, 549.

In a technical sense, the term "bill" is applicable properly to the enactment as a whole. Although the technical sense of words should prevail, where not inconsistent with the clear intent of the instrument, yet when such intent requires that words should be used in the larger sense, it is competent so to regard them. If we should hold that the Constitution regards the enactment as a whole, in an exclusive sense, we should be led to the conclusion that to become a law, all the substantial parts of the measure must have together passed through all the requisite stages before it became a law. *State v. Platt*, 2 S. C. (2 Rich.) 150, 153, 157, 16 Am. Rep. 647.

A "bill" is a form of a draft of a law presented to a Legislature but not enacted. After a bill has passed both branches of the Legislature and received the approval of the

government, it becomes a law; but until then is a bill, a draft of a proposed law. And under a statute declaring that whosoever shall add to, alter, deface, erase, or mutilate any bill pending before either branch of the General Assembly shall be guilty of felony, the writing on the outside of a bill indorsements stating that it had passed, but in no manner changing or altering the bill itself, does not constitute an offense. *State v. Hegeman* (Del.) 44 Atl. 621, 622, 2 Pennewill, 147.

Within the contemplation of the Constitution requiring several reading of bills before their passage, a "bill" means a draft of the proposed law, and nothing else. After a bill has been introduced in one house, and an amendment which changes one or more of its original features or adds new features is adopted by such house, the amendment then enters into and becomes a part of the bill, as if it had been incorporated in the draft of the proposed law before it was introduced into such house. The Constitution provides that no law shall be passed except by bill, and further says, "nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon." The term as here used is generic, and it means not only the draft of the proposed law as originally introduced, but such draft with all of the draftings which may be made thereon. *Cohn v. Kingsley*, 49 Pac. 985, 993, 5 Idaho, 416, 38 L. R. A. 74.

#### Same—As law or act.

"Bill," as used in Const. art. 4, § 18, declaring that no private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title, is synonymous with the word "law" or "act." *Durkee v. City of Janesville*, 26 Wis. 697, 703. See, also, *People v. Lawrence* (N. Y.), 36 Barb. 177, 187.

The language of the constitutional provision that no legislative enactment shall contain more than one subject, which shall be clearly expressed in its title, differs in some respects in the different states. In some the word "act" is used, while in others the word "bill" or "law" is used. However, each of these provisions, as presented to the courts, means the final determination of the Legislature upon the particular subject embraced in such bill, act, or law. The word "act" is probably the best word to use, for it includes no action of the Legislature or of any person prior to the final act of the Legislature, and it includes the whole of the act; nothing more and nothing less. The word "law" is probably the worst word to use, for a portion of any act may be law, as well as the whole of the act. The word, however, as used in such connection is intended to be synonymous with "act." The

word "bill" means the bill as it is first introduced, and as it may be at any time or in any of its stages until it is finally passed, signed by the necessary officers, and filed away as the highest evidence of what the law is. And when it is thus filed it is called the "enrolled bill." Where the constitutional provision uses the word "bill," it means that if any bill should in any stage be in conflict with the provision it should be amended by the Legislature, and if the Legislature should fail to correct it the bill itself, or some portion of it, would be void. *Sedgwick County Com'rs v. Bailey*, 13 Kan. 600, 608.

A "bill" is the draft or form of an act presented to the Legislature, but not enacted, and is not synonymous with "act," which is the appropriate term for the draft or form after it has been acted on by and passed the Legislature, when it becomes something more than a draft. *Southwark Bank v. Commonwealth*, 26 Pa. (2 Casey) 446, 450.

"Bill" is often used as synonymous with "act" or "law," but properly means the act as it is first introduced into one of the houses of the Legislature, and as it may be at any time in any of its stages until it is finally passed by both houses and signed by the officers of each house and by the Governor. *Sedgwick County Com'rs v. Bailey*, 13 Kan. 600, 608.

#### In pleading.

See "Ancillary Bill"; "Bill of Middlesex"; "Creditors' Bill"; "Cross-Bill"; "Fishing Bill"; "Original Bill"; "Supplemental Bill."

In the language of Story (Eq. Pl. § 268), a bill in chancery is not only a pleading for the purpose of bringing before the court and putting in issue the material allegations and charges on which the plaintiff's right to relief rests, but it is also in most cases an examination of a defendant on oath for the purpose of obtaining evidence to establish the plaintiff's case, or to counterprove or discharge the offense which may be set up by such defendant in his answer. *Feeney v. Howard*, 21 Pac. 984, 986, 79 Cal. 525, 4 L. R. A. 826, 12 Am. St. Rep. 162.

The term "bill," as used in equity pleadings, is the name of the pleading by which the complainant sets out his cause of action. *United States v. Ambrose*, 2 Sup. Ct. 682, 683, 108 U. S. 336.

The term "bill" is frequently used to designate the first pleading on the part of the plaintiff in causes which are equitable in their nature, although there is but one form of action in the state, which is designated as a "civil action," and though the word "complaint" may be correctly used to designate the first pleading of the plaintiff



in all such cases. *Sharon v. Sharon*, 7 Pac. 456, 457, 67 Cal. 183.

The word "bill" or "complaint," when found in the Code of Civil Procedure, shall mean "petition." *Cobbeys' Ann. St. Neb.* 1903, § 1851.

#### **BILL AND NOTE BROKER.**

A bill and note broker is a broker who buys and sells notes and bills of exchange. *City of Little Rock v. Barton*, 33 Ark. 436, 444.

A bill and note broker is one who negotiates the purchase and sale of bills of exchange and promissory notes, but no person can be considered a broker who buys notes and bills for himself. *Gast v. Buckley* (Ky.) 64 S. W. 632, 633.

The words "bill broker," as used in Act May 27, 1841, imposing a tax on bill brokers, is used in the sense of street brokers, as that phrase is used in the great commercial cities of the country, and are the agents and go-betweens of others, whereby the discount of bills in the street for an enormous usury is effected, and for which they receive a regular commission. *Commonwealth v. Holmes*, 11 Pa. (1 Jones) 468, 470.

#### **BILL FOR ACCOUNT.**

The phrases "bill for account" and "account rendered" were formally employed in a common-law practice to denote the procedure by which the account was secured, and the frequent inadequacy of the remedy at law or by jury trial gave rise to the equitable remedy of account. *Field v. Brown*, 45 N. E. 464, 465, 146 Ind. 293.

#### **BILL FOR NEW TRIAL.**

Where, after judgment has been rendered at law, facts are proven which show it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, a court of equity is authorized to interfere by injunction to restrain the adverse party from availing himself of such judgment, and bills setting up such facts and seeking such relief are called "bills for a new trial." *Spokane Co-operative Min. Co. v. Pearson*, 68 Pac. 165, 168, 28 Wash. 118.

#### **BILL FOR RAISING REVENUE.**

Ky. St. art. 2, § 80, declares that "all bills for raising revenue shall originate in the House of Representatives." Held, that a "bill for raising revenue," as the term has

been used and construed, means what are usually termed "money bills," and applies in general to bills for the levy of taxes in the strict sense of the term, and, as used in the federal Constitution, embraced all appropriations of money from the public treasury, whether the bill either provides for the levy of taxes, capitation or ad valorem, upon the people, or is a part of a system of laws or another bill which does so provide. "The principle underlying this provision of the Constitution is founded on the ground that the people are bound to pay the taxes to support the government, in consideration of protection to their lives, liberty, and property, and hence the payer of taxes was placed in the hands of the popular branch of the Legislature as a means of security to the people, from whom its members are selected, against exactions by taxation for other and strictly governmental purposes; and hence this view excludes from the comprehension of this constitutional clause such bills as appropriate money to or from the treasury raised from the people in consideration of other benefits and services than protection in their life, liberty, and property." And it is therefore clear that from every source that "bills for raising revenue" are confined to bills to levy taxes in the strict sense of the word, and do not embrace bills for other purposes which incidentally create revenue, unless so framed as to draw money from the people with no other advantage or benefit to them except the general protection which belongs to the citizens under our form of government as a matter of common rights. *Commonwealth v. Bailey*, 81 Ky. 395, 399. Any law which has for its object the taking of money from the people is a "bill for raising revenue." A bill regulating postal rates for postal services provides an equivalent for the money which the citizen may pay. He gets the service or lets it alone as he pleases, and hence the bill is not one to raise revenue. *Commonwealth v. Bailey*, 3 Ky. Law Rep. 110, 117.

#### **BILL FOR SPECIFIC PERFORMANCE.**

A "bill for specific performance" is a bill seeking to enforce the performance of a contract in the specified form in which it was agreed upon, and is addressed to the discretion or to the extraordinary jurisdiction of equity, and cannot be exercised in favor of those who have slept on their rights, or acquiesced in a title in possession adverse to their claim. *Van Doren v. Robinson*, 16 N. J. Eq. (1 C. E. Green) 256, 263.

#### **BILL IN THE NATURE OF INTERPLEADER.**

See, also, "Bill of Interpleader."

A "bill in the nature of an interpleader" lies by a party in interest to ascertain and

establish his own rights when there are other conflicting rights between the third person, as where a mortgagor wishes to redeem a mortgaged estates, and there are conflicting claims between third persons as to their title to the mortgage money, he may bring them before the court to ascertain their rights, and to have a decree for redemption, and to make a secure payment to the party entitled to the money. By such bill the plaintiff seeks relief as well as protection. *Pusey & Jones Co. v. Miller* (U. S.) 61 Fed. 401, 403.

A "bill in the nature of an interpleader" is one in which the complainant asks some relief over and above a mere injunction against suit by the contesting parties, and states facts which entitle him to such relief independent of the fact of the adverse claims of the several defendants. *Van Winkle v. Owen*, 84 Atl. 400, 401, 54 N. J. Eq. 253.

### BILL OBLIGATORY.

A "bill obligatory" is a bond without a condition, sometimes called a "single bill," and differing from a promissory note in nothing but the seal which is attached to it. *Farmers' & Mechanics' Bank v. Greiner*, 2 Serg. & R. 114, 115.

### BILL NOT ORIGINAL.

A bill in equity which is a "bill not original" is one that relates to some matter orally litigated in the same court by the same person, and which is either an addition to or a continuance of an original bill, or both. *Longworth v. Sturges*, 4 Ohio St. 690, 708.

"Bills not original" are those which relate to some matter already litigated in the court by some person, and which are an addition to or continuance of an original bill, or both. According to this definition, a creditors' bill is a continuation of the former controversy, so far as the fruits of the judgment are concerned. *Hatch v. Dorr*, 11 Fed. Cas. 805, 806.

### BILL OF ATTAINDER.

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial. 'Bills of this sort,' says Mr. Justice Story, 'have been most usually passed in England in times of rebellion, or of gross subversy to the Crown, or of violent political excitements, periods in which all nations are most liable, as well the free as enslaved, to forget their duties and to trample upon the rights and liberties of others.' These bills are generally directed against individuals by name, but they may be directed against a whole class." *Cummings v. Missouri*, 71 U. S. (4 Wall.) 277, 323, 18 L. Ed. 356.

A "bill of attainder," at the time of the adoption of the first Constitution of the state, had a well-understood meaning. It was a legislative judgment of conviction; an exercise of judicial power by Parliament, without a hearing, and in disregard of the first principles of natural justice. Such bills had been passed in England, and the parties thereby condemned had been put to death. *People v. Hayes*, 35 N. E. 951, 952, 140 N. Y. 484, 23 L. R. A. 830, 37 Am. St. Rep. 572.

"Bills of attainder" are such special acts of the Legislature as inflict capital punishment on all persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. *Green v. Shumway*, 39 N. Y. 418, 431; *Gotchens v. Matheson* (N. Y.) 40 How. Prac. 97, 102 (citing 3 Story, Comm. Const. 209); *Anderson v. Baker*, 23 Md. 531, 623 (citing Story's Const. § 1344); *Ex parte Law*, 35 Ga. 285, 298, 15 Fed. Cas. 8.

The term "bill of attainder," within the meaning of the federal Constitution, included a general statute passed after the Civil War, which required all attorneys at law to take an oath that they had never voluntarily borne arms against the United States, or given aid, countenance, counsel, or encouragement to persons engaged in armed hostilities thereto, as a condition to their right to practice in the Supreme Court of the United States. In this leading case the majority opinion was written by Field, J., and was based to a large extent upon a prior decision in the same term of *Cummings v. State of Missouri*, 4 Wall. 277, in which the statute of Missouri, requiring ministers of the Gospel to take a similar oath as a condition to their right to exercise the privileges of their profession, was held unconstitutional. Mr. Justice Miller, on behalf of himself, the Chief Justice, and Justices Swayne and Davis, delivered a dissenting opinion in *Ex parte Garland*, which is expressly made applicable not only to that case, but to the case of *Cummings v. State of Missouri*, in which he says "the word 'attainder' is derived by Sir Thomas Tomlins, in his law dictionary, from the words 'attincta' and 'attinctura,' and is defined to be 'the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence of the common law on the pronouncing the sentence of death.' The effect of this corruption of the blood was that the party attainted lost all inheritable quality, and could neither receive nor transmit any property or other rights by inheritance. Upon an attentive examination of the distinctive features of this kind of legislation, I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned, which distinguish them

from other legislation, and which made them so obnoxious to the statesmen who organized our government: (1) They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial. (2) The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule. (3) The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence or that of his counsel, and no recognized rule of evidence governed the inquiry." The conclusion of the majority of the court was denied by the dissenting judges on the ground that the laws in question did not contain the essential requirements, in the definition of "bill of attainder," of working a corruption of blood, or in describing any person or class of persons by name or description. *Ex parte Garland*, 71 U. S. (4 Wall.) 333, 387, 18 L. Ed. 366.

#### Bill of pains and penalties included.

A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, it is a bill of pains and penalties. As the term "bill of attainder" is used in the federal Constitution, it includes both bills of attainder particularly, and bills of pains and penalties. *Cummings v. Missouri*, 71 U. S. (4 Wall.) 277, 18 L. Ed. 356; *Drehman v. Stifle*, 75 U. S. (8 Wall.) 595, 601, 19 L. Ed. 508; *Pierce v. Carskadon*, 83 U. S. (16 Wall.) 234, 239, 21 L. Ed. 276.

As used in U. S. Const. art. 1, § 10, providing that no state shall pass any "bill of attainder," *ex post facto* law, or laws impairing the obligation of contracts or granting any title of nobility, means a legislative act which inflicts punishments without a judicial trial. "If the punishment be less than death, the act is termed a 'bill of pains and penalties.'" Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." Hence Act March 29, 1867, providing for a convention to revise and amend a state constitution requiring of an elector, when challenged, that he solemnly swear that he had never voluntarily borne arms against the United States since he had been a resident thereof; had voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that he had neither sought nor expected nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; and that he had not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto; and did not unlawfully desert from the military or naval service of the United States, or leave the state to avoid a draft during the late Rebellion—is a bill of pains and penalties, and void within the constitu-

tional provision against the passage of a bill of attainder. *Green v. Shumway* (N. Y.) 36 How. Prac. 5, 7.

"Bill of attainder," as used in a constitution where the passage of any bill of attainder is prohibited, is a generic term, meaning both bills of attainder, properly so called at common law, and bills of pains and penalties. *Gaines v. Buford*, 31 Ky. (1 Dana) 481, 509.

"A bill of attainder is a special act of legislature which inflicts punishment without a judicial trial. If the punishment is less than death, the act is called a 'bill of pains and penalties.'" As used in Const. U. S. art. 1, § 9, prohibiting bills of attainder, it includes bills of pains and penalties. In *re Yung Sing Hee* (U. S.) 86 Fed. 437, 439.

#### BILL OF COSTS.

The phrase "bill of costs," as used in a statute authorizing the taxation of a bill of costs, means the costs legally taxable in a particular suit to the person entitled thereto. *Doe v. Thompson*, 22 N. H. 217, 219.

#### BILL OF CREDIT.

A "bill of credit," in its commercial sense, comprehends a great variety of evidences of debt, which circulate as money in a commercial community. In the early history of banks, their notes were generally denominated "bills of credit," but in modern times they have lost that designation, and are now called either "bank bills" or "bank notes." The definition of a "bill of credit," however, as the term is used in statutes, ordinarily applies only to paper emitted or issued by colonies or states, by the sovereign power, containing a pledge of its faith for its ultimate redemption. *Briscoe v. Bank of Kentucky*, 36 U. S. (11 Pet.) 257, 271, 9 L. Ed. 709.

The term "bill of credit" as used in the federal Constitution, is a paper intended to circulate through the community, for its ordinary purposes as money, which paper is redeemable at a future day. *Craig v. Missouri*, 29 U. S. (4 Pet.) 410, 431, 7 L. Ed. 908; *Breitenbach v. Turner*, 18 Wis. 140, 146; *Linn v. State Bank of Illinois*, 2 Ill. (1 Scam.) 87, 91, 25 Am. Dec. 71. See, also, *Indiana v. Woram*, 6 Ill. 33, 37, 40 Am. Dec. 378. It signifies "a paper medium intended to circulate between individuals, and between government and individuals for the purposes of society." *Breitenbach v. Turner*, 18 Wis. 140, 145; *Pagaud v. State*, 13 Miss. (5 Smedes & M.) 491. It means "promissory notes or bills, for the payment of which the faith of the state only is pledged. They are such bills as were emitted by Congress in the different states anterior to the adoption of the Constitution." *State v. Billis*, 2 McCord, 12, 15. Also "paper is-

sued by a state on the faith of the state, which circulates on the credit of the state, and is received and used in the ordinary business of life." *Hale v. Huston*, 44 Ala. 134, 138, 4 Am. Rep. 124; *Poindexter v. Greenhow*, 5 Sup. Ct. 903, 910, 114 U. S. 270, 29 L. Ed. 185; *Bailey v. Milner*, 35 Ga. 330, 332 (U. S.) 2 Fed. Cas. 378; *Delafield v. Illinois*, 28 Wend. 192, 218.

As to the term "bills of credit," the Chief Justice said: "Bills of credit signify a paper medium intended to circulate between individuals, and between the government and individuals, for the ordinary purposes of society." In the case of *Briscoe v. Bank of Commonwealth of Kentucky*, 36 U. S. (11 Pet.) 257, 313, 9 L. Ed. 709, the court, speaking of this definition, says: "A definition so general would certainly embrace every description of paper which circulates as money." *Lucas v. City of San Francisco*, 7 Cal. 463, 477.

"The term 'bill of credit,' says Marshall, C. J., delivering the opinion of the court in the case of *Craig v. State*, 'in its enlarged and literal sense, may comprehend any instrument by which a state engages to pay money at a future date.' As the term is used in the federal Constitution, prohibiting the states from emitting bills of credit, it includes notes of the Bank of the Commonwealth of Kentucky. *Bank of Commonwealth of Kentucky v. Clark*, 4 Mo. 59, 60, 28 Am. Dec. 345.

"To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes as money, which paper is redeemable at a future day. This is a sense in which the term has always been understood." *Bank of Commonwealth of Kentucky v. Clark*, 4 Mo. 59, 61, 28 Am. Dec. 345; *Shollenberger v. Brinton*, 52 Pa. (2 P. F. Smith) 9, 31, 54; *Linn v. State Bank of Illinois*, 2 Ill. (1 Scam.) 87, 91, 25 Am. Dec. 71.

#### Bill of chartered state bank

Notes issued by a bank created by the state which upon their face purported to be issued by the president and directors of the bank, and which contained no pledge of the faith of the state in any form, but were issued on the credit of the funds of the bank, the president and directors not assuming to act as agents of the state, were not "bills of credit issued by the state," within the inhibition of the Constitution, though the capital of the bank was to be paid by the state. *Briscoe v. Bank of Commonwealth of Kentucky*, 36 U. S. (11 Pet.) 257, 312, 9 L. Ed. 709.

The constitutional inhibition against emitting bills of credit does not include notes issued by a state bank which are payable in coin, but only means "paper money," properly so called, issued by the mere authority of

the government, and resting for support on the credit of the government. *Owen v. Branch Bank at Mobile*, 3 Ala. 258; *Jones v. Bank of Tennessee*, 47 Ky. (8 B. Mon.) 122, 46 Am. Dec. 540.

The entire stock of the Bank of the State of Arkansas was owned by the state, which furnished the capital and received the profits. The president and trustees were to have a common seal, were authorized to deal in bullion, gold and silver, etc., purchase real property, erect buildings, issue notes, and make loans, etc. Some doubt was suggested whether the notes of this bank were not "bills of credit" within the prohibition of the Constitution. But to constitute a "bill of credit" within the Constitution, it must be issued by a state on the faith of the state, and be designed to circulate as money; it must be a paper which circulates on the credit of the state, and is so received and used in the ordinary business of life. The bills of this bank were not made payable by the state, and capital was provided for their redemption, and the general management of the bank and the charter were committed to the president and treasurer, as in ordinary banking associations. The holders could in a summary manner obtain judgments against their debtors, and, although the directors were not expressly made liable to be sued, yet without doubt they could be held legally responsible for an abuse of the trust confided to them. *Woodruff v. Trapnall*, 51 U. S. (10 How.) 190, 205, 13 L. Ed. 383.

Bills of a banking corporation are not bills of credit, though the state creating the bank is the only stockholder, and pledges its faith for the redemption of the bills. A bill of credit emanates from the sovereignty of the state. It rests for its currency on the faith of the state, pledged by a public law. *Darrington v. Branch of Bank of Alabama*, 54 U. S. (18 How.) 12, 14 L. Ed. 30.

#### Certificate of indebtedness.

Certificates of indebtedness issued by the Governor of a state, under a statute authorizing such issue for the purpose of paying the current expenses of the state, and made receivable for all state taxes, etc., and which is actually issued, containing a recital that the sum specified is due by the state and that the certificate is receivable in payment of all state dues, are bills of credit. *City Nat. Bank v. Mahan*, 21 La. Ann. 751, 753.

A "bill of credit," in its enlarged, and perhaps in its literal, sense, may be defined as any instrument by which a state engages to pay money at a future day, and includes a certificate given for borrowed money. "Bills of credit" signify a paper medium intended to circulate between individuals, and between the government and individuals, for the ordinary purposes of society. *Craig v. State*, 29 U. S. (4 Pet.) 410, 431, 7 L. Ed. 903.

**Confederate treasury note.**

The term "bills of credit" cannot be construed to include the securities known as "Confederate treasury notes," issued by the self-styled "Confederate States" during the Civil War of 1861. "Bill of credit" means a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money. A paper currency emitted by a state, and receivable in discharge of all debts and taxes due the state, and of all salaries and fees of offices, and pledging the faith and funds of the state for the redemption of this paper issued, are bills of credit. *Bailey v. Milner* (U. S.) 2 Fed. Cas. 378, 379.

**Loan office certificate.**

A "bill of credit," as used in its constitutional sense, includes loan office certificates issued by the state, which were made receivable by all the officers of the state, both civil and military, in the discharge and payment of both salaries and fees. *Loper v. State*, 1 Mo. 632, 633.

**Revenue bond scrip.**

A paper which is a "bill of credit" has three essentials: (1) It must be issued by state in its sovereign character; (2) it must contain a pledge of the faith of the state; (3) it must be a design to circulate as money. Thus revenue bond scrip of the state of South Carolina issues in denominations as small as \$1, which bears no interest and no date of payment, but the faith and funds of the state are pledged to their ultimate redemption, and they were made receivable at all times after their issuance for all dues and taxes to the state, except taxes levied to pay interest on the public debt, and when so received the State Treasurer was authorized to pay the amount again, with satisfaction of any kind against the treasury. They were intended to circulate as money, and hence constituted "bills of credit" within the prohibition of the Constitution of the United States. *Wesley v. Eells* (U. S.) 90 Fed. 151, 158.

**State bank bill.**

Bills issued by the State Bank of Illinois under an act of the State Legislature permitting it to do so, which bills purported on their face to be receivable at the treasury or any loan office of the state of Missouri in discharge of debts due the state, are bills of credit. *Lynn v. State of Illinois*, 2 Ill. 87, 91, 25 Am. Dec. 78.

**State bond.**

Mere state bonds made payable to the bearer fall, within the constitutional inhibition, upon the state to issue bills of credit. But bonds which are simply transferable certificates of stock, and binding the state to pay money at a future day for services actually rendered or for money borrowed, are

not included within the term. *Delafield v. Illinois*, 28 Wend. 192, 218.

**State warrant.**

A contract by which a state binds itself to pay money at a future day for service actually received or for money borrowed for present use is not a bill of credit. *Linn v. State Bank of Illinois*, 2 Ill. (1 Scam.) 87, 90, 25 Am. Dec. 71.

"Bills of credit," as used in Const. U. S. art. 1, § 10, forbidding any state to emit bills of credit, should be construed to include treasury warrants issued by the state which are receivable at par in payment of the debts of the state, being issued on the faith and credit of the state, the promise to pay being directly that of the state, and being designed as a substitute for money. *Bragg v. Tuffts*, 6 S. W. 158, 162, 49 Ark. 554.

A warrant drawn by state authorities in payment of an appropriation made by the Legislature for a debt due from the state to an individual, and payable upon presentation if there be funds in the treasury, cannot be deemed a "bill of credit," within the meaning of Const. U. S. art. 1, § 10, prohibiting a state from emitting bills of credit, although the state directs its officers to receive such warrants as money in payment of certain dues to the state, and to deliver them to those who would receive them as money in payment of dues from the state, but not to reissue them when once they come back to the treasury of the state. *Houston & T. C. R. Co. v. Texas*, 20 Sup. Ct. 545, 554, 177 U. S. 66, 44 L. Ed. 672.

**BILL OF DISCOVERY.**

A "bill of discovery," in the old chancery courts, was an auxiliary or assistant proceeding to the courts of law, and arose from the defects in the courts of common law to compel a complete discovery by the oath of the parties in the suit. Modern legislation, however, has greatly interfered with the practical exercise of the auxiliary jurisdiction for discovery by introducing simpler and more efficacious methods in its stead, and thus rendering resort to it unnecessary, and even inexpedient. In some of the states a "suit for discovery," properly so called, is expressly abolished by statute, and in all of them is utterly inconsistent with both the fundamental theory and with the particular doctrines and methods of the reformed procedure. *Wright v. Superior Court of Santa Clara County*, 73 Pac. 145, 146, 139 Cal. 469.

"A 'bill of discovery,'" says Lord Redesdale, in *Mittf.* 52, "is commonly used in aid of the jurisdiction of some other court, so as to enable the plaintiff to prosecute or defend an action at law," and the bill must be filed as soon as the party discovers the

necessity of appealing to the conscience of his adversary. Equity will not suffer him to spin out litigation, take the chance of a jury, and, failing there, file his bill for discovery. *Faulkner's Adm'x v. Harwood*, 6 Rand. 125, 129. It is commonly used in aid of the jurisdiction of some court at law, to enable the party to obtain discovery of the facts which are material to the prosecution or defense thereof. If it can be used in any other cases, they are few, and under very special circumstances. *Everson v. Equitable Life Assur. Co. (U. S.)* 68 Fed. 258, 259 (citing *Story's Eq. Pl.* § 331).

A bill of discovery is "a bill showing a cause of action, and praying for the discovery of particular facts alleged to be true in fact, but which are peculiarly within the knowledge of the defendant." *Carroll v. Carroll*, 11 Barb. 293, 298. It is a mere instrument of procedure in aid of relief sought by the party in some other judicial controversy, filed for the sole purpose of proving the plaintiff's case from the defendant's own mouth, or from documents in his possession, and asking no relief in the suit, except it may be a temporary stay of the proceedings in another suit to which the discovery relates. *State v. Security Savings & Trust Co.*, 43 Pac. 162, 164, 28 Or. 410.

Every bill is in reality a "bill of discovery," but the species of bill usually distinguished by that title is a bill for discovery of facts resting in the knowledge of the defendant, or of deeds or writings or other things in his custody or power, and seeking no relief in consequence of the discovery. *McFarland v. Hunter (Va.)* 8 Leigh, 489, 492 (citing *Mitford*, p. 52).

## BILL OF EXCEPTIONS.

A bill of exceptions is a formal statement in writing of the exceptions taken to the opinion, decision, or direction of the judge, delivered during the trial of a cause, setting forth the proceedings on the trial, the opinion or decision given, and the exception taken thereto, and sealed by the judge in testimony of its correctness. *Everman v. Hyman*, 28 N. E. 1022, 1023, 26 Ind. App. 165, 84 Am. St. Rep. 284; *Herron v. State*, 46 N. E. 540, 542, 17 Ind. App. 161 (citing *Schlunger v. State*, 113 Ind. 295, 15 N. E. 269; *Bowen v. State*, 108 Ind. 411, 9 N. E. 378); *Galvin v. State*, 56 Ind. 51, 56; *Bowen v. State*, 108 Ind. 411, 414, 9 N. E. 378, 379 (citing 2 Works, Pr. § 1075); *St. Croix Lumber Co. v. Pennington*, 11 N. W. 497, 498, 2 Dak. 467; *Huddleston v. State*, 66 Tenn. (7 Baxt.) 55, 56.

A bill of exceptions is a statement of the points on which the court below gave an opinion. *Coxe v. Field*, 13 N. J. Law (1 J. S. Green) 215, 218; *Oliver v. Phelps*, 20 N. J. Law (Spencer) 180, 183 (quoting 3 Bl.

Comm. 372); *Garretson v. Appleton*, 37 Atl. 150, 152, 58 N. J. Law (29 Vroom) 386.

A bill of exceptions is a single history of the case as tried, and should contain nothing more or less than the facts as they appeared to the court and jury from the commencement of the trial until the final judgment of the court. It is a formal statement in writing of exceptions taken to a ruling, decision, charge, or opinion of the trial judge setting up the proceedings on the trial. It should contain all evidence necessary to an understanding of the exceptions. Motions made during the trial of a cause, and the rulings of the court thereon, must be preserved in a bill of exceptions. *Rogers v. Richards*, 47 Pac. 719, 720, 8 N. M. 658.

A "bill of exceptions" is defined as a formal statement in writing taken by a party to the decision of the court on a point of law, clearly stating the objection, with the facts and circumstances on which it is founded, which, to attest its accuracy, is authenticated by the trial judge according to law. *Freeburgh v. Lamoureux (Wyo.)* 73 Pac. 545, 547.

A bill of exceptions is a written statement, settled and signed by the judge, of what the ruling was, the facts in view of which it was made, and the protest of counsel. A document which merely details certain acts which transpired at the trial of a cause, and fails to show that there was any ruling by the court in relation thereto, or any protest against the action of the court, is not a bill of exceptions. *People v. Torres*, 38 Cal. 141, 142.

A bill of exceptions is a statement of the objections made by the parties to the ruling of the court. A bill of exceptions showing that the ruling of the court was objected to at the time it was made on the trial is sufficient, it not being necessary to state specifically that the ruling of the court was excepted to. *Sackett v. McCord*, 23 Ala. 851, 854.

A bill of exceptions is a method of placing the law of the case on a record which is to be brought before the appellate court by writ of error. *Ex parte Crane*, 30 U. S. (5 Pet.) 190, 198, 8 L. Ed. 92.

A bill of exceptions is a statement of the questions made, and exceptions taken to the ruling of the court or judge on the trial of a cause to a jury. *Berly v. Taylor*, 5 Hill, 577, 579.

A bill of exceptions is a formal statement, for the purpose of a writ of error or appeal, to a court possessing the proper jurisdiction, by way of review, of exceptions taken on the trial. *Caston v. Brock*, 14 S. C. 104, 108.

The office of a bill of exceptions is to bring into the record of a case those mate-

rial matters which otherwise would not appear. *Mewis v. Johnson Harvester Co.*, 5 Neb. 217, 218.

"A bill of exceptions is the means for placing matters on the record of proceedings in a case, where they do not properly belong to it, and the bill of exceptions should contain matter so intended to be placed on the record. It means a present and distinct substantive case, and is conclusive on the court." *Berry v. Hale*, 2 Miss. (1 How.) 315, 318.

In *Rogers v. Richards*, 47 Pac. 719, 8 N. M. 658, defining a "bill of exceptions," it is said that it should embrace, among other things, all the evidence necessary to an understanding of the exceptions, to which should have been added, "and a review thereof." *Denver & R. G. R. Co. v. United States*, 51 Pac. 679, 680, 9 N. M. 309.

"The sole office of a bill of exceptions is to make matters which are extrinsic or out of the record a part of the record." *Kitchell v. Burgwin*, 21 Ill. (11 Peck) 40, 45; *State v. Anders* (Kan.) 68 Pac. 668.

A "bill of exceptions," as the expression shows, must contain exceptions; but exceptions lie only for some error of law occurring at the trial, and, a motion for a new trial being made after verdict and before judgment, no exception lies to any ruling of such motion. *Kearney v. Snodgrass*, 7 Pac. 309, 310, 12 Or. 311.

The stenographer's report of the evidence brought into the transcript by the clerk is not a bill of exceptions. *State v. Bercaw*, 31 N. E. 798, 182 Ind. 260.

#### **Extract from minutes of clerk.**

An extract from the minutes of the clerk, signed by the judge in the due course of the proceedings of the court had from day to day during the term, is not a bill of exceptions. *Haraszthy v. Horton*, 46 Cal. 545.

#### **As part of the record.**

At common law a bill of exceptions formed no part of the record in the trial court, and the original was carried into the appellate court and there annexed to the record. It was for the benefit of the party tendering it, and he could use it or not as he saw proper. Rev. St. Fla. § 1268, provides that when the bill is signed by the trial judge it shall become a part of the record in the case, and the original is not sent up, but the clerk certifies it as a part of the record of the proceedings below. It is said in *Bailey v. Clark*, 6 Fla. 516, that a bill of exceptions is made up with care by the judge, under the solemn sanction of his signature and seal, with the aid of the attorneys of the respective parties during the term of court at which the trial is had, unless by special order further time is allowed, and has absolute verity. *Glaser v.*

*Hackett*, 20 South. 820, 821, 38 Fla. 84. See, also, *People v. Trim*, 37 Cal. 274, 275.

A "bill of exceptions," as the term was used at common law, meant a statement of facts by the party whose pleadings were overruled or exceptions disallowed, and on which the court was required to put its seal if the statement was correct. "This statement so sealed was ultimately to form a part of the record, and as such was liable to revision by the court of errors. Great formality and certainty was necessary. It must set forth just so much and no more of the elements and proceedings necessary to show the precise nature of the exceptions. It must be engrossed (formerly on parchment), and then tendered to the judge. Then the seal must be acknowledged or proved, and the bill must be tacked to the record. In this country the bill of exceptions is regulated by statutes and rules, equal in particularity with the English statute in all matters of substance, and require as much, if not more, time and care in its preparation by notice, amendment, settling, and signing, and its office is the same, it being made a part of the record which may go to the court of error. When the record is thus completed, the errors of law apparent thereon, whether arising from the original record or the bill of exceptions, may be reviewed on the writ." *State v. Clifford*, 16 N. W. 25, 27, 58 Wis. 113.

#### **As a pleading.**

A bill of exceptions is not to be considered as a writing of the judge, but as a pleading of the party alleging the exception. Like any other pleading, it is to be construed most strongly against the party preparing it, and he must be responsible for all uncertainty and omissions. *Johnson v. Johnson*, 58 N. E. 237, 240, 187 Ill. 86.

#### **BILL OF EXCHANGE.**

See "Accommodation Bill or Note"; "Approved Bill or Paper"; "Bank Bill"; "Current Bills"; "Foreign Bills of Exchange"; "Inland Bill of Exchange"; "Safe Bills"; "Single Bill."

A bill of exchange is a written order or request by one person to another for the payment of a specified sum of money to a third person absolutely and at all events. *Luff v. Pope* (N. Y.) 5 Hill, 413, 416; *Adams v. Boyd*, 33 Ark. 33, 47; *Gaar v. Louisville Banking Co.*, 74 Ky. (11 Bush) 180, 186, 21 Am. Rep. 209; *Coffin v. Spencer* (U. S.) 39 Fed. 262, 263; *Smith v. Wood*, 1 N. J. Eq. (Sart.) 74, 90; *Carran v. Little*, 40 Ohio St. 397, 399; *Hoyt v. Lynch*, 4 N. Y. Super. Ct. (2 Sandf.) 328, 332; *Jones v. Pacific Wood Lumber & Flume Co.*, 18 Nev. 359, 372, 39 Am. Rep. 308.

A bill of exchange is an instrument, negotiable in form, by which one, who is called

the "drawer," requests another, called the "drawee," to pay a specified sum of money. Civ. Code Cal. 1903, § 3171; Civ. Code Idaho 1901, § 2911; Civ. Code Mont. 1895, § 4110; Rev. St. Okl. 1903, § 3853; Rev. Codes N. D. 1899, § 4914; Civ. Code S. D. 1903, § 2229; Rev. St. Utah 1898, § 1612; Rev. St. Wyo. 1899, § 2393; *Woolley v. Sergeant*, 8 N. J. Law (3 Halst.) 262, 264, 14 Am. Dec. 419.

A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money, to order or to bearer. Negotiable Instruments Law N. D. § 126; Rev. Codes N. D. 1899, § 1054; *Bates' Ann. St. Ohio* 1904, § 3175q; *Ann. Codes & St. Or.* 1901, § 4528; *Code Supp. Va.* 1898, § 2841a.

A bill of exchange is an order by one person, called the "drawer" or "maker," to another, called the "drawee" or "acceptor," to pay money to another (who may be the drawer himself), called the "payee," or his order, or to the bearer. Civ. Code Ga. 1895, § 3678.

A bill of exchange is an order upon the drawee to pay a certain sum of money to the holder. Such a bill, when the drawee has the funds of the drawer in his hands, is a transfer by the drawer of this fund to the payee, and creates in the latter, if not a legal, at least an equitable, interest in the fund. *Janney v. Bank of Missouri*, 12 Mo. 583, 587.

"A bill of exchange is an order by one person to a second, directing him, in effect, to pay absolutely, and at all events, a certain sum of money therein named to a third person, or to any other to whom that third person may order it to be paid; or it may be payable to a bearer, and to the drawer himself." Nicely v. Commercial Bank, 44 N. E. 572, 574, 15 Ind. App. 563, 57 Am. St. Rep. 245 (quoting *Culbertson v. Nelson*, 93 Iowa, 187, 61 N. W. 854, 27 L. R. A. 222, 57 Am. St. Rep. 268); *Allen v. Leavens*, 37 Pac. 488, 489, 26 Or. 164, 28 L. R. A. 620, 46 Am. St. Rep. 613.

A bill of exchange is an instrument governed by the commercial law; it must carry on its face its authority to command the money drawn for, so that the holder, or the notary acting as his agent, may receive the money, and give a discharge, on presenting the bill and receiving payment; or, if payment is refused, enter a protest, from which follows the incident of damages. But if no demand can be made on the bill standing alone, and it depends on other papers or documents to give it force and effect, and these must necessarily accompany the bill and be presented with it, it cannot be a simple bill

of exchange, that circulates from hand to hand as the representative of cash. It derives all of its properties from the commercial law. It is a most convenient instrument for the transfer of funds, and its chief and only value in such respect arises from the legal principles in which it is invested, and which regulate the duties and liabilities of those who become parties to it. *United States v. Bank of United States*, 46 U. S. (5 How.) 382, 408, 12 L. Ed. 199. It is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note, merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder when it becomes payable. The taxing power of a state extends to such bills. *Nathan v. Louisiana*, 49 U. S. (8 How.) 73, 81, 12 L. Ed. 993.

Bills of exchange and promissory notes are commercial instruments to facilitate commerce, and are subject to certain rules of law not applicable to other contracts. *Smith v. Kendall*, 9 Mich. 241, 242, 80 Am. Dec. 83.

It is not essential to the validity of a bill of exchange that it be in form negotiable. *Coursin v. Ledlie's Adm'rs*, 81 Pa. (7 Casey) 506, 509.

The term "bill of exchange," as used in the act relating to bills of exchange and promissory notes, shall be so construed as to include all drafts or orders drawn by one person on another for the payment of a sum of money specified therein. *Ann. St. Ind. T.* 1899, § 453.

A "bill of exchange," within Gen. St. 1901, § 547, providing that no person shall be charged as an acceptor of a bill of exchange unless his acceptance shall be in writing, means nothing more than a written order to pay money. *Shutt Imp. Co. v. Erwin*, 71 Pac. 521, 522, 66 Kan. 261.

While a bill of exchange contains no express promise between the parties, the promise is implied on the value received from the general usage which is the foundation of the common law. *Brooks v. Page* (Vt.) 1 D. Chip. 340, 344.

An order drawn by a creditor on his debtor for the payment of money certain is none the less a bill of exchange because it shows on what account it is to be applied or the consideration which has been received. It does not indicate an intention to transfer or bind the amount of a debt, more or less, but fixes the amount which is ordered to be paid. It is not material whether it is defined as a particular sum "due us," or a sum "which is due us." *Hillstrom v. Anderson*, 49 N. W. 187, 46 Minn. 382.



An order drawn at the foot of a bill rendered for services done, expressing a certain sum as due by the debtor in such bill, and drawn on a third person requesting him to pay the bill and charge it to such debtor, is a bill of exchange. *Hoyt v. Lynch*, 4 N. Y. Super. Ct. (2 Sandf.) 328, 332.

An order in the form, "Pay J. or order \$300, if the same may be due him from me on his and my settlement out of the last payment due from you to me on the house which I am now building for you," accepted by the drawee, is not a bill of exchange, but, in order that the payee may recover, he must prove that there was due him upon settlement with the drawers \$300, or some other amount, and that a sum of money was due from the acceptor out of the last payment to be made by him. *Jackman v. Bowker*, 45 Mass. (4 Metc.) 235, 241.

An order for a definite sum not drawn on any particular fund is not an assignment, but is a bill of exchange, within Code, § 1766, providing that no person must be charged as acceptor of a bill of exchange unless his acceptance is in writing, signed by himself or agent. *Anderson v. Jones*, 14 South. 871, 872, 102 Ala. 537.

#### **As bank check.**

"Bank checks are not bills of exchange, and, though the rules applicable to each are in many respects the same, they differ in important particulars. Among these particulars is that a check is drawn against funds on deposit with the banker, and the indorsement that it is good implies that when the indorsement is made there were funds there to meet it. A bill of exchange is not drawn on such deposits necessarily, and its acceptance raises no implication that the drawer has such funds to meet it. It is a new promise by the acceptor to pay, funds or no funds. In both cases the bank is supposed to know the signature of its correspondent, and cannot, after indorsing it as good or accepted, dispute his signature. One of the main elements of utility in a bill of exchange is that it was circulated freely, and it may thus pass through many hands on the faith of the acceptor's signature. It may possibly be that he should be responsible for the promise contained in it as it came from his hands, for it was drawn on no special fund, and the possession of such fund by him does not affect his liability. By such acceptance he becomes primarily liable as if he were the maker of a promissory note." *Espy v. First Nat. Bank of Cincinnati*, 85 U. S. (18 Wall.) 604, 605, 21 L. Ed. 947.

A check is a draft or order upon a bank or banker, as purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money to a certain person named therein, or to him or to his order, or to bearer, and payable instantly on

demand. *Daniel's Negotiable Instruments*, § 1566. Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper, the chief points of difference being that a check is always drawn on a bank or banker; no days of grace are allowed; the drawee is not discharged by the laches of the holder in presentment for payment, unless he can show that he sustained some injury by the default; it is not due until the payment is demanded, and the statute of limitation runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. *Merchants' Bank v. State Bank*, 77 U. S. (10 Wall.) 604, 647, 19 L. Ed. 1008. But as the execution and delivery of such paper assigns to the payee a specified amount represented as belonging to the drawer in the hands of the drawee, it is really an undertaking that the bank or banker on whom it is drawn will deliver to the payee the amount of money expressed, and comes within the provision of the statute of limitations relating to simple contracts in writing. *Haynes v. Wesley*, 37 S. E. 990, 991, 112 Ga. 668.

The ancient bill of exchange was a mere convenience for enabling a creditor of the drawer to receive his payment at some other place than the latter's residence, and it was drawn on correspondents who knew of the credit and responsibility of the drawer, and were willing to pay money at his request, and look to him for reimbursement, either by remittance, or by reciprocal honor to their own bills of exchange. In modern times, at least, the check upon a banker has attained a different significance. The banker is not customarily or often in the habit of honoring checks except as they are drawn against a fund first placed in his hands for that purpose. *Raesser v. National Exch. Bank*, 88 N. W. 618, 619, 112 Wis. 591.

Although a check upon a bank is in many respects a bill of exchange, yet as the Penal Code distinguishes between them in that, while rendering the forgery of either an offense, it does not provide for the case of drawing a check in a fictitious name, while it does for the execution of a bill of exchange, a conviction under the kind describing a check as a "bill of exchange" cannot be sustained. *Townsend v. State*, 19 S. E. 55, 56, 92 Ga. 732.

A check is a species of inland bill of exchange, not with all the incidents of an ordinary bill of exchange it is true, but still it belongs to that class of commercial paper. *Exchange Bank v. Sutton Bank*, 28 Atl. 563, 564, 78 Md. 577, 23 L. R. A. 173.

A "bill of exchange," as used in Gen. St. 1901, c. 14, § 9, providing that an acceptance thereof written on any other paper than the bill shall not bind the acceptor except in fa-

ver of a person to whom such paper has been shown, includes a bank check. *Eakin v. Citizens' State Bank* (Kan.) 72 Pac. 874, 875.

A "bill of exchange," as used in Act 1872, c. 270, providing that a married woman may be sued jointly with her husband on a "note, bill of exchange," etc., includes a check, since a check is, at least in a qualified sense, an inland bill of exchange. *Wilderman v. Rogers*, 6 Atl. 588, 589, 86 Md. 127.

A check is a short bill of exchange, payable on demand, and is therefore within the term "bill of exchange" in Act Ill. Nov. 5, 1849, § 2, providing that all actions founded on bills of exchange, orders, etc., shall be commenced within five years after the action accrued. *Rogers v. Durant*, 11 Sup. Ct. 754, 755, 140 U. S. 298, 35 L. Ed. 481.

An order by A. upon B. to pay money to C., without words of negotiability, is not an "inland bill of exchange," but is classed with bank checks, and the drawer is entitled, as the drawer of a bank check, to notice of the failure of the drawee to pay upon presentation. *Sinclair v. Johnson*, 85 Ind. 527, 528.

#### **Consideration imported.**

It is not necessary that a bill of exchange, either foreign or inland, should recite that it is for value received. Being an order for the payment of money to another, it imports under the law merchant a consideration without such recital. *Taylor v. Newman*, 77 Mo. 257, 262.

#### **Draft synonymous.**

See "Draft."

#### **As equitable assignment.**

See "Equitable Assignment."

#### **As equitable assignment pro tanto.**

A bill of exchange or check is not an equitable assignment pro tanto of the funds of the drawer in the hands of the drawee. *American Pin Co. v. Wright*, 46 Atl. 215, 217, 60 N. J. Eq. 147.

#### **As order for payment of goods.**

The term "bill of exchange" does not include an order payable in merchandise. "It is too well settled to need the citation of authority that it is essential to a bill of exchange that it should be drawn for money, and all other drafts or orders drawn for other commodities operate only as an authority to receive the contents, and the holder of them is not bound to apply either the speed or the formalities required in conducting a bill of exchange, and, when they sue, must resort to the original cause of action." *Coyle's Ex'r v. Saterwhite's Adm'r*, 20 Ky. (4 T. B. Mon.) 124, 125. See, also, *Johnson v. War-den*, 1 Tenn. Cas. 670, 671.

The term "bill of exchange" does not include an order for the payment of a certain sum in chattels, and the law and incidents of a bill of exchange do not attach to such an instrument. Therefore such an order does not legally import an undertaking by the drawer that the payee shall obtain the chattels, nor that the drawer will be answerable to him for the value of them on the drawee's refusal, to accept or to pay the order. *Sears v. Lawrence*, 81 Mass. (15 Gray) 287, 289; *Hyland v. Blodgett*, 9 Or. 166, 42 Am. Rep. 799.

A bill of exchange is an order or letter requesting the payment of money. It does not include a request to pay in any other substance or commodity. Thus a cotton obligation, or a promise to pay cotton, is neither a promissory note nor a bill of exchange. *Auerbach v. Pritchett*, 58 Ala. 451, 457.

#### **As payable out of general fund.**

A bill of exchange is an order for a sum certain payable in money absolutely, and not contingently or out of any particular fund, but generally. *Hillstrom v. Anderson*, 49 N. W. 187, 46 Minn. 382.

An order payable out of a particular fund is not properly a bill of exchange, though it is accepted generally, since the acceptance necessarily follows the nature of the draft. *Smith v. Wood*, 1 N. J. Eq. (Saxt.) 74, 80.

A "bill of exchange" in its proper legal sense is a bill for the payment at all events in money of a sum certain, and must not be in the alternative or payable out of a particular fund, and in order to give the holder a right of action on it against the payee must be accepted by the drawee. *Burch v. Newbury*, 10 N. Y. (6 Seld.) 374, 385.

"An order to pay money out of a particular fund is not a bill of exchange; but an order to pay, with directions to the drawee as to how he may reimburse himself, is a bill of exchange." *Carran v. Little*, 40 Ohio St. 397, 399.

A "bill of exchange" implies a personal general credit, not limited or applicable to particular circumstances and events which cannot be known to the holder in the general course of negotiation. *Coffin v. Spencer* (U. S.) 89 Fed. 262, 263.

#### **Written instrument imported.**

The phrase "bill of exchange" necessarily imports that there is a written instrument. *Pierson v. Townsend* (N. Y.) 2 Hill, 550, 551; *Citizens' Bank of Dyersburg v. Millett*, 44 S. W. 366, 372, 103 Ky. 1, 82 Am. St. Rep. 546.

#### **BILL OF INDICTMENT.**

The recital in the caption of an indictment can always be made to conform with the truth. The names of the grand jury can-

be inserted, and the day of the term in which they are in session and upon which they find their bill. This can be done at any time without altering or in any wise interfering with the material and essential allegations in an indictment. Before the paper containing the criminal charge is handed out to the grand jury, it is called a "bill of indictment." After it is found and all the blanks filled out, it is called an "indictment." *State v. Ray* (S. C.) Rice, 1, 4, 33 Am. Dec. 90.

### BILL OF INTERPLEADER.

See, also "Bill in the Nature of Interpleader."

"The definition of 'interpleader,'" said Lord Cottenham in *Hoggart v. Cutts*, Craig & P. 198, 204, "is not, and cannot be disputed. It is where the plaintiff says, 'I have a fund in my possession in which I claim no personal interest, and to which you, the defendants, set up conflicting claims; pay me my costs, and I will bring the fund into court, and you shall contest it between yourselves.' The case must be one in which the fund is a matter of contest between two parties, and in which the litigation between these two parties will decide all their respective rights with respect to the fund. Thus, a defendant in a strict interpleader proceeding cannot have relief by cross-bill against the claimant." *Wakeman v. Kingsland*, 18 Atl. 680, 681, 46 N. J. Eq. (1 Dick.) 113.

A strict interpleader bill can only be exhibited where two or more persons claim the same debt, duty, or thing from the plaintiff by different or separate interests, and he, not knowing to which of the claimants he ought of right to render the debt, duty, or other thing, fears that he may suffer injury from their conflicting claims, and therefore he prays that they may be compelled to interplead and state their several claims, that the court may adjudge to whom the debt, duty, or other thing belongs. *Wakeman v. Kingsland*, 18 Atl. 680, 681, 46 N. J. Eq. (1 Dick.) 113; *Sloux Falls Sav. Bank v. Lien*, 85 N. W. 924, 927, 14 S. D. 410. It claims no right in opposition to those claimed by the persons against whom the bill is exhibited, but only prays the decree of the court to decide between the rights of those persons for the safety of the claimant. The nature of the allegations, therefore, in every bill of interpleader are: (1) That two or more persons have preferred a claim against the complainant; (2) that they claim the same thing; (3) that the claimant has no beneficial interest in the thing claimed; and (4) that he cannot determine without hazard to himself to which of the defendants the thing of right belongs, and he must bring the money or thing claimed into court, so that he cannot be benefited by the delay of payment which may result from the filing of his bill. *Sloux*

*Falls Sav. Bank v. Lien*, 85 N. W. 924, 927, 14 S. D. 410 (citing *Atkinson v. Manks* [N. Y.] 1 Cow. 691; *Crane v. McDonald*, 118 N. Y. 648, 23 N. E. 991).

A bill of interpleader lies where two or more persons severally claim the same thing under different titles or in separate interests from another, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties. The object of the application to a court of equity is to protect the complainant, not only from being compelled to pay or deliver the thing claimed to both the claimants, but also from the vexation attending upon the suits which are or possibly may be instituted against him. *Gibson v. Goldthwaite*, 7 Ala. 281, 288, 42 Am. Dec. 592.

A "bill of interpleader" is defined to be a bill exhibited when two or more persons claim the same debt or duty from the complainant by different or separate interests, and he, not knowing to which of the claimants he ought of right to pay or render it, exhibits a bill against them praying that the court may adjudge between them to whom the thing belongs, and that he may be indemnified. It claims no right in opposition to those claimed by the persons against whom the bill is exhibited, but only prays the court to decide between the rights of those persons for the safety of the complainant, so that he may not be damaged by paying the money to a wrong hand. *Atkinson v. Manks* (N. Y.) 1 Cow. 691, 703.

A "bill of interpleader" is defined to be a bill exhibited when two or more persons claim the same debt or duty from the complainant by different or separate interests, and he, not knowing to which of the defendants he ought of right to pay or render it, fears that he may be damaged by the defendants as by paying his money to a wrong hand, and therefore exhibits his bill of interpleader against them, praying that the court may judge between them to whom the thing belongs, and that he may be indemnified. *Atkinson v. Manks* (N. Y.) 1 Cow. 691, 703 (citing *Coop. Eq. Pl.* 456).

A bill of interpleader "is a bill filed by complainant, who seeks no relief against any defendant, but only asks that he may be at liberty to pay money or deliver paper to the one to whom it of right belongs, that he may thereafter be protected against the claims of both. In such case the only decree to which the complainant is entitled is a decree that the bill is properly filed; that he be at liberty to pay the funds into court, and for his costs; and that the defendants in

terplead and settle the matter between themselves. Filing bills of interpleader ought not to be encouraged, and should never be brought except in cases where the complainant can in no other way protect himself from an unjust litigation in which he has no interest." *Bedell v. Hoffman* (N. Y.) 2 Paige, 199, 200.

A bill of interpleader is a bill filed for the protection of a person from whom several persons claim, either legally or equitably, the same thing, debt, or duty, but who has incurred no independent liability to any one of them, and does not himself claim an interest in the matter. The object and effect of the bill is to compel such claimants to litigate the question among themselves, so that it may be determined which one of them complainant is under an obligation to. The bill will not lie where the complainant has incurred any independent liability by means of an express agreement with any one of the defendants. *Sprague v. Soule*, 35 Mich. 85.

A bill of interpleader is a bill filed for the protection of a person from whom several persons claim, legally or equitably, the same thing, debt, or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. The equity is that the conflicting claimants should litigate the matter among themselves without involving the stakeholder in their dispute. *Bennett v. Pennsylvania R. Co.*, 17 Pa. Co. Ct. R. 189, 190 (citing *Adams*, Eq. 202).

A bill of interpleader is a bill filed for the protection of a person from whom several persons claim, legally or equitably, the same thing, debt, or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. The equity is that the conflicting claimants should litigate the matter amongst themselves without involving the stakeholder in their dispute. *McDonald v. Allen*, 37 Wis. 108, 111, 19 Am. Rep. 754 (citing *Adams*, Eq. 202).

A bill of interpleader is where the complainant claims no relief against either of the defendants claiming of him the same debt or duty by different or separate interests, he being uncertain with which of the claims he ought to comply; in which case he may apply to the court, by a bill of this nature, for leave to pay the money or deliver the property to whom it of right belongs, and that he may thereafter be protected from the claims of both. *Bird v. Fake* (Wis.) 2 Pin. 69, 71.

The purpose of a bill of interpleader is to compel the claimants of the same thing, debt, or duty from the party liable therefor to litigate their respective claims between themselves, the party liable being under no independent liability to any of the claimants, and being merely in the position of a stakeholder, without interest in the matter itself.

By such bill the plaintiff seeks protection from rival claimants and a multiplicity of suits. It is essential in every bill of interpleader that each of the defendants claims a right, and such right as they may interplead for. *Pusey & Jones Co. v. Miller* (U. S.) 61 Fed. 401, 402.

Jurisdiction in interpleader is founded upon a conflict between two or more persons severally claiming the same debt through separate and different interests, and the person liable to discharge the debt is unable to ascertain which of the claimants is entitled, and he is therefore threatened with two or more suits in respect of a subject-matter in which he claims no interest, and in regard to which he is an indifferent stakeholder. The want of pecuniary interest on the part of the person in possession of the fund is a necessary element to the maintenance of an interpleader, and hence it is held that, where a trustee in possession of a fund would be entitled to commissions on three or four thousand dollars if the deed of trust is sustained, he could not be said to be an indifferent stakeholder without any interest in the subject-matter in controversy, and hence could not maintain a bill of interpleader. *National Park Bank v. Lanahan*, 60 Md. 477, 514.

A bill of interpleader cannot be maintained by plaintiff, who has a personal interest in the subject of controversy. He must show that he is a mere stakeholder, without any right of his own to be litigated. The object of the proceeding is to determine to which of several claimants the plaintiff shall pay a certain debt or duty, as to which there is no dispute except as to the person entitled to receive it, so that, when their respective rights are settled, nothing further remains in controversy. In this case, where there was a dispute between the plaintiff and the defendants as to whether plaintiff should pay interest on the moneys in his hands, such dispute could not be settled by interpleader, and the bill must be dismissed. *Appeal of Bridesburg Mfg. Co.*, 106 Pa. 275, 276.

One of the essential elements of the equitable remedy of interpleader is that all the adverse titles or claims to the thing or debt in reference to which the bill is filed must be dependent or be derived from a common source. Where there is no privity between the claimants, where their titles are independent, not derived from a common source, but each asserted as wholly paramount to the other, the stakeholder is obliged, in the language of the authorities, to defend himself as well as he can against each separate demand; a court of equity will not grant him an interpleader. *Kyle v. Mary Lee Coal & Ry. Co.*, 20 South. 851, 852, 112 Ala. 606 (citing 3 Pom. Eq. Jur. §§ 132, 324).

To maintain a bill of interpleader, it is necessary the complainant should be uncer-

tain as to whom the right belongs. *Howe Mach. Co. v. Gifford* (N. Y.) 66 Barb. 597, 600.

The remedy of interpleader is intended for the relief of those only who occupy the position of mere stakeholders and are in danger of being drawn into a controversy in which they have no concern. *Wing v. Spaulding*, 64 Vt. 83, 86, 23 Atl. 615.

Bills of interpleader do not ordinarily lie except in cases of privity of some sort between all the parties, such as privity of estate, or title, or contract, and where the claim by all is of the same nature and character. But where the claimants assert their rights under adverse titles, and not in privity, and where their claims are of different natures, the bill is wholly unmaintainable. *Goodrich v. Williamson*, 63 Pac. 974, 980, 10 Okl. 588.

It is well settled that a bill of interpleader will only lie in favor of a plaintiff who has no interest against defendants' claim in privity with each other. *Newman v. Home Ins. Co.*, 20 Minn. 422, 426 (Gil. 378, 381).

An interpleading suit involves two successive litigations; one between the plaintiff and the defendants upon the question whether the defendants shall interplead, the other between the different defendants—that is, the interpleading itself. *Roselle v. Farmers' Bank*, 24 S. W. 744, 745, 119 Mo. 84.

The nature of the allegations in every bill of interpleader are: (1) That two or more persons have preferred a claim against the complainant; (2) that they claim the same thing; (3) that the complainant has no beneficial interest in the thing claimed; and (4) that he cannot determine without hazard to himself to which of the defendants the thing of right belongs. *Atkinson v. Manks* (N. Y.) 1 Cow. 691, 703 (quoted in *Hasberg v. Mutual Life Ins. Co.*, 80 N. Y. Supp. 867, 871, 81 App. Div. 199).

The purpose of a bill of interpleader is to ascertain to whom plaintiff shall deliver the property. *Steed v. Savage*, 41 S. E. 272, 274, 115 Ga. 97.

## BILL OF LADING.

See "Clean Bill of Lading"; "Ship's Bill."

Bills of lading have been in common use from time immemorial. They have their origin in mercantile usages and customs. The law in respect to them should be interpreted in the light of those usages and customs as commonly understood by those conducting business in accordance with them. *German-American Sav. Bank v. Craig* (Neb.) 96 N. W. 1023, 1025.

The office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and

is not concerned with liabilities to contribute in general average. *The Roanoke* (U. S.) 59 Fed. 161, 165, 8 C. C. A. 67.

A bill of lading is a commercial document, to be interpreted according to the usages of commerce. Consequently shippers could not complain at the discharge of the goods at a certain place in the port of destination, where such discharge was made under the usages of commerce, and the bill itself named no particular place in the port where the delivery should be made. *Devato v. Eight Hundred and Twenty-Three Barrels of Plumbago* (U. S.) 20 Fed. 510, 515.

### As contract of carriage.

A bill of lading is the contract by which the carrier agrees to deliver the goods intrusted to him for transportation to the person named therein, or his order, and if he delivers them to any one else, and loss ensues to the party entitled to receive the goods, he becomes liable. *National Bank of Chester v. Atlanta & C. A. L. Ry. Co.*, 25 S. C. 216.

A bill of lading is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place. *Rev. St. Okl. 1903, § 674*; *Rev. Codes N. D. 1899, § 4198*; *Civ. Codes S. D. 1903, § 1551*; *Civ. Code Cal. 1903, § 2126*; *Civ. Code Mont. 1895, § 2830*.

### As contract of carriage by water.

A bill of lading is a commercial document which is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. *Mason v. Lickbarrow*, 1 H. Bl. 359. It is a written memorandum, given by a person in command of a merchant ship or vessel, acknowledging the receipt on board the ship of certain specified goods in good order, or "apparent good order," which he undertakes, in consideration of the payment of freight, to deliver in like good order (dangers of the sea excepted) at a designated place to the consignee therein named, or to his assigns. The term is often applied to a similar receipt and undertaking given by a carrier of goods by land. A contract evidenced by such a bill must be interpreted according to the usages of commerce. *Devato v. Eight Hundred and Twenty-Three Barrels of Plumbago* (U. S.) 20 Fed. 510, 515. But the term is often applied to a similar receipt and undertaking given by a carrier of goods by land. In maritime affairs a writing which is in form of bill of lading, but signed only by the consignor, is not one. *Gage v. Jaqueth* (N. Y.) 1 Lans. 207, 210. It is the written evidence of a contract between the owner of the goods and the master or owner of the vessel for the carriage and de-

livery of the goods, at a certain freight, when sent by sea or other public waters. *Creery v. Holly* (N. Y.) 14 Wend. 26, 28. It is a written evidence of a contract for the carriage and delivery of goods, sent by water, for a certain freight. There are generally three or more parts of the instrument, one of which is usually sent to the consignee by the ship which carries the goods, another which is sent to him by some other conveyance, and a third which is kept by the shipper. *Covill v. Hill* (N. Y.) 4 Denio, 323, 330. It is a contract of bailment, and, in the usual form of the contract, the undertaking is to deliver to the order or assigns of the shipper. *Blanchard v. Page*, 74 Mass. (8 Gray) 281, 286, 287 (citing *Mason v. Lickbarrow*, 1 H. Bl. 359). It is a written evidence of a contract for the carriage of goods by sea, although the term is frequently used relative to similar evidence for contracts on land. Though, as between the shipper of goods and the owner of a vessel, a bill of lading may be explained as to the quantity and condition of the goods, yet it may not be so explained as between the owner of the vessel and a consignee or assignee of the bill who has in good faith advanced money on the strength of it. In such case the bill is conclusive on the owner in respect to the quantity of the goods. *Dickerson v. Seelye* (N. Y.) 12 Barb. 99, 102. It is a written, simple contract between a shipper of goods and a shipowner, the latter to carry the goods, and the former to pay a stipulated compensation for that service. *Blanchard v. Page*, 74 Mass. (8 Gray) 281, 295. It "is a contract of carriage for hire, by which the master engages to deliver the goods to the shipper or his order." *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 807, 813, 23 Am. Dec. 607. It is a contract by which the master engages to carry and deliver goods to the consignee, or to the order of the shipper. It requires the goods to be on board, and they should be on board before the bill is signed. *The L. J. Farwell* (U. S.) 15 Fed. Cas. 707, 708. It is a contract between the owner of the vessel and the freighters. It is a contract by the master for the owners, and subjects them to all the liability incident to it. *Faulkner v. Wright* (S. C.) Rice, 107, 116.

The contract between the ship and the shipper is that which is contained in the bills of lading delivered. The copy retained by the ship, or the "ship's bill," as it is sometimes called, is designed only for its information and convenience, not for evidence as between the parties of what their agreement was. If it differs from the others, they must be considered as the true and only evidence of the contract. Where the contract in the bill of lading is to deliver to the shipper "or order," on the indorsement of the bill by the shipper the indorsee became the owner of the goods, and, by the force of the contract with the ship, the goods were deliverable to such indorsee or to his order

only. *The Thames*, 81 U. S. (14 Wall.) 93, 105, 106, 20 L. Ed. 804.

*Lord Ellenboro* (*Dickson v. Lodge*, 1 Starkie, 226) said a bill of lading was "nothing more than the declaration of a captain." Bills of lading are not admissible as evidence, in a suit on an insurance policy, to show the loss sustained by the person insured. *Paine v. Maine Mut. Marine Ins. Co.*, 69 Me. 568, 571.

#### Manifest includes bill of lading.

A "manifest" is a declaration of the entire cargo; a "bill of lading" is a declaration of a specific part of the cargo. A manifest is essentially a summary of all the bills of lading. *New York & Cuba Mail S. S. Co. v. United States* (U. S.) 125 Fed. 320.

#### As negotiable instrument.

Commercial men have from time immemorial treated bills of lading as convenient symbols or muniments of title, and as instruments for transfer of title, and they have for that purpose acquired among them a negotiability or capacity to pass from hand to hand by indorsement. Mr. Justice Clifford defines "bill of lading" thus: "Such an instrument acknowledges the bailment of the goods, and is evidence of a contract for the safe custody, due transport, and right delivery of the same upon the terms, as to the freight, therein described; the extent of the obligation being specified in the instrument." *Robinson v. Memphis & C. R. Co.* (U. S.) 9 Fed. 129, 133 (citing *The Delaware*, 81 U. S. [14 Wall.] 579, 20 L. Ed. 779).

A bill of lading is, by the custom of merchants, transferable so as to vest in the assignee the title to the goods which the assignor had in them; but if a person, without authority from the owner, ships the goods to another, and takes a bill of lading in his own name, he cannot, by assigning the bill to a third person, divest the owner of his title to the property. *Saltus v. Everett* (N. Y.) 20 Wend. 267, 272, 32 Am. Dec. 541.

A bill of lading is an instrument well known in commercial transactions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand with or without indorsement, and is efficacious in the hands of the holder for its ordinary purposes, it is not a negotiable instrument or obligation in the sense that a bill of exchange or promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it. *Missouri Pac. R. Co. v. Mc-*

Fadden, 14 Sup. Ct. 990, 991, 154 U. S. 155, 38 L. Ed. 944.

A bill of lading is a negotiable instrument, and, when indorsed and delivered, transfers the property to the assignee. *McCants v. Wells*, 4 S. E. (4 Rich.) 381, 387.

A bill of lading is a symbol of property, and when properly indorsed operates as a delivery of the property itself. Quoting *And. Law Dict.* In the hands of a holder of a bill of lading it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive the property at the place of delivery. *Neill v. Rogers Bros. Produce Co.*, 41 W. Va. 37, 56, 23 S. E. 702, 709.

"A bill of lading is understood to be a symbol of the property for which it is given, and when in favor of the consignor, his agent or factor, is transferable by delivery without indorsement, for value, and when so transferred carries with it the property in the goods which it covers." This is according to the law merchant, which prevails in the state of Louisiana as in the state of Missouri. *Scharff v. Meyer*, 34 S. W. 858, 863, 133 Mo. 428, 54 Am. St. Rep. 672.

The Supreme Court of Ohio, in *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299, said: "By the rules of commercial law a bill of lading is regarded as the symbol of the property therein described, and, in case the shipper reserves to himself the *jus disponendi*, he can transfer the title, at any time before the property is delivered by the carrier to the consignee, as effectually by the delivery of the bill of lading as by the delivery of the property itself." *Kentucky Refining Co. v. Globe Refining Co.*, 47 S. W. 602, 605, 104 Ky. 559.

A bill of lading represents and stands for the property for which it was given, and the right and title of such property may pass by an indorsement of the bill, or by a mere delivery thereof, when such was the intention with which the indorsement or delivery was made. *Walker v. First Nat. Bank*, 72 Pac. 635, 636, 43 Or. 102.

Bills of lading, by the law merchant, are representatives of the property for which they have been given, and the indorsement and delivery of a bill of lading transfers the property from the vendor to the vendee, is a complete legal delivery of the goods, and divests the vendor's lien. *Missouri Pac. Ry. Co. v. McLinney*, 32 Mo. App. 166, 175 (citing *Benj. Sales*, § 813).

A bill of lading represents the goods for which it is given, and its delivery passes title as effectually as an actual delivery of the goods, even though the bills are not indorsed. *American Zinc, Lead & Smelting Co. v. Markle Lead Works*, 76 S. W. 668, 670, 102 Mo. App. 158.

Bills of lading are documents which pass from hand to hand. They enter largely into the commercial business of the world, and the strict rules of the holders must be absolutely maintained, or they will lose a material part of their value as instruments of commerce. *The Kirkhill* (U. S.) 99 Fed. 573, 578, 39 C. C. A. 658.

A bill of lading is regarded as a quasi negotiable instrument. It symbolizes property which it describes. The assignment of a bill of lading, indorsed thereon, accompanied by delivery of the instrument, passes to the assignee title to the goods, though actually in transit, as completely as if they had passed through the buyer's hands and been delivered to the assignee. *Missouri Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. 608, 609, 27 Am. St. Rep. 861.

Bills of lading, though transferable by indorsement, are only quasi negotiable. The indorser does not acquire the right to change the agreement between the shipper, which was not in the power of the drawer and consignor. *Russel v. Smith Grain Co.* (Miss.) 32 South. 287, 289.

A bill of lading, though not strictly a negotiable instrument like a bill of exchange, is a representative of the property itself, and the means by which the ownership and control of the property is transferred; hence the delivery of a bill of lading is in law the delivery of the property itself. *Forbes v. Fitchburg R. Co.*, 133 Mass. 154, 157.

Bills of lading are not negotiable instruments in the full sense that promissory notes are. Yet they are justly styled "negotiable." Among the reasons for this are that they are well-recognized commercial instruments; that, when indorsed in blank, they carry title by mere delivery from hand to hand; and that the community gives credit in reliance on what appears on the face of them. *Pollard v. Reardon* (U. S.) 65 Fed. 848, 849, 13 C. C. A. 171.

The functions of a bill of lading are entirely different from those of a bill or note. It is not a representative of money, used for the transmission of money or for the payment of debts or for purchases, and it is merely a contract for the performance of a certain duty. It is a symbol of ownership of the goods covered by it, a representative of those goods; but if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser, will divest the ownership of the person who lost them or from whom they were stolen. Bills of lading are to be regarded as so much cotton, grain, iron, or articles of merchandise. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose, and performing different functions. Hence a statute making them negotiable in

the same manner as bills of exchange and promissory notes are negotiable cannot be construed as intending to change totally their character, put them in all respects to the footing of instruments which are the representative of money, and charge the negotiation of them with all of the consequences which usually attend or follow the negotiation of bills or notes. Under these principles it is held that Hill's Ann. Laws, § 4205, declaring that warehouse receipts shall be negotiable and transferable by an indorsement, does not render such receipts negotiable so as to render parol evidence inadmissible in an action on such receipts to show that the firm issuing the same was in fact acting as agent for defendant. *Anderson v. Portland Flouring Mill Co.*, 60 Pac. 839, 842, 37 Or. 483, 50 L. R. A. 235, 82 Am. St. Rep. 771. See, also, *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557, 564, 25 L. Ed. 892; *Landa v. Latin*, 46 S. W. 48, 50, 19 Tex. Civ. App. 246.

A bill of lading "is the receipt for the conveyance of the cargo of a carrier, and, though it is signed by the master, he does it as the agent of the owner, and it is a contract binding on them. By the bill of lading the common carrier engages to carry and deliver the goods to the consignee or his order. It is the document and title of the goods, and as such, if it be to order or assignees, is transferable in market. The indorsement and delivery of it transfers the property in the goods from the date of the delivery. The function of a bill of lading is different from that of ordinary commercial paper. It is not a representative of money, used for the transmission of money or for the payment of debts; it is merely a contract for the performance of a certain duty, a representation of goods and personal property to be delivered." *Lallande v. His Creditors*, 7 South. 895, 896, 42 La. Ann. 705.

"A bill of lading is the written acknowledgment of the master of a vessel that he has received specified goods from the shipper, to be conveyed, on the terms therein expressed, to their destination, and their delivery to the parties therein designated. *Abb. Shipp.* 322. It constitutes the contract between the parties in respect to the transportation, and is the measure of their rights and liabilities, unless where fraud or mistake can be shown. *Redf. Railways*, 307-309, and notes; *Ang. Car.* § 223. It has acquired from usage a negotiable character, and the carrier may be estopped, as against an indorsee for value, from showing mistakes in giving it." *McMillan v. Michigan S. & N. I. R. Co.*, 16 Mich. 79, 113, 93 Am. Dec. 208.

A "bill of lading" is not a negotiable instrument in the ordinary sense of those words. *Stollenwerck v. Thacher*, 115 Mass. 224. An indorsement and delivery of it for value operates to transfer the title to the

goods described in it, but not as an assignment of the contract, except by force of some statute, as is now the case in England and some of the states here. *Cox v. Central Vermont R. Co.*, 49 N. E. 97, 100, 170 Mass. 129.

A bill of lading is a nonnegotiable instrument. In *Garden Grove Bank v. Hume-ton & S. R. Co.*, 67 Iowa, 526, 534, 25 N. W. 781, it is said bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. They are in commerce a very different thing from bills of exchange and promissory notes, answer a different purpose, and perform a different function. It is not a representative of money used for transmission of money or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it, a representative of those goods; but if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value received, will divest the ownership of the person who lost them. *Weyand v. Atchison, T. & S. F. Ry. Co.*, 39 N. W. 899, 902, 75 Iowa, 573, 1 L. R. A. 650, 9 Am. St. Rep. 504.

A bill of lading is the written evidence for a contract for the carriage of goods. It is only so far negotiable as to protect a bona fide indorsee thereof for value from the exercise by the consignor of the right of stoppage in transitu; but when the bill of lading is obtained by fraud from the owner of the goods shipped, an indorsee, though taking in good faith and for value, can obtain no better title to the goods than the indorser had. *Dows v. Perrin*, 16 N. Y. 325, 331.

Acts 1876, c. 262, § 1, providing that all "bills of lading, warehouse, elevator and storage receipts, shall be negotiable instruments, unless it be provided to the contrary on the face thereof," does not mean that a mere receipt issued by one engaged in the canning business for goods canned by him, and which were to remain in his possession subject to the order of the purchaser, should be negotiable in the same sense as bills of exchange and promissory notes, and such receipt cannot be considered as a "warehouse or storage receipt" within the meaning of the act. *State v. Bryant*, 63 Md. 66, 71.

#### As receipt.

A bill of lading is the ancient, usual, and almost constant indicium of property in goods shipped; and that or some equivalent document is absolutely necessary to enable a vendee to dispose of the goods before their arrival, or for his vendee to demand them from the master of the ship, or to protect the master in delivering them. *Ober v. Smith*, 78 N. C. 313, 319.



A bill of lading in the usual form is a receipt for the goods or things shipped, and an agreement to carry and deliver the same as stipulated; and, in the absence of any statute, the receipt is merely *prima facie* evidence of the delivery of the goods, and may be modified or contradicted by parol evidence. A bill of lading is defined by Justice Clifford in *The Delaware*, 81 U. S. (14 Wall.) 579, 20 L. Ed. 779, as a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed to the described place of destination, and there to be delivered to the consignee or party therein designated. *The Guiding Star* (U. S.) 62 Fed. 407, 411, 10 C. C. A. 454.

A bill of lading "is a written acknowledgment, signed by the master, that he has received the goods described in the bill from the shipper to be transported, on the terms therein expressed, to the described place of destination, and there to be delivered to the consignees, the parties therein designated." *The Delaware*, 81 U. S. (14 Wall.) 579, 600, 20 L. Ed. 779; *Bonito v. Mosquera*, 15 N. Y. Super. Ct. (2 Bosw.) 401, 438; *First Nat. Bank v. McAndrews*, 5 Pac. 879, 880, 5 Mont. 325, 51 Am. Rep. 51; *Witzler v. Collins*, 70 Me. 290, 300, 35 Am. Rep. 327; *The Tongoy* (U. S.) 55 Fed. 329, 331.

It is the essence of a bill of lading that it contains a receipt for the goods, with a promise to carry and deliver them, for this the master promises; but it necessarily contains no more. The price of the carriage is usually inserted for convenience, but it is not an essential part of the instrument. *The Mayflower* (U. S.) 16 Fed. Cas. 1,250, 1,251.

#### As both receipt and contract.

A bill of lading is twofold in its character. It is a receipt specifying the quantity, character, and condition of the goods received, and it is also a contract by which the carrier agrees to transport the goods therein described to a place named, and there deliver them to a designated consignee upon the terms and conditions specified. *The Delaware*, 81 U. S. (14 Wall.) 579, 20 L. Ed. 779. As a contract, a bill of lading, like other written contracts, is presumed, in the absence of imposition or mistake, to embody the entire agreement of the parties, and, where bills of lading are silent as to the amount of freight to be paid, the law will imply that the compensation will be reasonable, and such as is ordinarily charged for like service under like conditions. In the absence of fraud, concealment, or mistake, evidence of an oral agreement is inadmissible in controlling such implied provisions. *Louisville, E. & St. L. R. Co. v. Wilson*, 119 Ind. 352, 355, 21 N. E. 341, 342, 4 L. R. A. 244.

A bill of lading "is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel; in the latter it is a contract to carry safely and deliver." *Pollard v. Vinton*, 105 U. S. 7, 8, 26 L. Ed. 998; *McLeod v. Fourth Nat. Bank of St. Louis* (U. S.) 20 Fed. 225.

"The office of a bill of lading is to embody the contract of a carriage as well as to evidence the receipt of the goods, and when the shipper accepts it without objection before the goods have been shipped, and permits the carrier to act upon it by proceeding with the shipment, it is to be presumed that he has accepted it as containing the contract, and that he has assented to its terms, except in so far as it undertakes to limit the general liability of the carrier." *Central R. & Banking Co. v. Hasselkus*, 17 S. E. 838, 839, 91 Ga. 382, 44 Am. St. Rep. 37.

A bill of lading "is a receipt given by a common carrier for a consignment of goods, and a contract for their transmission. A bill of lading neither makes a title where the shipper has none, nor transfers a title as between shipper and consignee, unless such is the intention of the parties." *Minturn v. Alexandre* (U. S.) 5 Fed. 117, 118.

A bill of lading "is a receipt given by a carrier for a consignment of goods, and operates both as a receipt and as a contract for the transportation of goods." A bill of lading can properly only be given when there is an actual receipt of the goods, and an executory contract to ship in the future is not properly a bill of lading. *The Caroline Miller* (U. S.) 53 Fed. 136, 138.

"A bill of lading is both a written acknowledgment, signed by the master, that the vessel has received from the shippers the goods therein described, and a promise to transport and deliver them on the terms therein expressed." *The Tongoy* (U. S.) 55 Fed. 329.

A bill of lading is a contract including a receipt. *O'Brien v. Gilchrist*, 34 Me. 554, 559, 56 Am. Dec. 676; *Babcock v. May*, 4 Ohio (4 Ham.) 334, 347; *Stapleton v. King*, 33 Iowa, 28, 32, 11 Am. Rep. 109. It is a contract admitting the reception of certain goods, with an agreement to carry them to the port of discharge. *Stapleton v. King*, 33 Iowa, 28, 32, 11 Am. Rep. 109.

Bills of lading are contracts, or receipts and contracts. The carrier acknowledges the receipt of the property that he carried, states the condition on which he is to carry the property, the person to whom and the place where delivery is to be made, and the rate of compensation for the carriage. This he delivers to the consignor as evidence of a contract between them. By receiving the

bill of lading the assignor assents to the terms of the consignment contained in it, and becomes bound thereby, so far as the conditions named are reasonable in the eye of the law. Thus the condition in the bill of lading exempting the carrier for loss by fires, except such as occur by its own negligence, is reasonable and binds the consignor, though he failed to read its terms. *Davis v. Central Vermont R. Co.*, 29 Atl. 313, 314, 66 Vt. 290, 44 Am. St. Rep. 852.

A bill of lading is both a receipt and a contract, and the receipt of the goods for carriage is the basis of the contract of carriage. If no goods are received for carriage, there can be nothing on which the contract of carriage can be based, as the duties and obligations of the carrier with respect to the goods must commence with their delivery to him in a manner that puts upon him the exclusive duty of seeing to their safety. Like all receipts, such bills of lading, so far as they are receipts, may be explained, modified, or contradicted by parol proof. *Lake Shore & M. S. Ry. Co. v. National Live Stock Bank*, 53 N. E. 326, 329, 178 Ill. 506 (citing *Bissel v. Price*, 16 Ill. [6 Peck] 408; *Hutch. Carr. par.* 122; *Illinois Cent. R. Co. v. Cobb*, 72 Ill. 148; *Sears v. Wingate*, 85 Mass. [3 Allen] 103; *Strong v. Grand Trunk R. Co.*, 15 Mich. 206, 93 Am. Dec. 184; *Dean v. King*, 22 Ohio St. 118).

A bill of lading is of twofold character; it is a receipt for goods, and a contract for carriage. As a receipt it makes a prima facie case only, and is undoubtedly open to explanation. *Planters' Fertilizer Mfg. Co. v. Elder* (U. S.) 101 Fed. 1001, 1003, 42 C. C. A. 130.

A bill of lading is an instrument well known to the commercial law, and, according to mercantile use, is only signed by the master of a ship, or other agent of the carrier, and delivered to the shipper. When thus signed and delivered it constitutes not only a formal acknowledgment of receipt of goods therein described, but also contracts for the carriage of such goods, and defines the extent of the obligation assumed by the carrier. A bill of lading signed by the carrier, and delivered to and accepted by the shipper without objection, in the absence of fraud, constitutes a contract for carriage, and binds the shipper, though not signed by him; and a stipulation stamped on the face of the bill of lading before its delivery to the shipper, by its express terms included therein, becomes a part of the contract. *The Henry B. Hyde* (U. S.) 82 Fed. 681, 682.

"Mr. Justice Miller, in *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998, in speaking of a bill of lading, says: 'It is an instrument of a twofold character; it is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the

vessel, in the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or deliver.'" *St. Louis, I. M. & S. R. Co. v. Knight*, 7 Sup. Ct. 1132, 1136, 122 U. S. 79, 30 L. Ed. 1077.

A bill of lading has a twofold character; it operates both as a receipt for the goods taken by the carrier, and a contract to deliver such goods at the place and to the consignee named. *Wolfe v. Myera*, 5 N. Y. Super. Ct. (3 Sandf.) 7.

### BILL OF MIDDLESEX.

The word "bill" in the act of 1784 (P. L. 340), enacting that any person who shall keep a billiard table shall forfeit 50 pounds sterling for every such offense, to be recovered by bill, plaint, or information, cannot be construed to mean a bill of indictment. The word "bill" means "bill of Middlesex," the leading process in the King's Bench in England. It is a kind of capias, and answers the same purpose as a capias in the Court of Common Pleas. 3 Bl. Comm. c. 19. And, if the word has any meaning in this country, it must mean the writ of capias. *State v. Mathews* (S. C.) 2 Brev. 82, 83.

The term "bill," in law language, as used in Act April 2, 1831 (Supp. Rev. Code, c. 88, p. 112), providing that "if any sheriff or other officer conducting an election shall \* \* \* so interfere in the election of senators or delegates, as to show partiality for any of the candidates, he shall forfeit and pay \* \* \* to be recovered by bill, plaint or information in any court of record," etc., distinctly indicates an action by bill of Middlesex in the Court of King's Bench. This "bill of Middlesex" was equally applicable to actions of debt, assumpsit, etc., but as the action of debt is, as has been shown, the most approved action for a penalty, where another is not pointed out, so the word "bill" here would be construed to mean "bill in debt." *Sims v. Alderson* (Va.) 8 Leigh, 479, 484.

### BILL OF PAINS AND PENALTIES.

As bill of attainder, see "Bill of Attainder."

A bill of pains and penalties is a legislative act which inflicts punishment less than death without a judicial trial. *Cummings v. State of Missouri*, 71 U. S. (4 Wall.) 277, 323, 18 L. Ed. 356; *Drehman v. Stifle*, 75 U. S. (8 Wall.) 595, 601, 19 L. Ed. 508; *In re Yung Sing Hee* (U. S.) 36 Fed. 437, 439.

### BILL OF PARTICULARS.

A bill of particulars is the appropriate remedy where the party seeks to be fully ap-

prised of the particulars, or circumstances of time and place, of the matters set forth in his opponent's pleadings. *Durant v. East River Electric Light Co.*, 2 N. Y. Supp. 380, 390, 15 Civ. Proc. R. 193; *Kelly v. Kelly*, 34 N. Y. Supp. 255, 256, 12 Misc. Rep. 457.

A bill of particulars is an account of the items of the claim, and shows the manner in which they arose. It should be as full and specific as the nature of the case admits in respect to all matters as to which the adverse party ought to have information. *Bouv. Law Dict. Ferguson v. Ashbell*, 53 Tex. 245, 250.

A bill of particulars filed by a plaintiff, or a specification of defense filed by a defendant, is usually a formal document drawn up by counsel after some examination of his client's case, and is made broad enough to cover all which the party can expect in any event to prove, and in most instances, probably, is not signed by the party in whose behalf it is filed. *Baldwin v. Gregg*, 54 Mass. (13 Metc.) 253, 255. It is a statement of the details or particulars of the claim set up in a pleading, and its office is to apprise the opposite party of the claim made against him, so that he may not be surprised at the trial. *Seaman v. Low*, 17 N. Y. Super. Ct. (4 Bosw.) 337, 345. It is an amplification of more particular specifications of the matter set forth in the pleading. *Starkweather v. Kittle* (N. Y.) 17 Wend. 20, 21.

In a bill for the settlement of a partnership account brought to the court of common pleas, the jurisdiction of which is limited to \$500, the petitioner alleged that there was a balance due him of between \$400 and \$500, and prayed that the court would decree that the respondent should pay such sum as should be found due him, not exceeding \$500. On a hearing before a committee the petitioner presented to the committee a statement of the partnership account, showing a balance due him of over \$500. Held, that this statement was not to be regarded as a bill of particulars. *Welles v. Allen*, 41 Conn. 140, 141.

"The purpose of a bill of particulars is to give the defendant reasonable notice of the claim he is required to meet, and hence a bill of particulars, in an action to recover for goods sold, showing dates and prices of sales, and describing the property as 'mds,' was insufficient for failing to show the character of merchandise." *O'Hara v. Reed* (Del.) 39 Atl. 776, 1 Pennewill, 138.

"The object of a bill of particulars is to specify the plaintiff's claim, and to apprise the opposite party of the distinct grounds and several items of the demand. Evidence of a new claim, or of a distinct matter not embraced in the bill of particulars, cannot be allowed, on the ground of surprise to the

other side." *Levy v. Gillis* (Del.) 39 Atl. 785, 786, 1 Pennewill, 119.

#### As part of pleading.

A bill of particulars is regarded as an amplification of the pleading to which it relates, and is to be construed as forming a part of it. *Bowman v. Earle*, 3 Duer, 691, 694. Its object is to inform the opposite party what will be attempted to be proved against him on the trial, so that he may prepare his evidence accordingly, and it has the effect to restrict the proof and limit the recovery to the matters set forth in it. Such a bill may be amended by other pleadings upon terms where it will promote substantial justice. *Cudworth v. Gaynor*, 44 N. W. 1103, 1104, 76 Wis. 296 (citing *Melvin v. Wood*, \*42 N. Y. [3 Keyes] 533, 4 Abb. Prac. [N. S.] 433).

"A bill of particulars is an amplification or more particular specification of the matter set forth in the pleading, and is designed to restrict the proofs and limit the recovery or set-off to the matters which have been put in issue by the pleadings. When the bill is finished it is deemed a part of the declaration, plea, or notice to which it relates, and is construed in the same way as if it had originally been incorporated in it." *Roscoe Lumber Co. v. Standard Silica Cement Co.*, 70 N. Y. Supp. 1130, 1131, 62 App. Div. 421.

A bill of particulars is an amplification or some particular specification of the matter set forth in a pleading. The declaration, pleading, or notice of set-off may be so general in its terms that the opposite party will not be fully apprised of the demand which will be set up on the trial, and therefore he is permitted to call on his adversary to give a more detailed and particular statement of the claim on which he intends to rely. When the bill is furnished it is deemed a part of the declaration, pleading, or notice to which it relates, and is construed in the same way as though it had been originally incorporated in it. The particulars cannot be evidence against the party furnishing them, in any case or for any purpose, where the pleading or notice to which the bill relates would not be evidence. *Starkweather v. Kittle* (N. Y.) 17 Wend. 20, 21.

The office of a bill of particulars is to apprise the party of the specific demand of his adversary, and not to furnish him with his proofs or the names of his witnesses. It is, perhaps, in its strictest sense, an amplification of the pleadings, as if the party had alleged generally that he had sustained damages in consequence of some act or another of his adversary, and without disclosing the nature of the act. *Marco v. Bird*, 53 N. Y. Supp. 411, 412, 24 Misc. Rep. 377.

A bill of particulars is simply an extension of the pleading in relation to which it is ordered, and has no relation to the final

judgment. It does not necessarily affect the judgment, but has relation to preparing the issues to be presented to the court upon trial. *Raff v. Koster, Bial & Co., 56 N. Y. Supp. 997, 998, 38 App. Div. 338.*

Although rule 23 of the Supreme Court only provides for amendments of pleadings, yet for most purposes the bill of particulars is regarded as an amplification of the pleading to which it relates, and is construed as though it formed a part of it; and therefore it seems that, if one served a bill of particulars, the original declaration might be amended under such rule by simply changing the form of the particulars. But a notice served with a declaration containing the money counts, that two promissory notes, of which copies were subjoined, would be given in evidence on the trial, was not a bill of particulars either in terms or legal effect, and an amendment to such notice was not a good and sufficient amendment to the declaration. *Chrysler v. James (N. Y.) 1 Hill, 214, 215.*

Under Ballinger's Ann. Codes & St. §§ 4904, 4905, declaring that a pleading is a complaint, a demurrer, or a reply, and providing that a first pleading of a plaintiff is a complaint, a bill of particulars cannot be considered a pleading. *Dudley v. Duval, 70 Pac. 68, 70, 29 Wash. 528.*

#### To fix mechanic's lien.

"Our statute," says the court in *Ferguson v. Ashbell, 53 Tex. 245, 250*, "does not prescribe the requisites of the bill of particulars (to be filed in order to fix a mechanic's lien), and, although no precise rule can be laid down which would apply to every case, it may be safe to say that it should be reasonably certain as to the character and amount of materials furnished and the work performed, the dates and place when thus furnished and performed, and the value of the same. An account merely specified as a 'bill of sash and doors' and a 'bill of mill-work' is not an itemized account sufficient to fix a lien, and an account having no date whatever is fatally defective on that ground." *Meyers v. Wood, 65 S. W. 174, 176, 95 Tex. 67.*

#### BILL OF PEACE.

Bill quia timet distinguished, see "Bill Quia Timet."

The object of a bill of peace is to suppress useless litigation, to prevent multiplicity of suits, to restrain oppressive litigation, and to prevent irreparable mischief. 2 Story, Eq. Jur. § 853. Thus, in actions in ejectment, courts of equity will interfere after repeated trials of the question of title to a satisfactory determination, and grant a perpetual injunction to restrain further litigation. *Mitt. Eq. Pl. 116.* If the right of the

party has been satisfactorily established, it is not material what number of trials have taken place, whether two or more, but the right must have been satisfactorily established at law. 2 Story, Eq. Jur. § 850. Accordingly, where it appeared that one had once withdrawn his claim to certain land, once obtained a verdict in his favor, but dismissed his action on the appeal trial after the evidence had been submitted to the jury, and was instituting another suit when the bill of peace was filed against him, the rights of the parties had not been sufficiently established at law to authorize equity to grant perpetual injunction to restrain further litigation. *Bond v. Little, 10 Ga. 395, 400.*

A "bill of peace" is said to be a bill brought by a person to establish and perpetuate a right which he claims, and which from its nature may be controverted by different persons at different times and by different actions, or where separate attempts have been made to overthrow the same right and justice requires that the party should be quieted in his right. In such a case a court of chancery, in furtherance of the policy of law, would interpose to prevent litigation, and perpetually enjoin those claiming adversely from prosecuting their claims against the person showing himself clothed with the legal right. *Ritchie v. Dorland, 6 Cal. 33, 37.* Its object is the suppression of useless and vexatious litigation. A bill of peace has been sustained to settle the rights of parties in a single suit, where the questions to be determined were questions of fact, or mixed questions of fact and law; but no such bill can be sustained to restrain one from suing at law where his right depends on a question of law merely, and where the defendant in a suit at law must eventually succeed in law, and it is in his favor. *Murphy v. City of Wilmington (Del.) 6 Houst. 108, 138, 22 Am. St. Rep. 345.* It is an equitable remedy to determine in one suit what may be or threatens to be the subject of repeated litigation by various persons. "In the note to *Woodward v. Seely (Ill.) 50 Am. Dec. 449*, it is said bills of peace are of two kinds. To the first class belong those bills brought to establish one general right between a single party on one side and a great number of persons on the other, where such right could not be determined by several suits between the different parties. To the second class belong bills brought between two parties to prevent further litigation of a right after it has been satisfactorily established by one or more trials of law. Bills of the first class require that a community of interest in the subject-matter of the controversy, or a common title from which all the separate claims which are at issue arise, shall exist among the individuals composing the numerous body on the one side, or between one of them and his single adversary, in order to the exercise of the equity juris-

diction, where the bill is a strict, technical bill of peace." *Waddingham v. Robledo*, 28 Pac. 663, 672, 6 N. M. 347. A bill of peace to prevent litigation is allowed only in case the plaintiff has satisfactorily established his right at law, or where the persons who controvert the right are so numerous as to render an issue under the directions of the court necessary to bring in all the parties concerned and prevent a multiplicity of suits. *Eldridge v. Hill* (N. Y.) 2 Johns. Ch. 281.

A bill of peace is made use of where a person has a right which may be controverted by various persons at different times, or where several persons having the same right are disturbed, and the court will thereupon prevent a multiplicity of suits by directing an issue to determine the right, and ultimately an injunction. *Randolph's Adm'x v. Kinney* (Va.) 3 Rand. 394, 395.

Bills of peace are filed where the controversy and its origin possess some ingredient of equitable jurisdiction, such as fraud or accident. Another state of causes is where, though the question be merely legal, yet, in order to prevent endless and useless litigation, a court of litigation will grant a perpetual injunction in repeated and successive trials at law. *Town of Huntington v. Nicoll* (N. Y.) 3 Johns. 566, 572.

A bill to enjoin the enforcement of a city ordinance imposing a license tax, which alleges, in addition to the illegality of the tax, that, if the city is permitted to proceed to enforce it by the remedies provided, complainant will be called upon to defend a multitude of criminal prosecutions, and will suffer irreparable injury in its business, is a bill of peace. *City of Hutchinson v. Beckham* (U. S.) 118 Fed. 399, 401, 55 C. C. A. 338.

### **BILL OF REVIEW.**

A bill of review is one brought to have a decree of the court reviewed, altered, or reversed. Citing *Bouvier*. *Dodge v. Northrop*, 48 N. W. 505, 85 Mich. 243.

A bill of review "is the technical form whereby the chancellor exercises the prerogative, inherent in him, of modifying his decrees in permitted cases." *Jones v. Davenport*, 19 Atl. 22, 24, 46 N. J. Eq. (1 Dick.) 237.

A bill of review is in the nature of a writ of error, and its object is to procure an examination and alteration or reversal of a decree made upon a former bill, which decree has been signed or enrolled. *Warren v. Union Bank*, 28 App. Div. 7, 20, 51 N. Y. Supp. 27, 34 (citing 2 Barb. Ch. Prac. 90); *Appeal of Fidelity Ins. Trust & Safe-Deposit Co.* (Pa.) 3 Walk. 185, 186; *Hyman v. Smith*, 10 W. Va. 298, 312; *Taylor v. Charter Oak Life Ins. Co.* (U. S.) 17 Fed. 566. It is a proceeding in the nature of a writ of error, and

which may be brought to modify or reverse a decree given in a suit in equity in favor of the United States for errors apparent upon the face thereof. It has the same scope and purpose that a writ of error has in an action at law—"to procure an examination and alteration on a reversal of a decree made upon a former bill" between the same parties. *Bush v. United States* (U. S.) 13 Fed. 625, 627 (citing *Story Eq. Pl.* § 403). It lies only after a final decree. Strictly speaking, a bill of review is a proceeding to correct a final decree in the same court for error apparent on the face of the decree, or on account of new evidence discovered since the final decree. *Hyman v. Smith*, 10 W. Va. 298, 312.

By Lord Chancellor Bacon's rules, it was declared: "No bill of review shall be admitted except it contain error in law appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath arisen in time after the decree, and not on any new proof which might have been used when the decree was made. Nevertheless, upon new proof that is come to light after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be granted by the special license of the court, and not otherwise." *Purcell v. Miner*, 71 U. S. (4 Wall.) 513, 521, 18 L. Ed. 435.

The object of a bill of review and of a bill in the nature of a bill of review is to procure the reversal, alteration, or explanation of a decree made in a former suit. If the decree has been signed and enrolled, a bill of review must be filed; if not, a bill in the nature of a bill of review. A bill of this character can only be brought on error in law appearing on the face of the decree, without examination of matters of fact, or on some new matter which has been discovered after the decree, and could not possibly have been used when the decree was made. *Mat-tair v. Card*, 19 Fla. 455, 458.

A bill of review for errors apparent on the face of the record will not lie after the time within which the writ of error could be brought, for courts of equity govern themselves in this particular by the analogy of the common law in regard to writs of error. *Taylor v. Charter Oak Life Ins. Co.* (U. S.) 17 Fed. 566.

The ground of a bill of review is error apparent on the face of the decree, or new evidence of a fact materially pressing upon the decree, and discovered at least after publication in the cause. *Young v. Kelghly*, 16 Ves. 348, 350. A bill of review lies to have a final decree of the court revised, altered, or reversed, and lies in two classes of cases, viz., upon error in law appearing in the body of the decree itself, or upon discovery of the new relevant, material matter, or material evidence not known prior to the decree.

sought to be reviewed, and which could not have been discovered by the exercise of reasonable diligence. Ordinarily a bill of review will not lie where the newly discovered evidence is simply confirmatory or cumulative. *Custer v. Custer*, 17 W. Va. 113, 123 (citing *Nichols v. Nichols' Heirs*, 8 W. Va. 174).

A bill of review corresponds with and is in the nature of a writ of error in an action at law, and can only be introduced for the purpose of impeaching, and reversing or modifying, in whole or part, an original decree on account of errors in law apparent on its face. A bill of review cannot be sustained on the ground that the court decided wrong on a question of fact, nor for wrong inferences of the court on matters of fact, nor on the ground that the original decree was not warranted by the facts. *Maxwell Land Grant & Ry. Co. v. Thompson*, 1 N. M. 603, 605.

The object of a bill of review is to procure the reversal, alteration, or explanation of a decree made in a former suit on the ground of error of law apparent or newly discovered matter. A bill which concedes the correctness of the former decree, and in no wise questions it or seeks to review it, and does not ask a rehearing of the former suit, cannot be considered a bill of review. *Wallace v. Goodlett*, 58 S. W. 343, 344, 104 Tenn. 670.

A bill of review ordinarily lies to reverse or modify a decree for error in law apparent upon its face, or on account of the facts discovered since the decree. *Adamski v. Wleczorek*, 48 N. E. 951, 170 Ill. 373.

#### **As part of original proceeding.**

A bill of review is an independent proceeding, and does not constitute a part of the original proceeding. *Cole v. Miller*, 32 Miss. 89, 100.

#### **Petition for rehearing distinguished.**

A bill of review based on newly discovered evidence is designed to accomplish the same purpose as a petition for a rehearing in chancery or a motion for a new trial at law. Such a petition or motion must, however, be filed or made during the term, while a bill of review is filed only after the term at which the decree was entered. *Watts v. Rice*, 61 N. E. 337, 339, 192 Ill. 123.

#### **Writ of error distinguished.**

A bill of review is prosecuted to reverse a decree of the same court, while a writ of error is to reverse the judgment of an inferior court. The rights of the parties in both cases have been determined by a competent tribunal, and the object of the proceedings in both cases is to reverse the judgments. *Longworth v. Sturges*, 4 Ohio St. 690, 707.

### **BILL OF REVIVOR.**

A bill of revivor is one which is brought to continue a suit which has abated before its final consideration, as for example, by death. *Clarke v. Mathewson*, 37 U. S. (12 Pet.) 164, 171, 9 L. Ed. 1041.

A bill of revivor is but a continuation of the original suit, and, if the plaintiff was competent to sue the defendant in the circuit court, his administrator, though a citizen of the same state as the defendant, may revive it. *Brooks v. Laurent* (U. S.) 98 Fed. 647, 652, 39 C. C. A. 201.

### **BILL OF REVIVOR AND SUPPLEMENT.**

"A bill of revivor and supplement is a compound of a supplemental bill and bill of revivor, and not only continues the suit which has abated by the death of a plaintiff, but supplies any defects in the original bill arising from subsequent events, so as to entitle the plaintiff to relief on the whole merits of the case." *Westcott v. Cady* (N. Y.) 5 Johns. Ch. 334, 342, 9 Am. Dec. 306.

"A bill of revivor and supplement is said to be a compound of a supplemental bill and bill of revivor, and it not only continues a suit which has abated, but supplies any defects in the original bill arising from subsequent events; and where a complainant has a right to revive a suit he may add to the bill of revivor such supplemental matter as is proper to be added, but the supplemental matter must have been newly discovered and verified by affidavit, and may be demurred to by the defendant." *Bowie v. Minter*, 2 Ala. 406, 411.

### **BILL OF RIGHTS.**

The term "bill of rights" is derived primarily from 2 St. Wm. & Mary, c. 2, and was so called because that statute declared the rights of a British subject. The object of that statute, as well as of every British statute of a like kind, was to operate as a limitation on the powers of the crown, and secure from encroachment the ascertained and declared rights of the subject. As used in this country, the Bill of Rights contains the political aphorisms, general principles, and fundamental ideas of free government, and is usually made a part of the Constitution of the state and reserved from legislative action, so that the people themselves shall retain the exclusive right either to modify or disregard it. *Eason v. State*, 11 Ark. (6 Eng.) 481, 491.

Bills of rights "are the enumeration of certain great political truths essential to the existence of free government. They are not to be regarded as a mere compilation of glittering generalities, for many of their sections

are clear, precise, and definite limitations on the powers of Legislature and every other officer and agency of the people. They limit the power of the Legislature, and no acts of that body can be sustained which conflicts with them." *Atchison Street Ry. Co. v. Missouri Pac. Ry. Co.*, 3 Pac. 284, 31 Kan. 661.

An American "bill of rights" is a declaration of private rights reserved in a grant of public powers—a reservation of a limited individual sovereignty, annexed to and made a part of a limited form of government established by the independent, individual action of the voting class of the people. The general purpose of such a bill of rights is to declare those fundamental principles of the common law, generally called the "principles of English constitutional liberty," which the American people always claimed as their English inheritance, and the defense of which was their justification of the War of 1776. *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 343, 344. All, or nearly all, the guaranties and prohibitions of our Bill of Rights were supposed to be necessary here because they had been necessary in England. Many of them were originally taken almost literally from English documents (constitutional in the English sense), where they had been recorded, after violent controversies; as authoritative acknowledgments and affirmations of ancient English liberties. The specification of many of them is due to particular events in English history, which from time to time called for declarations and guaranties that introduced no new principle. Innovation was always disclaimed. When some peculiar violation of an ancient general right was resisted and suppressed as an innovation, so much of the violated right as was vindicated on that occasion was put on record, and solemnly declared to be the undoubted and immemorial birthright of Englishmen. Details of this kind, occupying much space in American bills of rights, and, by their historical associations, engrossing attention and magnifying their apparent importance, have been influential in disseminating the idea that broad and comprehensive rights of life, liberty, and property, expressly declared to be natural, essential, and inherent, and reserved in the organic law, are not constitutional rights, and cannot be practically upheld by the court (Sedg. St. & Const. Law [2d Ed.] 153, 154, 407) in any other cases than those mentioned in accompanying specifications that do not profess to comprise the entire reservation, and are necessarily partial and imperfect because they were drawn with reference to particular instances or modes of infringing or securing the general rights reserved. Specifications and details of administration, inserted by reason of an anxiety to strengthen the sweeping reservation of essential rights, do not deduce that reservation to an abstraction, nor limit the extent or energy of its operation. They illustrate its power by prac-

tical examples, they require its continued application to such cases as the principle of it has been applied to on certain great historical occasions, they prohibit particular violations, they furnish particular safeguards; instead of destroying the general reservation, they re-enforce it. *Orr v. Quimby*, 54 N. H. 590, 613.

### **BILL OF SALE.**

A bill of sale is a writing evidencing the transfer of personal property from one person to another. The nature of the writing would seem to require that it contain some statement of the fact of transfer. We think it will be found that all the informal writings treated by our court as bills of sale refer to the property as having been bought. Where defendant sold a bicycle to plaintiff, a written instrument executed by him to plaintiff reciting: "Terms cash. P. to M., dr., one bicycle, \$47.50, paid July 27, 1896"—was not sufficient to constitute a bill of sale, since it did not contain words importing a transfer of title, but was merely a receipted statement of account. *Putnam v. McDonald*, 47 Atl. 159, 72 Vt. 4.

Testator's will mentioned bills of sale which a debtor had made to the testator "to prevent his creditors from sacrificing his property," and directed his executors, upon a settlement and payment of the balance due from the debtor, to release the bills of sale. Held that, it appearing that the testator held a mortgage on land of a debtor, the phrase "bills of sale" should be construed as meaning such mortgage. *Breckinridge v. Waters'* Heirs, 34 Ky. (4 Dana) 620, 622.

### **Assignment for creditors distinguished.**

There is a broad and well-defined distinction between a general assignment for the benefit of creditors, and a deed or bill of sale. The former is a transfer by a debtor of his property to another, in trust, to sell and convert into money, and distribute the proceeds among his creditors, and it implies a trust, and contemplates the intervention of a trustee. The others import an absolute sale and transfer of the title, to be held and enjoyed by the purchaser without any attending trust. A written instrument by a debtor to a creditor, purporting to be a bill of sale of all the debtor's property, which is worth more than the creditor's claims, and which states that the property is sold in consideration of the indebtedness due the creditor, and to secure other creditors, is not a bill of sale, either as collateral or absolute security, but an attempted assignment for the benefit of creditors. *Young v. Stone*, 70 N. Y. Supp. 558, 561, 61 App. Div. 364.

### **Chattel mortgage distinguished.**

An instrument conveying chattels, which provides that it is to be void on repayment of

the consideration within a certain time, is not a bill of sale, but a chattel mortgage, though it provides that the sale is to become absolute, and the title is to pass without any legal process, on the seller's failure to make such payment, and though it is described as a bill of sale; and hence it is within 2 Sayles' Civ. St. art. 338, requiring chattel mortgages to be registered, to be valid against creditors. *Williams v. Farmers' Nat. Bank*, 56 S. W. 261, 22 Tex. Civ. App. 581. See, also, *Musser v. King*, 59 N. W. 744, 746, 40 Neb. 892, 42 Am. St. Rep. 700.

Where a debtor by a written instrument transfers personal property to his creditor, and delivers possession of such property to him, with authority to sell, and, after paying all prior incumbrances, applies the excess to the payment of his own claim, no definite price being fixed for the property between the parties to the instrument, the writing is not a bill of sale, even though the words "bargain, sell, transfer, and deliver" are used therein, but such instrument will be construed to be a deed of trust or a chattel mortgage. A bill of sale of chattels, absolute on its face, may be shown, even by those not parties to it, to be a security for mortgage, void against subsequent lienholders, unless filed as required by law, or unless possession of the property be given to the mortgagee, and such possession be actual and continuous. *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 60 Pac. 249, 260, 9 Okl. 353.

#### **BILL QUIA TIMET.**

"Bills quia timet are also known in the practice of equity as 'writs of prevention,' and are used to accomplish the ends of precautionary justice. The name of this bill is taken from the expression of the party's fears in the application. He fears some future probable injury to his life or interest, and not because an injury has already occurred which requires relief. His object is to secure the preservation of property to its appropriate uses, where there is future or contingent danger of its being diminished, or lost by gross neglect, without the interposition of the court. It generally relates to personal property, and is applicable as against executors, administrators, trustees, and corporations, where there is danger of devastation, waste, or collusion, by which estates may be diminished, and where the appointment of a receiver is necessary." *Bailey v. Southwick* (N. Y.) 6 Lans. 356, 364. See, also, *Southern R. Co. v. North Carolina R. Co.* (U. S.) 81 Fed. 595, 598.

Actions to cancel instruments and remove clouds are purely preventive remedies for avoiding apprehended injuries which may be occasioned to the plaintiff by reason of some action which may be taken in the future by the defendant under and by virtue of the instrument alleged to be a cloud. *Town*

of *Mt. Morris v. King*, 40 N. Y. Supp. 709, 712, 8 App. Div. 495.

Bills quia timet are bills, in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischiefs. The party seeks the aid of equity because he fears some future probable injury to his rights or interests, and not because any injury has already occurred which requires compensation or any other relief. *Bryant v. Peters*, 3 Ala. 160, 169.

A bill quia timet "is a bill filed by one who is apprehensive of being subjected to some future inconvenience, probable or even possible to happen, or to be occasioned by the neglect, inadvertence, or culpability of another, as where any property is bequeathed to one after the death of another, and which the former is desirous of having secured safely for his use, or where a surety is fearful of injury from a neglect of his principal to pay the debt." *Randolph's Adm'x v. Kinney* (Va.) 3 Rand. 394, 398.

#### **Bill of peace distinguished.**

"A bill quia timet, or to remove a cloud on the title of real estate, differs from a bill of peace in that it does not seek so much to put an end to vexatious litigation respecting the property, as to prevent future litigation by removing existing causes of controversy as to its title. It is brought in view of anticipated wrongs or mischief, and the jurisdiction of the court is invoked because the party fears future injury to his rights or interests." *Holland v. Challen*, 3 Sup. Ct. 495, 498, 110 U. S. 15, 28 L. Ed. 52; *Northern Pac. R. Co. v. Amacker* (U. S.) 49 Fed. 529, 530, 1 C. C. A. 345; *Roman Catholic Archbishop v. Shipman*, 11 Pac. 343, 344, 69 Cal. 586.

#### **BILL RECEIVABLE.**

Bills receivable are promissory notes, bills of exchange, bonds, and other evidence of securities which a merchant or trader holds, and which are payable to him. *State v. Robinson*, 57 Md. 486, 501.

#### **BILL RENDERED.**

The term "bill rendered," as used in books of account, is to be construed to mean as rendered at the date when such accounts were assigned of articles delivered before the assignment and in satisfaction of the account. *Hill v. Hatch*, 11 Me. (2 Fairf.) 450, 455.

#### **BILLED STRAIGHT.**

"Billed straight" means that the goods were billed to a particular person, and not to order. *Forbes v. Boston & L. R. Co.*, 133 Mass. 154, 157.



**BILLETS.**

"Ingots" or "billets" of steel are the steel bars when taken from the molds of a steel manufactory, the words being applied to the finished product as it is ready for shipping. *Illinois Steel Co. v. Bauman*, 53 N. E. 107, 108, 178 Ill. 851, 69 Am. St. Rep. 316.

**BILLIARDS.**

Under an ordinance forbidding the keeper of a billiard saloon from allowing minors "to play billiards" the words do not mean to play a game of billiards for wager, and it is not necessary for the owner of the billiard table to allow more than one minor to play billiards in order to constitute the offense. *State v. Ward*, 57 Ind. 537, 538.

It is held that a statute licensing billiard tables is only intended to legalize the game of billiards proper, in the popular and commonly received acceptation of that term, and not to authorize other games for which a billiard table is not commonly understood to have been designed, but which may be played thereon, even though they may be regarded as a species of or included under some of the several varieties of billiards. *Barker v. State*, 12 Tex. 273, 277.

**Pool included.**

"Billiards," as used in 2 Rev. St. 1876, p. 484, § 1, providing that if any person owning or having the care and management or control of any billiard table, who shall allow any minor to play billiards, etc., is not a generic term broad enough to cover any game that may be played on a billiard table, but includes only the ordinary game of billiards, which is played with three or four balls only, and does not include the game ordinarily known as "pool," which is played with fifteen balls. *Squler v. State*, 66 Ind. 317, 318.

"Billiards" is described in Webster's Unabridged Dictionary (1870 Ed.) as a game played on a table having pockets at the sides and corners of the table, and so includes pool. *Sikes v. State*, 67 Ala. 77, 80.

"Billiards," as used in a statute permitting the playing of billiards, means the game called "billiards" as then known and played in the United States, and does not include the game of pin pool, though such game would be regarded in Cuba and in Mexico as billiards. *Smith v. State*, 17 Tex. 191, 192.

**As sport.**

See "Sport."

**BILLIARD ROOM.**

Every building or space where bowls are thrown, or where games of billiards or pool are played, and that are open to the public with or without price, shall be regarded as a

bowling alley or billiard room, respectively, within the meaning of the war revenue act of 1898. U. S. Comp. St. 1901, p. 2288.

**BILLIARD TABLE.**

A billiard table erected and used merely for the purposes of amusement is liable to a tax imposed on "billiard tables" in the same way as if used for the purposes of gaming. *Sears v. West*, 5 N. C. 291, 292, 3 Am. Dec. 694.

Rev. Code, art. 12, § 8, providing that any person or persons keeping or exhibiting a billiard table without first obtaining a license, which is kept for private use, shall be fined, etc., means that the table is kept for the use of the owner or such persons as he may choose to invite, and that it is not accessible to any one who may choose to play a game on it. *Schmetzer v. State*, 63 Md. 420, 422.

The authority to license the keeping of billiard tables gives authority to regulate through the license, which is of itself a species of regulation, and authorizes police regulation of billiard or pool rooms. *State v. Pamperin*, 44 N. W. 251, 252, 42 Minn. 320.

Under a charter authorizing a city to regulate "billiard tables" on which games are played for amusement, the city has the power to regulate not only the tables on which the game is played, but the halls or rooms in which they are kept. *City of Tarkio v. Cook*, 25 S. W. 202, 203, 120 Mo. 1, 41 Am. St. Rep. 678.

**Faro table.**

The court cannot judicially know that a billiard table is not a table where the game of faro is usually played. *State v. Price*, 12 Gill & J. 260, 263, 37 Am. Dec. 81.

**As a gaming table.**

Keeping a billiard table, even though the loser pays for the use of the billiard table, is not keeping a gaming table. *People v. Forbes*, 4 N. Y. Supp. 757, 758, 52 Hun. 30.

**Pool table included.**

"Billiard table," as used in Code, § 4213 prohibiting saloon keepers from permitting minors to play on "billiard tables," includes all tables with or without pockets on which the game of billiards could be or was played, and tables which were usually used in playing the game of pool. *Sikes v. State*, 67 Ala. 77, 80.

**BIND.**

See, also, "Bound."

The terms "bind," "bound," "binding effect," and "obligation" are often used by the most responsible jurists without meaning to

have them applied to bonds, in the technical language of the law. *Stone v. Bradbury*, 14 Me. (2 Shep.) 185, 193.

In Common Law Procedure Act 1854, § 62, providing that the service of the order on the garnishee shall bind such debts in his hands, is to be construed as not changing the property or giving even an equitable property, either by way of mortgage or lien, but as putting the debt in the same situation as goods when the writ was delivered to the sheriff under execution. The word "bind" means that the debtor, or those claiming under him, shall not have power to convey or do any act as against the right of the party in whose favor the debt is bound, and gives a security as distinguished from a lien. *Holmes v. Tutton*, 5 El. & Bl. 65, 80.

#### As promise to pay.

In an instrument seeking to bind a married woman, with the consent of her husband, in connection with certain notes executed by her, stating that she "does hereby charge and specifically bind her following separate estate for the payment of all her aforesaid obligations, and any and all renewals thereof," "bind," means no more than if used in a simple promissory note, which might have been signed by the married woman for the purpose of charging her separate estate, and cannot be held to be a word of conveyance. *Wachovia Nat. Bank v. Ireland*, 37 S. E. 223, 224, 127 N. C. 238.

In an agreement to pay certain money, "to which payment well and truly to be made I bind myself," the word "bind" sufficiently imports a promise to support an action. *Douglas v. Hennessy*, 10 Atl. 583, 584, 15 R. I. 272.

#### BINDERS.

Binders are the secondary or inside wrapper of tobacco, holding together the loose materials which constitute the filling. *Falk v. Robertson*, 11 Sup. Ct. 41, 42, 137 U. S. 225, 34 L. Ed. 645.

#### BINDING EFFECT.

The terms, "bind," "bound," "binding effect," and "obligation" are often used by the most responsible jurists without meaning to have them applied to bonds, in the technical language of the law. *Stone v. Bradbury*, 14 Me. (2 Shep.) 185, 193.

#### BINDING OR TAPE.

A narrow woven tape of cotton, used largely for covering the seams of underwear and waists, is a binding or tape, dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 320, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], placing a 45 per cent. duty on bindings or tape. *A. Steinhart & Bro. v. United States* (U. S.) 121 Fed. 442, 443.

#### BINDING TRANSACTION.

A binding transaction requires the free and conscious action of the party's mind upon its subject. Thus, where the managing officer and principal stockholder of a bank, while acting in a fiduciary capacity for its customers, by means of concealment and false representations induces the latter to invest in bonds, bought and held by the bank for speculative purposes, in reliance wholly on his representation that they were first-class securities, and that he had got them for her expressly, when in fact they were second mortgage bonds, and were sold at a profit, the customer may rescind the transaction, and recover from the bank the money received therefor. *Carr v. National Bank & Loan Co.*, 60 N. E. 649, 650, 167 N. Y. 375, 82 Am. St. Rep. 725.

#### BIRDS.

Where an act was entitled "An act to provide for the protection of game, wild fowl and birds," the words "wild fowl and birds" will be presumed to have been added to the word "game" for the reason that game will be understood in its sense of including all game birds, game fowl, and game animals, and hence were intended to include species of wild fowl and birds not covered by the word game. *Meul v. People*, 64 N. E. 1106, 1107, 193 Ill. 253.

#### BIRDS OF WARREN.

Grouse are not "birds of warren." *Duke of Devonshire v. Lodge*, 7 Barn. & C. 36.

#### BIRTH.

See "Actual Birth."

"It is an established maxim," says Mr. Madison, "that birth is a criterion of allegiance. Birth, however, derives its force sometimes from place, and sometimes from parentage; but, in general, place is the most certain criterion; it is what applies in the United States." Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; secondly, birth within the protection and obedience, or, in other words, within the allegiance of the sovereign. *Opinion of Judge*, 44 Me. 521, 523 (quoting *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U. S. [3 Pet.] 99, 155, 7 L. Ed. 617).

#### BISECTING METHOD.

As used by surveyors for the purpose of determining the center of a section of land, the bisecting method is a method pursued by running a line from the quarter corner on the east to the quarter corner on the west side of the section, or vice versa, and the point half

way on said line between said corners is the center. *Gerke v. Lucas*, 60 N. W. 538, 539, 92 Iowa, 79.

## BISHOP.

See "Coadjutor Bishop."

The English phrase "bishop," derived from the Saxon "Bircop," means to oversee. *People v. Steele*, 6 N. Y. Leg. Obs. 54, 59.

### Archbishop.

In a transfer tax law, exempting from the tax property devised or bequeathed to a bishop, the term "bishop" will be held to include an archbishop, or the cardinal archbishop. In *re Kelly's Estate*, 60 N. Y. Supp. 1005, 1006, 29 Misc. Rep. 169.

## BITCH.

The term "bitch" is at times a common street expletive, and may have reference to several different phases of character, and the intent with which the word is used depends upon the circumstances, and may mean no more than a violent, though inelegant, expression of contempt. *Schurick v. Kollman*, 50 Ind. 336, 338; *Robertson v. Edelstein*, 104 Wis. 440, 80 N. W. 724. Such word is not actionable per se. *Jacobs v. Carter*, 92 N. W. 397, 398, 87 Minn. 448.

### Prostitution imported.

The language, "You are a God damn low-down son of a bitch," though profane, coarse, opprobrious, and abusive, is not obscene and vulgar, inasmuch as the word "bitch," applied to a woman, does not, in its ordinary sense, import prostitution. *Shields v. State*, 16 S. E. 66, 67, 89 Ga. 549.

The word "bitch" has not any such meaning as "prostitute," in English, and, although used as a term of reproach when applied to a woman, does not charge the crime of prostitution, and is not actionable. A complaint for slander, where the words are alleged to have been spoken in German, charging the plaintiff with being a bitch, and setting forth the same in the German language with an English translation, does not show a cause of action, even if the German words were actionable. *K— v. H—*, 20 Wis. 239, 242, 91 Am. Dec. 397.

### Want of chastity imported.

The term "bitch" is an opprobrious name for a woman, especially a lewd woman. It has not been thought to imply want of chastity nor to mean prostitute. It is generally held not to be libelous per se to call a woman a "bitch." *K— v. H—*, 20 Wis. 239, 242, 91 Am. Dec. 397; *Schurick v. Kollman*, 50 Ind. 336, 338; *Craig v. Pyles*, 39 S. W. 33, 101 Ky. 593; *Blake v. Smith*, 34 Atl. 995, 996, 19 B. I. 476; *Craver v. Norton*, 86 N. W. 54,

114 Iowa, 46, 89 Am. St. Rep. 346; *Shields v. State*, 16 S. E. 66, 67, 89 Ga. 549; *Roby v. Murphy*, 27 Ill. App. 394, 398; *Phillips v. Baldwin* (N. Y.) 8 Wkly. Dig. 194, 195; *Anonymous*, 60 N. Y. 262, 264, 19 Am. Rep. 174; *McMahon v. Hallock*, 1 N. Y. Supp. 312, 48 Hun, 617; *Nealon v. Frisbie*, 31 N. Y. Supp. 856, 857, 11 Misc. Rep. 12. CONTRA, see *Logan v. Logan*, 77 Ind. 558, 561, 564; *Riddell v. Thayer*, 127 Mass. 487, 490; *Scott v. McKinnish*, 15 Ala. 662, 664.

The word "bitch" is synonymous with "wench" or "hussy," and often implies lewdness. *Bailey v. Bailey*, 63 N. W. 341, 342, 94 Iowa, 598.

## BITTERS.

See "Intoxicating Bitters."

Where the purpose of the prohibitory liquor laws is to promote the cause of temperance and prevent drunkenness, the evil to be redeemed is the use of intoxicating liquors as a beverage rather than as an ingredient of medicines and articles for the toilet or for culinary purposes. There may be cases where the bona fide use of a moderate quantity of spirituous liquor in a medicinal tonic would not alone bring a beverage within a statute prohibiting the sale of intoxicating liquors. This question is exhaustively discussed in the *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284. The Kansas statute prohibited the sale of "all liquors and mixtures, by whatever name called, that will produce intoxication." It was held not to embrace standard medicines and toilet articles, not ordinarily used as beverages, such as tincture of gentian, bay rum, and essence of lemon, although containing alcohol. Whether it embraced certain cordials or bitters was held to be a question of fact dependent on the evidence as to their intoxicating qualities and ordinary use. It was said that "bay rum, cologne, paregoric, and tinctures generally all contain alcohol, but in no fair or reasonable sense are they intoxicating liquors or mixtures thereof." And as to the cordials and bitters the question was said to be one of fact, which should be referred to the jury. "If the compound or preparation," said the court, "be such that the distinctive character and effect of intoxicating liquor are gone, that its use as an intoxicating beverage is practically impossible by reason of the other ingredients, it is not within the statute. The mere presence of the alcohol does not bring the article within the prohibition. The influence of the alcohol may be counteracted by the other elements, and the compound be strictly and fairly only a medicine. On the other hand, if the intoxicating liquor remain as a distinctive force in the compound, and such compound is reasonably liable to be used as an intoxicating beverage, it is within the statute; and this,

though it contain many ingredients, and ingredients of an independent and beneficial force in counteracting disease or strengthening the system. 'Intoxicating liquors, or mixtures thereof'—this, reasonably construed, means liquors which will intoxicate, and which are commonly used as beverages for such purposes, and also any mixtures of such liquors as, retaining their intoxicating qualities, it may be fairly presumed may be used as a beverage, and become suitable for the ordinary intoxicating drinks." In *King v. State*, 58 Miss. 737, 38 Am. Rep. 344, the defendants were indicted for selling intoxicating liquor without a license and contrary to law. The article sold was "Home Bitters," a decoction composed of 30 per cent. of alcohol, and the rest of water, barks, seeds, herbs, and other like ingredients. It was alleged by the defendant to have been sold as a medicine. It was held that if the compound was intoxicating, and was sold as a beverage, the jury should convict; but if it was sold in good faith, only as a medicine, they should acquit. It was said: "One authorized to sell medicines ought not to be guilty of violating the laws relative to retailing because the purchaser of a medicine containing alcohol misuses it, and becomes intoxicated; but, on the other hand, these laws cannot be evaded by selling as a beverage intoxicating liquors containing drugs, barks, or seeds which have medicinal qualities. The uses to which the compound is ordinarily put, the purposes for which it is usually bought, and its effect upon the system are material facts, from which may be inferred the intention of the seller. If the other ingredients are medicinal, and the alcohol is used either as a necessary preservative or vehicle for them—if, from all the facts and circumstances, it appears that the sale is of the other ingredients as a medicine, and not of the liquor as a beverage—the seller is protected; but if the drugs or roots are mere pretenses of medicines, shadows and devices under which an illegal traffic is to be conducted, they will be but shadows, when interposed for protection against criminal prosecution." *Carl v. State*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380. See, also, *Wall v. State*, 78 Ala. 417, 418; *Ryall v. State*, Id. 410. To the same effect, substantially, is the case of *Commonwealth v. Ramsdell*, 130 Mass. 68.

The word "bitters," in its ordinary acceptance, means a spirituous liquor, and not a drink or beverage of the kind or class known as mineral or soda waters. *State v. Dinnisse*, 19 S. W. 92, 93, 109 Mo. 434.

Medicated bitters, called "Doctor Wilson's Rocky Mountain Herb Bitters," and containing alcohol, is within the prohibition of a statute against dealers in drugs and medicines selling or giving away intoxicating liquors or medicated bitters. *State v. Wilson*, 80 Mo. 303, 306.

## BITUMEN.

"Bitumen" is a generic term, applied to a large number of natural substances, which consist largely or chiefly of hydrocarbons. This substance may be gaseous, as natural gas or marsh gas; fluid, as petroleum or naphtha; viscous, as the semifluid asphaltum; or solid, as forms of asphaltum. According to McCulloch's Commercial Dictionary, bitumen includes a considerable range of inflammable mineral substances, burning with the flames in the open air, which differ in consistency from a thin fluid to a solid. The term "bitumen," within the meaning of the tariff act placing bitumen on the free list, was held by Wallace, Circuit Judge, in a concurring opinion, to include natural gas, the same result having been reached by the majority of the court by construing natural gas to be a mineral within the meaning of the free list. *United States v. Buffalo Natural Gas Fuel Co.* (U. S.) 78 Fed. 110, 112, 24 C. C. A. 4.

## BITUMINOUS COAL MINE.

The term "bituminous coal mine," as used in the chapter relating to mines and mining, shall include all coal mined in the state now included in the anthracite boundaries. *Pepper & L. Dig. Pa. Laws 1894*, p. 3150, § 849.

## BLACK.

The artificial coal-tar colors employed in dyeing black, either alone or in admixture with other colors generally, dye dark blue shades, which have the appearance of black, and which, when sufficiently concentrated, are commercially known as "black colors." *Matheson v. Campbell* (U. S.) 69 Fed. 597, 600.

## BLACK BOOK OF THE ADMIRALTY.

The Black Book of the Admiralty is a book containing the laws of admiralty, and was originally compiled in the reign of Edward III, and has always been deemed of the highest authority in matters concerning the admiralty, and contains, besides the laws of Oleron, an ample view of the crimes and offenses cognizable in the admiralty, and also occasional ordinances and commentaries on matters of prize and maritime torts, injuries, and contracts. *De Lovio v. Bolt* (U. S.) 7 Fed. Cas. 418, 420.

## BLACK CODE.

The black code was that body of rules and laws existing in the time of slavery, by which the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. Such laws, after the abolition of

slavery, could not have such an object, and might be an infringement of the civil laws of the negro. *Civil Right Cases*, 3 Sup. Ct. 18, 29, 109 U. S. 3, 27 L. Ed. 835.

### BLACK PERSON.

The words "black person" are not synonymous with "negroes"; "black person" may include all negroes, but the term "negro" does not include all black persons. The term "black person" is to be construed as including every one who is not of white blood. *People v. Hall*, 4 Cal. 399, 403.

### BLACKBERRY BRANDY.

"Blackberry brandy," as used in an indictment charging an unlawful sale of blackberry brandy, designated a particular kind of brandy, and did not indicate that the liquor was not brandy of some character. *Fenton v. State*, 100 Ind. 598, 599.

### BLACKLIST.

Blacklisting is a part of the paraphernalia of a strike. It may be said to represent the malignant hate and revenge of the parties resorting to it. In its purposes and effects it is closely allied to a boycott. A "blacklist" is defined to be a list of the persons marked out for special avoidance, antagonism, and enmity on the part of those who prepare the list or those among whom it is intended to circulate, as where a trades union blacklists workmen who refuse to conform to its rules; but it is most usually resorted to by combined employers, who exchange lists of their employes who go on strikes, with the agreement that none of them will employ the workmen whose names are on the lists, and comes within the meaning of what is termed a "conspiracy." *Mattison v. Lake Shore & M. S. Ry. Co.*, 2 Ohio N. P. 276, 279, 3 Ohio Dec. 526, 529.

The term "blacklist" would include a so-called quarterly abstract gotten out by a retail merchant's commercial association in which the names of delinquent debtors are printed, and their credit thereby destroyed by such abstracts being sent to other persons engaged in mercantile business who are members of the association, the printing of such names being a representation that the persons whose names were printed were unworthy of credit. *Masters v. Lee*, 58 N. W. 222, 225, 39 Neb. 574.

### BLACKMAIL.

Worcester says in his dictionary that "blackmail" originally meant the performance of labor, or payment of copper coin, or delivery of certain things in kind, as rent, and refers to it as a term in old English law,

and contrasts it with blanch-farm or white rent, which was paid in silver. Spelman, in his glossary, attributes the term "black" to the color of the coin; and Jamieson, in his dictionary, attributes it to its illegality. Dean Swift used the word to signify hush money, or money extorted from persons under threat of exposure in print for an alleged offense. Bartlett, in his Dictionary of Americanisms, was the first to confine its meaning to that sense, and to use it in such sense in this country. "Blackmail" is defined in Wharton's Law Lexicon as being money paid to be protected from devastation. The term is not legally confined to extortion by threats or other morally compulsory measures, but includes the influence which arises out of previous dependency and superfluous gratitude to a public officer for merely doing his duty in recovering money or property which was lost, since such influences, when accompanied by the power of playing on the hopes and fears of the party injured, may be as effective as any moral compulsion. *Edsall v. Brooks*, 26 N. Y. Super. Ct. (3 Rob.) 284, 293, 25 N. Y. Super. Ct. (2 Rob.) 29, 34, 17 Abb. Prac. 221, 226. "Blackmail" (from "maille," French, signifying a small coin) is defined to be a certain rent of money, coin, or other thing, paid to persons upon or near the borders, being men of influence, and allied with certain robbers and brigands, to be protected from their devastation. Whart. Law Lexicon, 101. Substantially we now attach the same meaning to the term. In common parlance and in general acceptance, it is equivalent to and synonymous with "extortion," the exaction of money either for the performance of a duty, the prevention of an injury, or the exercise of an influence. *Edsall v. Brooks*, 25 N. Y. Super. Ct. (2 Rob.) 29, 33.

"Originally it had a definite, but provincial, meaning, familiar to those who inhabited the country periodically devastated by highway robbers. It was, indeed, the tribute levied by these last on the peaceable and unwarlike inhabitants of the lowlands of Scotland, which, being paid promptly and at regular intervals, was a substitute for complete spoliation. In this country the phrase is sometimes used in a metaphorical sense to signify any unlawful exaction of money by an appeal to the fears of the victim." *Life Ass'n of America v. Boogher*, 3 Mo. App. 173, 175.

"Blackmail is the extortion of money from a person by threats of accusation or exposure or opposition in the public prints; hush money; bribe to keep silence; extortion of hush money; obtaining of value from a person as a condition of refraining from making an accusation against him, or disclosing some secret calculated to operate to his prejudice. In common parlance and in general acceptance it is equivalent to and synonymous with 'extortion,' the exaction of money either for the performance of a duty,

the prevention of an injury, or the exercise of an influence. Not infrequently it is extorted by threats, or by operating on the fears or the credulity, or by promises to conceal or offers to expose the weaknesses, the follies, or the crime of the victim." *Hess v. Sparks*, 24 Pac. 979, 980, 44 Kan. 465, 21 Am. St. Rep. 300.

A crime may be committed by one who sends a letter conveying a threat of some other person to do the forbidden acts, providing he sends the letter for an unlawful purpose; nor is it necessary to constitute the crime that the threat should inspire fear, or that it should be calculated to produce terror. If the threat be made or conveyed with the view or intent to extort gain, the crime has been committed, however far the threat may have fallen short of its purpose. *People v. Thompson*, 97 N. Y. 313, 318.

Under the express provisions of Burns' Rev. St. 1894, § 1999, "blackmailing" consists of accusing any person of any crime punishable by law with intent to extort money from such person. *Utterback v. State*, 55 N. E. 420, 421, 153 Ind. 545.

#### **BLACKMAILER.**

To charge a person with being a "black-mailer" would be equivalent to charging such a person with being guilty of the crime of "extortion." The words are treated by lexicographers as synonymous "with exaction of money for the performance of a duty; the prevention of an injury or the exercise of an influence; the extortion of money from a person by threats of accusation or exposure; the wrongful exaction of money." *Mitchell v. Sharon* (U. S.) 51 Fed. 424, 425.

#### **Blackmailing crowd.**

The term "blackmailing crowd," when applied to persons keeping a boarding house, is libelous per se, as charging an unlawful act. *Robertson v. Bennett*, 44 N. Y. Super. Ct. (12 Jones & S.) 66, 69.

#### **BLANC SEIGN.**

Blanc seign is a paper signed at the bottom by him who intends to bind himself, giving acquittance or compromise, at the discretion of the person whom he intrusts with such blanc seign, giving him power to fully do that which he may think proper according to agreement. *Musson v. United States Bank* (La.) 6 Mart. (O. S.) 707, 718.

#### **BLANK.**

A blank is a space left unfilled in a written document, in which one or more words or marks are to be inserted to complete the sense. "Negotiable instruments are frequently delivered for use with blanks not filled,

and in respect to such instruments it is held that where a party to such an instrument intrusts it to the custody of another for use with blanks not filled up, whether it be to accommodate the person to whom it was intrusted or to be used for the benefit of the signer of the same, such negotiable instrument carries on its face an implied authority to fill up the blanks necessary to perfect the same; and the rule is that, as between such party and innocent third parties, the person to whom the instrument was so intrusted must be deemed the agent of the party who committed the instrument to his custody in filling the blanks necessary to perfect the instrument. *Angle v. Northwestern Life Ins. Co.*, 92 U. S. 330, 337, 23 L. Ed. 556.

#### **BLANK INDORSEMENT.**

See "Indorsement in Blank."

#### **BLANKET.**

"Blankets," in general, are used as coverings for protection against outer temperature and influences, and, in common speech, would be understood to refer to things so used. As used in Tariff Act Oct. 1, 1890, par. 393, it does not include thick woven woolen belts or blankets for paper or printing machines. *Bredt v. United States* (U. S.) 65 Fed. 496, 497.

#### **BLANKET POLICY.**

A blanket policy is an insurance policy covering several different articles, and underwriting all of them for a lump sum. *American Cent. Ins. Co. v. Landau*, 49 Atl. 788, 750, 62 N. J. Eq. 73.

In insurance a blanket policy is one which contemplates that the risk is shifting, fluctuating, or varying, and is applied to a class of property rather than to any particular risk or thing. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 541, 23 L. Ed. 868.

#### **BLASPHEMY.**

Blasphemy consists in speaking evil of the Deity with an impious purpose to derogate from the Divine Majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God which are calculated and designed to impair and destroy the reverence, respect, and confidence due to Him as the intelligent creator, governor, and judge of the world. It is a willful and malicious attempt to lessen men's reverence of God, by denying His existence, or His attributes as an intelligent creator, and to prevent others from having confidence in Him as such. Blackstone defines "blasphemy" as denying the Almighty's being or providence. Common-

wealth v. Kneeland, 37 Mass. (20 Pick.) 206, 213. The principal element of the offense is that it is a public or common nuisance. Young v. State, 78 Tenn. (10 Lea) 165, 166. That the words should be spoken profanely is the very gist of the offense of blasphemy. Commonwealth v. Spratt (Pa.) 14 Phila. 365, 37 Leg. Int. 234.

Blasphemy consists in maliciously reviling God or religion. Wantonly, wickedly, and maliciously uttering, in the presence of others, the words, "Jesus Christ was a bastard, and his mother must be a whore," is blasphemous. People v. Ruggles (N. Y.) 8 Johns. 290, 292, 5 Am. Dec. 335.

## BLAST.

See "Short Blast."

## BLASTING GELATINE.

Blasting gelatine is an explosive compound, in which nitroglycerin is the active element, and is manufactured as a convenient method for the application of the explosive force of the latter, which in its original state is a liquid. "This material, invented by Nobel, is composed of the liquid and of a small proportion of so-called 'nitro-cotton,' which consists chiefly of those products of the action of nitric acid on cellulose which are intermediate between collodion cotton and gun-cotton." Sperry v. Springfield F. & M. Ins. Co. (U. S.) 26 Fed. 234, 237.

## BLEACHING WORKS.

The term "bleaching works," as used in all laws relative to the employment of labor, shall mean any premises in which the process of bleaching yarn or cloth of any material is carried on. Rev. Laws Mass. 1902, p. 916, c. 106, § 8.

## BLEED.

The term "bleed," when used in a statement that plaintiff, in an action for libel, was attempting to bleed a railroad corporation, meant "to draw money from; to induce to pay." Patchell v. Jaqua, 33 N. E. 132, 133, 6 Ind. App. 70.

## BLENDS.

Blends are liquors produced by the union of several liquors of a high quality. Block v. Lewis, 5 Ohio Dec. 370, 5 Ohio N. P. 392.

## BLIND FLUE.

A blind flue is a short flue which extends into a boiler for about six or eight inches behind the flue sheet, and is closed at

the inner end. Such flue is located near the bottom of the flue sheet, and opens into the firebox. They are so attached to the flue sheet, that they may be taken out when it becomes necessary to remove sediment or incrustations on the bottom of the boiler. The usual method of attaching blind flues to the flue sheet of a boiler so that they cannot be blown out is to expand the flue on the inside next to the blind flue, thus forming a shoulder which abuts against the sheet. Atchison, T. & S. F. Ry. Co. v. Howard (U. S.) 49 Fed. 206, 207, 1 C. O. A. 229.

## BLIND SIDING.

By "blind siding" is meant a side track to a railroad where there is no telegraphic station. Galveston, H. & S. A. R. Co. v. Brown (Tex.) 59 S. W. 930, 932.

## BLIND TIGER.

"After the sale of intoxicating liquors had been prohibited, either by special acts or by vote of the people, all sorts of contrivances were resorted to to evade the operation of the law, which came to be popularly known as 'blind-tigers.' They were devices by which a liquor seller sought to ply his vocation, and at the same time to conceal his criminal agency in the selling." Glass v. State, 45 Ark. 173, 176.

A blind tiger is a place where intoxicating drinks the sale of which is prohibited by law are sold in violation of law. Schulze v. Jalonick, 44 S. W. 580, 581, 18 Tex. Civ. App. 296.

In its general acceptance and understanding, the term "blind tiger" means a person engaged in the unlawful sale of intoxicating beverages. It seems that the court will take judicial notice that the phrase has this meaning. Rush v. Commonwealth (Ky.) 47 S. W. 586, 587.

The Standard Dictionary defines a "blind tiger" to be a place where intoxicants are sold on the sly; and "sly" means artfully; dextrous in doing things secretly; cunning in evading notice or detection. A dispensary where intoxicating liquors are openly and publicly sold in a town, in good faith, under color of lawful authority, though in fact operated in violation of law, is not a blind tiger, subject to be abated or enjoined under the provisions of the act of December 19, 1899. Cannon v. Merry, 42 S. E. 274, 275, 116 Ga. 291.

A "blind tiger," using that term to describe a place where liquors are sold on the sly in violation of the law, is a public nuisance, independently of any provision relating thereto. Legg v. Anderson, 42 S. E. 720, 721, 116 Ga. 401.

A "blind tiger," within the meaning of the article punishing the keeping or running of a blind tiger, is any place in which intoxicating liquors are sold by any devise whereby the party selling or delivering the same is concealed from the person buying or to whom the same is delivered. Pen. Code Tex. 1895, art. 406.

## BLINDNESS.

Inability, by reason of defective sight, to read ordinary printed matter, is "blindness," within the meaning of the chapter relating to the deaf, dumb, and blind asylum. Pol. Code Cal. 1903, § 2241.

## BLOCK.

See "Each Block."

See, also, "Square."

Block of buildings as one building, see "Building."

The term "lots and blocks" must be construed with reference to the subject-matter, and, where used in reference to city property, means such lots and blocks as are appropriated to cities, and such as cities usually have for convenience, and for arrangement into groups with streets and alleys between, which may be larger or smaller in different cities or in different parts of the same city, subject to the general convenience, and generally the words do not include rural subdivisions for agricultural purposes. *Webster v. City of Little Rock*, 44 Ark. 536, 551.

There is no such governmental subdivision of a section as a "block." So that a description in a deed as "lot 56, block 12, section 7," is too indefinite and uncertain to warrant a decree for specific performance. *Glos v. Wilson*, 64 N. E. 734, 735, 198 Ill. 44.

### As land inclosed by streets.

"Block," as used in describing urban premises, means a square or portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots. *Fraser v. Ott*, 30 Pac. 783, 794, 95 Cal. 661.

The word "block" is defined by the Century Dictionary and Webster as "a square or portion of a city inclosed by streets, whether occupied by buildings or not." In *City of Ottawa v. Barney*, 10 Kan. 270, Mr. Justice Brewer, in referring to the above definition, said: "We are well satisfied with the definition, and, taking it as our guide in this decision, it follows, as a matter of course, that the word 'square,' used by the complainant, is synonymous with the word 'block.'" In *Olsson v. City of Topeka*, 42 Kan. 709, 712, 21 Pac. 219, the question arose again, and in that case the court, affirming its former decision, said, although a

square be cut into blocks by an alley running through it, yet these blocks are not, in fact, to be considered "blocks," as that term is synonymous with "squares." In *State v. Deffes*, 44 La. Ann. 164, 10 South. 597, the Supreme Court of Louisiana had under consideration a statute which provided that "no private market shall be established within a walking distance of six blocks from any public market," etc. The court held that the word "blocks" had the same meaning as "squares"; that the terms were interchangeable, and meant squares of the ordinary size. This court has several times used the word "block" as synonymous with the word "square." In *Todd v. Kankakee & I. R. R. Co.*, 78 Ill. 530, it was held that where a town has been laid out into blocks and streets for many years, and the same have always been recognized, treated, and dealt with by the owners and the people as blocks and streets, said blocks should be treated as distinct tracts of land; and that a block in a city is a part of the city inclosed by streets, whether occupied by buildings or composed of vacant lots. The word "block" in a municipal ordinance requiring the consent to the granting of a liquor license of the majority of the property owners, according to the frontage on both sides of the street in the "block" where it is desired to locate a dramshop, means the territory inclosed by the four streets, and is synonymous with the word "square." *Harrison v. People*, 63 N. E. 191, 192, 195 Ill. 466.

A "block" is defined by the statutes to mean such a block as is bounded by main streets. *City Street Imp. Co. v. Laird*, 70 Pac. 916, 917, 138 Cal. 27.

### Streets included.

"Blocks" as used in Act 1888, No. 116, prohibiting private markets within six blocks of any public market, means six city squares, of 300 feet each, together with the width of the intervening streets of 50 feet each, making a total distance of 2,100 feet. *State v. Deffes*, 10 South. 597, 44 La. Ann. 164.

In New Orleans City Ordinance No. 4143, providing that no private market shall be established within a walking distance of six blocks of any public market, "block" is exactly synonymous with "square," as used in city ordinance No. 4798, prohibiting private markets within a radius of six squares of any public market. *State v. Natal*, 7 South. 781, 782, 42 La. Ann. 612.

## BLOCK OF SURVEYS.

In popular use, the phrase "a block of surveys" means any considerable body of contingent tracts, surveyed in the same warrantee's name, without regard to the manner in which they were originally located. In a legal sense, the same phrase is employ-



ed to describe a body of contiguous tracts located by exterior lines, but not separated from each other by interior lines. *Morrison v. Seaman*, 38 Atl. 710, 712, 183 Pa. 74.

### BLOCK SYSTEM OF LOCATION.

The term "block system of location" was used in Pennsylvania to designate the location of public lands by a person holding a number of warrants for land by a survey of one body of land, including the amount called for in all the warrants. *Ferguson v. Bloom*, 23 Atl. 49, 144 Pa. 549.

### BLOCKADE.

See "Public Blockade"; "Simple Blockade."

A blockade is the exercise of a belligerent right. Before a blockade can be declared a war must exist; and a blockade, lawfully declared, is conclusive evidence that a state of war exists between the nation declaring such blockade and the nation whose ports are blockaded. *Grinnan v. Edwards*, 21 W. Va. 347, 358.

"A 'blockade,' as the word is understood in the law of nations, is an investment of a town of one belligerent by the force of another." *United States v. The William Arthur* (U. S.) 28 Fed. Cas. 624, 628.

A blockade, such as to authorize the seizure of vessels, only exists when there is a competent force to prevent the entrance or exit of vessels. No constructive blockade is allowed by international law. *The Peterhoff*, 72 U. S. (5 Wall.) 28, 50, 18 L. Ed. 564.

There is no rule of law determining that the presence of any particular force is essential to render a "blockade" legally effective. The test is whether it is practically effective, and this is a question, though a mixed one, more of fact than of law. It is sufficient if the force is such as to render ingress or egress in fact dangerous; and a single modern cruiser, whose guns command a circle of thirteen miles in diameter when stationary, is sufficient to maintain a legally effective blockade of a port having a single entrance, like that of San Juan, Porto Rico. *The Olinde Rodrigues*, 19 Sup. Ct. 851, 852, 174 U. S. 510, 43 L. Ed. 1065.

Dr. Johnson defines a "blockade" to be simply "to shut up by obstruction." In the *Imperial Dictionary* it is thus defined: "The shutting up of a place by surrounding it with hostile troops or ships, or by posting them at all the avenues to prevent escape, and hinder supplies of provisions and ammunition from entering, with a view to compel a surrender by hunger and want, without regular attacks." *The New English* (Ox-

ford) *Dictionary* gives this definition: "The shutting up of a place, blocking of a harbor, line of coast, frontier, etc., by hostile forces or ships, so as to stop ingress and egress, and prevent the entrance of provisions and ammunition, in order to compel a surrender from hunger or want, without a regular attack." In the *American Encyclopedic Dictionary* a "blockade" is thus defined: "The act of surrounding a town with a hostile army, or, if it be on the seacoast, of placing a hostile army around its landward side and ships of war in front of its sea defenses, so as, if possible, to prevent supplies of food and ammunition from entering it by land or water." What constitutes an "effective" blockade cannot be defined with absolute and rigorous precision. Some nations have endeavored to define it by treaty. Prussia and Denmark, in 1818, stipulated that two vessels should be stationed before every blockaded port. An earlier treaty between Holland and the two Sicilies prescribed that at least six ships of war should be arranged at a distance slightly greater than gunshot from the entrance. A still earlier treaty between France and Denmark provided that the blockaded port should be closed by two vessels at least, or by a battery of guns on land. There are no decisions of controlling weight upon the exact point. Sir William Scott, whose rigorous enforcement of the law of prize did not escape the censure of his contemporaries and the criticism of after ages, says, in *The Juffrow Maria Schroeder*, 3 C. Rob. Adm. 128: "A blockade may be more or less rigorous, either for the single purpose of watching the military operations of the enemy, and preventing the egress of their fleet, as at Cadiz, or, on a more extended scale, to cut off all access of neutral vessels to that interdicted place; which is strictly and properly a blockade, for the other is in truth no blockade at all, so far as neutrals are concerned. It is an undoubted right of belligerents to impose such a blockade though a severe right, and, as such, not to be extended by construction. It may operate as a grievance on neutrals, but it is one to which, by the law of nations, they are bound to submit. Being, however, a right of a severe nature, it is not to be aggravated by mere construction." In *The Mercurius*, 1 C. Rob. Adm. 69, he says: "For a blockade may exist without a public declaration, although a declaration unsupported by fact will not be sufficient to establish it." In *The Henrik and Maria*, 1 C. Rob. Adm. 124, he says: "The sight of one vessel would not, certainly, be sufficient notice of a blockade, and therefore it is necessary that it should be signified to me that there was a blockade de facto before that port." *The Olinde Rodrigues* (U. S.) 91 Fed. 274, 278.

**As peril of the sea.**

See "Perils of the Sea."

**BLOOD.**

See "Half Blood"; "Mixed Blood."

To be "of the blood" of any person means to be able to trace descent from some progenitor of that person. This is the common acceptation of the phrase, apart from the theoretical notion which makes "of one blood all nations of men." *Miller v. Speer*, 38 N. J. Eq. (11 Stew.) 567, 572.

To be of the blood of a person is to be descended from him, or from the same common stock, or the same couple of ancestors. *Delaplaine v. Jones*, 8 N. J. Law (3 Halst.) 840, 346; *Springer v. Fortune* (Ohio) 2 Handy, 52, 56.

In a general sense, the being of a man's kindred is being "of his blood," as the word "consanguinity," which is the same as "kindred," imports; but when in addition to being of his kindred, testator requires that the object of his bounty shall be of his blood, he must be understood as speaking of that blood which with some propriety may be called his, namely, that which in tracing an heir is considered as the blood of the most dignity and worth. *Leigh v. Leigh*, 15 Ves. 92, 108.

**Half blood included.**

"Blood," as used in a statute directing the distribution of estates among relatives of the blood of the person from whom such estate came or descended, includes the half blood also. "A person is, with the most strict propriety of language, said to be of the 'blood' of another who has any however small a portion of the same blood derived from a common ancestor. At common law the word is used to include half blood, and whenever it is used to express any qualification the word 'whole' or 'half' blood is generally used to designate it, or the qualification is implied from a context and known principles of law." *Gardner v. Collins*, 27 U. S. (2 Pet.) 58, 87, 7 L. Ed. 347.

A statute providing that no person who is not of the blood of the ancestor or other relations from whom the estate is descended shall, in any of the cases before mentioned, take any estate of inheritance therein, does not exclude a person of the half blood from inheriting, and the word "blood" is used in reference to the ancestor alone, and in its technical and natural sense includes persons of the half blood. *Baker v. Chalfant* (Pa.) 5 Whart. 477, 479; *Beebee v. Griffing*, 14 N. Y. (4 Kern.) 235, 241; *Cutter v. Waddingham*, 22 Mo. 206, 263; *May v. Espenshade* (Pa.) 1 Pears. 139, 142, 143.

The word "blood," in its technical and natural sense, includes the half blood. In a note to his last edition of his commentaries Kent says the words "in the laws of the

several states regulating the descent of ancestral inheritances required that the heir should be of the blood of his ancestor. This would, in the ordinary sense of the words, admit the half blood, for they may be of the blood of the ancestor, though only half blood to the intestate." *Kelly's Heirs v. McGuire*, 15 Ark. 555, 590.

**BLOOD RELATIONS.**

All my blood kind, see "All."

"Blood relations," as used in a will providing that the testator's executors should divide the principal of a certain trust fund equally between the testator's blood relations of the degree which the law permits, is equivalent to the word "heirs." *Cummings v. Cummings*, 16 N. E. 401, 405, 146 Mass. 501.

Primarily the words "nearest blood relation" indicate the nearest consanguinity, and they are perhaps more frequently used in this sense than in any other. *Swasey v. Jaques*, 10 N. E. 758, 761, 144 Mass. 135, 59 Am. Rep. 65.

**BLOOD RELATIONSHIP.**

"Blood relationship" is a term of very comprehensive meaning, including those persons who are of the same family stock or descended from a common ancestor. *Nye v. Grand Lodge, A. O. U. W.*, 36 N. E. 429, 436, 9 Ind. App. 131.

**BLOW.**

A "blow" is defined by Mr. Walker to mean a stroke; and the verb to "mash," of which "mashing" is a participle, means to beat into a confused mass; so that the use of the word "blow" in an indictment for "wound," there being other words used in the same context which show that a wound was given and what kind it was, is not ground for arresting the judgment, as a blow or stroke with a club which has the effect of cutting the left ear and mashing or beating into a confused mass the nose and left cheek of the deceased shows as clearly the means whereby the deceased was killed as if the word "wound" had been used. *State v. Noblett*, 47 N. C. 418, 433.

The words "blow the furnace with," in a devise, by the owner of a water power and of a furnace and mills, of the furnace, with the privilege of using water to "blow the furnace with," only operates to give the devisee the right to use the power to blow the bellows of the furnace, and does not authorize him to use water for drilling and grinding castings, although such operations are a necessary and incidental part of the business of operating the furnace, without which merely

blowing the bellows would be useless. *Lincoln v. Lincoln*, 110 Mass. 449, 452.

### BLOWING OUT.

The blowing out of a reservoir means turning loose the water in the reservoir, so as to discharge the water in such force and violence as to rapidly empty the water held by the reservoir, and also carry away with said water the large quantities of mud that accumulated in the dam. *Hunter v. Pelham Mills*, 29 S. E. 727, 733, 52 S. C. 279, 68 Am. St. Rep. 904.

### BLOWING UP.

Ordinarily the term "blowing up" means to scatter or destroy by an explosion of some kind. When we speak of a building as having been blown up, we ordinarily intend to convey the notion that its constituent parts have been scattered, and the integrity of the structure destroyed. Thus the breaking of plate glass in a store by an explosion of gas in a room, generated from gasoline being used to clean cloths, prior to fire in the building, is not caused by "blowing up of the building," within the exception to the policy. *Vorse v. Jersey Plate Glass Ins. Co.*, 93 N. W. 569, 119 Iowa, 555, 60 L. R. A. 838.

### BLOWN GLASSWARE.

Gauge glasses, consisting of hollow glass tubes ready for mounting, are assessable as blown glass ware, within Tariff Act 1897, par. 100 (Act July 24, 1897, c. 11, Schedule B, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633]). *Rogers v. United States* (U. S.) 121 Fed. 546, 547, 57 C. C. A. 608.

### BLUDGEON.

A bludgeon is a short stick with one end loaded, used as a weapon. *State v. Phillips*, 10 S. E. 463, 464, 104 N. C. 786.

### BLUE.

A contract for the sale and delivery of a blue Rutland marble headstone is satisfied by the delivery of a stone, though there is a whitish line or streak about a sixteenth of an inch wide running diagonally downward across the stone and through it, in striking contrast with the general color and appearance of the stone, if such streak is not a defect in the stone or arising from the manufacture. *Lyndon Granite Co. v. Farrar*, 53 Vt. 585, 588.

### BOAR.

A boar is an uncastrated male hog. *State v. Royster*, 65 N. C. 539.

## BOARD.

See "Canvassing Board"; "Governing Board"; "On Board"; "State Boards and Commissions"; "Text-Book Board"; "Town Board."

The term "board," as applied to the common council, consisting of a board of aldermen and a board of assistants, may have two meanings, one abstract, having reference to the legislative creation, which is continuous; and the other referring to its members, in which latter, and more important, sense, it is changed by every new general election. The members, of course, constitute the board for all purposes of action, and, when powers are to be exercised, the members legally assembled can alone act. *Wetmore v. Story* (N. Y.) 22 Barb. 414, 490.

The word "boards," in a bill of sale of lumber, held not used to indicate that the lumber was merchantable, or that it was sold as such, but as a term applied to a particular species of lumber. *Whitman v. Freese*, 23 Me. (10 Shep.) 212, 215.

Webster in his Dictionary gives this as one of the definitions of the term "board": "A body of men constituting a quorum, a court, or council, as a board of trustees, a board of supervisors, etc." *Broadwell v. People*, 76 Ill. 554, 558.

The term "board" includes and means the furnishing of the ordinary necessities of life, and must be considered as being synonymous with the word "entertainment." *Scattergood v. Waterman* (Pa.) 2 Miles, 323.

Under a statute fixing the fees of a sheriff for arresting prisoners and his compensation for boarding them, the word "boarding" does not, as used in the statute, or in its ordinary sense, include the furnishing of fuel. *Marion County v. Reissner*, 58 Ind. 260, 262.

Under a statute authorizing that, under a plea and set-off, defendant might give in evidence under the general issue his demand for goods delivered, board and lodging are included within the meaning of goods delivered and services performed. *Witter v. Witter*, 10 Mass. 223, 225.

#### Agency implied.

Where a combination known as the "Sugar Refineries Company" selected as the transferee of the stock of the corporation so known what was designated simply as a "board," it implied agency, a committee of managers, official servants charged with the executive duties, and acting for and in the interest of others. *People v. North River Sugar Refining Co.*, 24 N. E. 834, 836, 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843.

#### Guest relationship.

"The verb 'board' means to receive food as a lodger, or without lodging, for a com-

pensation; and hence an allegation that a person boarded with an innkeeper is merely an averment that he received food from the innkeeper for a compensation, and does not show whether he received such food as a boarder or as a guest." *Pollock v. Landis*, 36 Iowa, 651, 652.

#### BOARD MEASURE.

"Board measure" is the number of feet of board a log will yield when sawed. When the seller of logs and those who have a right to collect toll for them do not choose to express their intentions in the contract as to the mode of establishing the board measure, custom and usage furnish an explanation of the unexpressed intention. *Destrehan v. Louisiana Cypress Lumber Co.*, 45 La. Ann. 920, 927, 13 South. 230, 40 Am. St. Rep. 285.

#### BOARD OF ALDERMEN.

The phrase "board of aldermen," in statutes relative to a municipal corporation, means the governing body of the city. *Oliver v. Jersey City*, 42 Atl. 782, 783 63 N. J. Law, 96.

#### BOARD OF ARBITRATORS.

A board of arbitrators is not a court or judicial tribunal, in any proper sense of those terms. It has none of the powers that appertain to courts to regulate their proceedings or enforce their decisions. An award, when made, is more in the nature of a contract than of a judgment. It is but the consummation of the contract of submission; its appropriate and legitimate result. Hence it is held that the fact that a judgment rendered on Sunday is void does not render an award made on Sunday illegal. *Blood v. Bates*, 31 Vt. 147, 150.

#### BOARD OF AUDIT.

The board of audit is the tribunal to which the law has committed the adjustment and settlement of town charges, and the purpose for which it was created would be to a great extent defeated if its decisions could be drawn into controversy in courts whenever an error of judgment should be alleged. The boards of audit in allowing accounts are limited to the powers conferred upon them by the statute, and where they transgress its limitations their acts, like those of any other tribunals of limited jurisdictions, are void. *Osterhoudt v. Rigney*, 98 N. Y. 222, 232.

#### BOARD OF CIVIL AUTHORITY.

The words "board of civil authority" shall extend to and include the mayor and aldermen of cities. V. S. 1894, 19.

The words "board of civil authority," as used in the title relating to elections, shall mean, in the case of a city, the mayor and

aldermen of such city, and the justices residing therein; in the case of a town, the selectmen and town clerk of such town, and the justices residing therein; and, in the case of a village, the trustees or bailiffs of such village, and the justices residing therein. V. S. 1894, 59.

#### BOARD OF COUNTY COMMISSIONERS.

See "County Board."

Boards of county commissioners are public corporations, invested with subordinate legislative powers, to be exercised for local purposes connected with the public good. Comp. St. p. 153, § 6. As such, they are subject to the legal rules governing these bodies, and must derive all their powers from the law which creates them, or from some other positive statute; but it is to be understood that a corporation is not limited to the exercise of the powers specifically granted, but possesses, in addition, all such powers as are either necessarily incident to those specified, or essential to the purposes and objects of its corporate existence. *Chaska County v. Carver County*, 6 Minn. 204, 215 (Gil. 130, 137).

A board of county commissioners is a tribunal of special and limited jurisdiction. Its powers are wholly statutory. It must act, if it acts legally and within its authority, in substantial accord with the statute granting its powers. *Flint v. Horsley*, 66 Pac. 59, 60, 25 Wash. 648.

The board of county commissioners is the body—a quasi corporation—in whom is vested by law the title of all the property of the county. In one sense they are the agents of the county, and in another sense they are the county itself; and in this latter sense they acquire and hold in perpetuity the title to the county's property, and in this capacity they not only act for the county, but also as the county. The "county" and the "commissioners of the county" are often convertible terms, and a devise to the county is a devise to the commissioners of a county, and vests the title in them for the benefit of the county. *Carder v. Fayette County*, 16 Ohio St. 353, 369.

#### BOARD OF DIRECTORS.

See "De Facto Board of Directors."

The term "board of directors," as used in the chapter relating to home, life, and accident insurance companies, includes the persons duly appointed or designated to manage the affairs of the company. Rev. St. Tex. 1895, art. 3096a.

#### BOARD OF FIRE UNDERWRITERS.

It is a matter of common knowledge that, prior to any legislation on the subject,

associations called "boards of fire underwriters" (either fire or marine) existed in various states. These were voluntary associations, composed exclusively of those engaged in that particular line of business. Their general object was consolidation and co-operation in matters affecting their common business, just as lawyers, physicians, jobbers, grocers, etc., form associations for similar purposes. They often established at their own expense salvage corps. See 13 Enc. Brit. tit. "Insurance." Also, Enc. Ins. U. S. 1894-95. Held, that as Gen. Laws 1895, cc. 175, 178, did not define the term "board of fire underwriters," reference must be had to the prior history of such organizations in order to ascertain the legislative sense in which the term is used. From such reference it appears that the corporations of that name were composed exclusively of those who, for the time being, were engaged in the business of fire insurance in the city where the board was organized. *Childs v. Firemen's Ins. Co.*, 66 Minn. 393, 397, 69 N. W. 141, 142, 35 L. R. A. 99.

#### BOARD OF HEALTH.

The board of health is an instrumentality or agency of the city, and the city has the right to make general rules to be carried out by the board of health as its agent. As the board is but an agency of the city, its acts are in effect the acts of the city itself. *Gaines v. Waters*, 44 S. W. 353, 64 Ark. 609.

#### BOARD OF TAX REVIEW.

Boards to review taxation, while they act judicially, are not courts, but a part of the machinery of taxation, wholly within the power of the Legislature to create and regulate. *State v. Wharton*, 94 N. W. 359, 360, 117 Wis. 558.

#### BOARDER.

A boarder, who is defined by Burrill "as one who has food and lodging in another's house or family for a stipulated price," is not an inhabitant of a boarding house within Pen. Code, art. 739, providing that an entry into a house to commit theft, unless made by actual breaking, is not burglary when done by an inhabitant of the house. *Ullman v. State*, 1 Tex. App. 220, 222, 28 Am. Rep. 405 (quoting 1 Bur. Law Dict. p. 211).

##### Guest distinguished.

A "guest," as distinguished from a "boarder," is bound for no stipulated time. He stops at the inn for as long a time as he pleases, paying, while he remains, the customary charge. *Stewart v. McCready* (N. Y.) 24 How. Prac. 62.

If an inhabitant of a place makes a special contract with an innkeeper to board at

his inn, he is a "boarder," and not a "guest," and the test whether one is a boarder or a guest depends on whether he is a traveler and a wayfarer, and is received as such by the innkeeper in his inn. If he was, he at once becomes the innkeeper's guest, and the relation subsists so long as he sojourns there as a traveler. *Norcross v. Norcross*, 53 Me. 163, 169.

Where a person goes to an inn as a wayfarer man and a traveler, and defendants receive him as such a traveler as a guest at their inn, the relation of innkeeper and guest was instantly established between them, and the length of time that he stayed at the inn makes no difference as to his relationship, whether he stays a week or a month, or longer, so that he retains his character as a traveler. A guest for a single night might make a special contract as to the price to be paid for his lodging, and, whether it was more or less than the usual price, it would not affect his character as a guest. If an inhabitant of a place makes a special contract with an innkeeper there for board at his inn, he is a boarder, and not a traveler or guest in the sense of the law, so as to render the innkeeper liable for his goods stolen. *Berkshire Woolen Co. v. Procter*, 61 Mass. (7 Cush.) 417, 423.

Where an army officer, having no permanent home, but living where duty called him, occupied rooms in defendant's hotel under an agreement to occupy them until the following spring, providing everything was satisfactory and he was not ordered sooner away on military duty, and the officer and his family took their meals at the hotel restaurant, paying for each meal the same as other guests, they were guests, and not boarders, so as to render the innkeeper liable for loss of the property of the officer. *Hancock v. Rand*, 94 N. Y. 1, 8, 46 Am. Rep. 112.

Mere fixing of the price to be paid does not make the person a boarder, rather than a guest, so as to render the house a boarding house rather than an inn. In re Brewster, 80 N. Y. Supp. 606, 670, 39 Misc. Rep. 689 (citing *Hancock v. Rand*, 94 N. Y. 1, 10, 46 Am. Rep. 112).

Where a man and his family lived in an interior county of the state, and because of the dangers of war he took his family, together with their wardrobe and silverware, and most of their family paraphernalia, and by special contract lived at a leading hotel in a suite with three rooms, over which they seemed to exercise general, if not exclusive, control, they were boarders, and not ordinary transients, so as to render the innkeeper liable on destruction of their goods by fire. *Vance v. Throckmorton*, 68 Ky. (5 Bush) 41, 44, 96 Am. Dec. 327.

Where a person makes a flying visit to his family at the hotel where they are board-

ing, and a mere temporary stay, unless something appears affirmatively to the contrary, his status as a traveler, once shown to exist, is presumed to have continued. Neither the agreement by which he was to pay special rates for himself and family, lower than those ordinarily charged for transient guests, nor the fact that he remained in the inn for a month, nor any other fact which appeared in the case, furnished any evidence that his character was changed from that of a traveler to that of a boarder, so as to relieve the innkeeper from liability for property lost. *Lusk v. Belote*, 22 Minn. 468, 471.

A traveler entering an inn as a guest does not cease to be a guest by proposing to remain a certain given number of days or ascertaining the price that will be charged for his entertainment, or by paying in advance for a part or the whole of his entertainment, or paying for what he has occasion for as his wants are supplied. *Pinkerton v. Woodward*, 33 Cal. 557, 597, 91 Am. Dec. 657; *Hall v. Pike*, 100 Mass. 495, 496; *Metzger v. Schnabel*, 52 N. Y. Supp. 105, 106, 23 Misc. Rep. 698; *Ambler v. Skinner*, 30 N. Y. Super. Ct. (7 Rob.) 561, 563; *Ross v. Mellin*, 32 N. W. 172, 173, 36 Minn. 421.

A person coming under a special contract, who boards and sojourns at an inn, is not, in the sense of the law, a "guest," but is deemed a "boarder." *State v. Johnson*, 4 Wash. 593, 594, 30 Pac. 672; *Johnson v. Reynolds*, 3 Kan. 257, 261; *Hursh v. Byers*, 29 Mo. 469, 470; *Kisten v. Hildebrand*, 48 Ky. (9 B. Mon.) 72, 74, 48 Am. Dec. 416.

That a person enters a hotel under an agreement to board by the week deprives him of the character of a guest, and transforms him into a boarder, is not true as a matter of law. *Jalie v. Cardinal*, 35 Wis. 118, 128.

It is sometimes difficult to draw the line between "guests" and "boarders." They frequently run into each other, like light and shadow. So, the line between a common carrier and a bailee to carry is sometimes scarcely perceptible, but the law makes the distinction, and it is the province of the judge to draw the line. A transient customer at an inn, though he be not a traveler or stranger, is considered as a "guest"; a lodger, who sojourns at an inn, and takes a room for a specified time, and pays for his lodging on a special agreement, as by the month or week, is a "boarder." *Neal v. Wilcox*, 49 N. C. 146, 148, 67 Am. Dec. 266.

The distinction between a "boarder" and a "guest" at a hotel, which is difficult to draw, and which is variously stated, is based mainly on the fact that boarders contract for a definite stay at a specific price. In *Lawrence v. Howard*, 1 Utah, 142, the court said: "In this country, hotel keepers act in a double capacity, being between innkeepers and

boarding house keepers. As innkeepers they entertain travelers and transient persons, those who come without bargain as to time or price, and go away at their pleasure, paying for only actual entertainment received. As boarding house keepers they entertain resident and regular boarders for definite lengths of time, and at specified prices previously agreed upon." In *Shoecraft v. Bailey*, 25 Iowa, 553, the distinction between a guest and boarder seems to be this: The guest comes without any bargain for time, and remains without one, and may go whenever he pleases, paying only for actual entertainment received; and it is not enough to make one a boarder, and not a guest, that he stayed for a long time in the inn in this way. One who engaged rooms and board at a hotel for several weeks at a reduced price is a boarder, and not a guest. *Meacham v. Galloway*, 52 S. W. 850, 861, 102 Tenn. 415, 46 L. R. A. 319, 73 Am. St. Rep. 886.

Though the house be an inn, and the keeper an innkeeper, it does not follow that he is under the same liability to all persons who may be staying at the inn with their goods. The length of time that a man stays at an inn does not make the difference, though he stay a week or a month or more, so always, though not strictly transient, he retains his character as a traveler. *Kisten v. Hildebrand*, 48 Ky. (9 B. Mon.) 72, 74, 48 Am. Dec. 416.

## BOARDING HOUSE

A boarding house is a place where the guest is under an express contract for food and lodging at a certain rate for a certain period of time. *Willard v. Reinhardt* (N. Y.) 2 El. D. Smith, 148, 149.

A boarding house is a house where the keeping of boarders generally is carried on, and which is held out by the owner or keeper as a place where boarders are kept. A private housekeeper who entertains a boarder for hire, in a single instance, is not a boarding house keeper. A "boarding house" is not, in common parlance or in legal meaning, every private house where one or more boarders are kept occasionally only and on special considerations; it is a quasi public house where boarders are generally and habitually kept, and which is held out and known as a place of entertainment of that kind. *Cady v. McDowell* (N. Y.) 1 Lans. 484, 486.

A boarding house is for the accommodation only of those who are accepted as guests by the proprietor, and is as much a private house as if there were no boarders. A house is private though the head of the family boards his son, and, if taking a relative to board does not change the character of a private house, is it affected by receiving a

stranger as a lodger? *Commonwealth v. Cuncannon* (Pa.) 3 Brewst. 844, 347.

**As dwelling house.**

See "Dwelling—Dwelling House."

**Inn and hotel distinguished.**

See "Inn"; "Hotel."

**As public house.**

See "Public House."

**May contain bar and billiard rooms.**

"Boarding house," as used in representations as to the occupancy of a house in an application for insurance, stating that it was occupied as a "boarding house," meant a house kept principally for the residence of permanent boarders; and the fact that it had a bar and billiard room, while rendering the description incomplete, did not render it false. *Martin v. City Ins. Co.*, 44 N. J. Law, 485, 492.

**BOARDING HOUSE KEEPER.**

As innkeeper, see "Innkeepers."

Where a person lives at a hotel as a regular boarder by the month, at a fixed price, he is in no sense a guest, so as to hold the proprietors liable as innkeepers, but they are liable only as boarding house keepers. *Lawrence v. Howard*, 1 Utah, 142, 143.

"Boarding house keeper," as used in *Sess. Laws* 1860, 771, giving the keeper of a boarding house a lien on the property of a boarder to the extent of the board due, means "one who furnishes accommodations for a definite period, as by the week or month, at a rate of compensation agreed on." *Stewart v. McCready* (N. Y.) 24 How. Prac. 62.

As used in Act June 27, 1859, c. 2230, providing that all "boarding house keepers" shall have a lien on all the baggage and effects of their guests and boarders, includes innkeepers who, in addition to their business as innkeepers strictly, also take boarders. *Cross v. Wilkins*, 43 N. H. 332, 336.

**BOARDING HOUSE PURPOSES.**

Where the occupants of a building fitted up one side of a room with several stalls where oysters, cooked and raw, pies, cheese, etc., were served to persons who might call for the same, mostly to teamsters and others who were stopping in the village for a short time, the building is used for "hotel and boarding house purposes," within the restriction of a deed prohibiting the use for such purposes. *Stevens v. Pillsbury*, 57 Vt. 205, 210, 52 Am. Rep. 121.

**BOAT.**

See "Canal Boat"; "Ferryboat"; "Ship"; "Vessel."

**Barge.**

A barge is a boat or vessel, and hence is within the letter of a law relating to "boats and vessels." *The Resort v. Brooke*, 10 Mo. 531, 534.

That species of watercraft known on the western rivers of Pennsylvania as "barges" are neither ships, boats, nor vessels, within an act giving a lien for work furnished in their construction or repair. *Appeal of Nease* (Pa.) 3 Grant, Cas. 110, 113.

**As completed vessel.**

A "boat," within the marine lien law, is one that is complete and capable of being used to carry freight or passengers. The hull of a boat, without other parts necessary to its use, is not a "boat" to which a lien can attach. *Northup v. The Pilot*, 6 Or. 297, 299.

A small unfinished boat still in the hands of the builder, and unfit for use, is not a "vessel" within the statute punishing the burning of the same. *Commonwealth v. Francis* (Mass.) *Thacher*, Cr. Cas. 240, 242.

**As a house.**

See "House."

**Steamboat.**

The term "boats, vessels and other craft," in St. 7 & 8 Geo. IV, c. 75, § 57, authorizing by-laws for the government of "boats, vessels and other craft" to be rowed or worked, includes steamboats. *Tisdell v. Combe*, 7 Adol. & El. 783.

**Tug.**

"Boats used for the transportation of freight and passengers," within the meaning of a statute authorizing a canal company to charge tolls upon all boats, vessels, steamboats, and other craft used for the transportation of freight or passengers, does not include tugs engaged in towing freight or passenger vessels through the canal, or passing through the canal on their return trip. *Sturgeon Bay & L. M. Ship Canal & Harbor Co. v. Leatham*, 45 N. E. 422, 423, 164 Ill. 239.

**Vessel distinguished.**

The term "boat" is constantly used to designate small watercraft without a deck. In common parlance and maritime usage, there is a distinction between "vessels" and "boats," the term "vessel" being never, or at least very rarely, used to designate any watercraft without a deck. In *Mortimer's Commercial Dictionary* a "boat" is defined to be a "small open vessel, commonly

wrought by oars." The general sense in which the term "vessel" is used in our laws is in contradistinction to an open boat, and excludes the latter, and such is its use in Act May 15, 1820, c. 122, 3 Stat. 602, prohibiting commercial intercourse from the British colonies. *United States v. Open Boat* (U. S.) 27 Fed. Cas. 346, 352.

#### **Wharf boat or floating wharf.**

The term "boats and other vessels," in a statute giving a lien upon boats and other vessels for construction, repairs, and supplies, applies exclusively to vessels intended for navigation, and does not include a floating wharf constructed for receiving, storing, and forwarding merchandise. *Olmsted v. McNall* (Ind.) 7 Blackf. 387, 388.

Where the term "boat" is used, we are likely to catch the idea of locomotion, of passing or transportation from one point to another, without hesitating to inquire whether that term is ever applied to other structures which have no power of locomotion, no propelling force by which they can move from point to point. The wharfboat is not a "boat." It has no mobility, no apparatus to change place, or power to retain position other than land fastenings. It is a building, a floating business house, or, rather, a business house upon the surface of water and sustained by its cables. *Galbreath v. Davidson*, 25 Ark. 490, 494, 99 Am. Dec. 238.

#### **BOAT BUILDING.**

Boat building is not the purpose of the construction of dry docks, which are rather for the purpose of repairing boats, and therefore an exemption from taxation of capital or property used in boat building is not an exemption of a dry dock. The court cannot extend the article which exempts property used in boat building to mean to exempt articles used in boat repairing. *Robertson v. City of New Orleans*, 12 South. 753, 754, 45 La. Ann. 617, 20 L. R. A. 691.

#### **BOATABLE.**

Const. c. 2, § 40, providing that the inhabitants of the state shall have liberty in seasonable times to fish in all "boatable" and other waters not private property, under proper regulations, refers to waters that are of common passage as highways. The word "boatable" is an apt one to express the common-law status of nonnavigable waters, public in use, though private in ownership; that is, common highways. It is unwarrantable to say that "boatable" as used was intended to embrace all waters boatable in fact, though private in use as well as in ownership, for the common law, with reference to which the framers are presumed to have acted, does not give such waters the status of boatability,

but classes them by themselves as private, not only in propriety or ownership, but in use as little streams or rivers that are not of common passage for the king's subjects. *New England Trout & Salmon Club v. Mather*, 85 Atl. 323, 325, 68 Vt. 338, 83 L. R. A. 569.

#### **BOC.**

"Boc" is a Saxon word, signifying a beech tree. *Scoville v. Toland* (U. S.) 21 Fed. Cas. 863, 864.

#### **BOCK BEER.**

It is judicially known as a matter of common knowledge that bock beer, or common beer, is a malt liquor. *Pedigo v. Commonwealth* (Ky.) 70 S. W. 659, 660.

#### **BODILY.**

The word "bodily" means pertaining to or concerning the body; of or belonging to the body, or the physical constitution; not mental, but corporeal. *Terre Haute Electric Ry. Co. v. Lauer*, 52 N. E. 703, 706, 21 Ind. App. 466.

#### **BODILY HARM.**

See "Great Bodily Harm."

"Bodily harm" is any touching of the person of another against his will with physical force, in an intentional, hostile, and aggressive manner, or a projecting of such force against his person. *People v. Moore*, 3 N. Y. Supp. 159, 160, 50 Hun, 356.

#### **BODILY HEIRS.**

See "Heirs of the Body."

The expression "bodily heirs" is equivalent to "heirs of the body." *Stratton v. McKinnle* (Tenn.) 62 S. W. 636, 640; *Craig v. Ambrose*, 4 S. E. 1, 2, 80 Ga. 134.

In construing a devise to a devisee and bodily heirs, the words "bodily heirs" have no other or different meaning than the words "heirs of his body." *Turner v. Hause*, 65 N. E. 445, 447, 109 Ill. 464 (citing *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892; *Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925).

In *Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925, it was held that a conveyance to a grantee and her "bodily heirs" creates an estate in fee tail general at common law, but, since the abolition of estates tail, passes, under section 6 of the conveyance act, an estate for the grantee's natural life only, with a remainder in fee simple absolute to the person to whom the estate tail would, on the death of



the grantee, first pass at common law. At common law a devise to a devisee and the heirs of his body created an estate tail general, leaving in the heirs at law of the deviser the reversion in case of an entire failure of issue. In construing provisions of this kind in a will, the words "bodily heirs" have no other or different meaning than the words "heirs of the body." *Turner v. Hause*, 65 N. E. 445, 447, 199 Ill. 464.

"Bodily heirs," as used in a will giving a portion of an estate to testator's daughter and her bodily heirs, should be construed in their popular signification as synonymous with the word "children" or "descendants," and not in their technical sense. *Righter v. Forrester*, 64 Ky. (1 Bush) 278, 279; *Mitchell v. Simpson*, 10 S. W. 372, 373, 88 Ky. 125.

### BODILY INFIRMITY.

As used in Code Cr. Proc. art. 772, providing that depositions of witnesses may be read when by reason of bodily infirmity such witness cannot attend, "bodily infirmity" means such an illness or infirmity that no reasonable hope remains that the witness will be able to appear in court on any future occasion. *Collins v. State*, 5 S. W. 848, 850, 24 Tex. App. 141.

An "infirmity of the body," as the term implies, is something that materially impairs the bodily powers, and a statement in an application for an insurance policy that the applicant had never had any bodily infirmity is not disproved by the fact that during the Civil War he had received a gunshot wound. *Black v. Travellers' Ins. Co.* (U. S.) 121 Fed. 732, 733, 58 C. C. A. 14, 61 L. R. A. 500.

### Insanity.

Under a policy of insurance providing that the insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease the words "bodily infirmities or disease" do not include insanity, though insanity or unsoundness of mind often, if not always, is accompanied by or results from disease of the body, yet "mental" are distinguished from "bodily" diseases. In the phrase "bodily infirmities or disease" the word "bodily" grammatically applies to "disease" as well as to "infirmities," and it cannot but be so applied without disregarding the fundamental rule of interpretation that policies of insurance are to be construed most strongly against the insurers who framed them. The prefix of "bodily" hardly affects the meaning of "infirmities." It is difficult to conjecture any purpose it answers in this proviso other than to exclude mental disease from enumeration of the causes of death or disability to which the insurance does not extend. *Accident Ins. Co. v. Crandal*, 7 Sup. Ct. 685, 688, 120 U. S. 527, 30 L. Ed. 740.

The term "bodily infirmity," with reference to introduction of statement of witness in evidence, is broad enough to cover a disease of the brain or of any other part of the body, and hence includes insanity. *Stewart v. State* (Tex.) 26 S. W. 203.

### Temporary infirmity.

An anæmic murmur indicating no structural defect of the heart, but arising simply from a temporary debility or weakened condition of the body, is not within the meaning of the term "bodily or mental infirmity" in an application for accident insurance, in which the applicant states his freedom from such infirmities. *Manufacturers' Acc. Indemnity Co. v. Dorgan* (U. S.) 58 Fed. 945, 951, 7 C. C. A. 581, 22 L. R. A. 620.

In a broad generic sense, any temporary trouble by reason of which a man loses consciousness is a "disease." It is a condition of the body not normal, and produced by the imperfect working of some function; but as the imperfect working is not permanent, and the body returns at once or in a short period of time to its normal condition, it does not rise to the dignity of a "disease." A fainting spell produced by indigestion or lack of proper food for a number of hours, or from any other cause which would not indicate any disease in the body, but would show a mere temporary disturbance or enfeeblement, would not come within the meaning of the words "disease and bodily infirmity," as used in an insurance policy providing that the risk shall not extend to death caused by disease and bodily infirmity. *Manufacturers' Acc. Indemnity Co. v. Dorgan* (U. S.) 58 Fed. 945, 955, 7 C. C. A. 581, 22 L. R. A. 620.

The words "disease or bodily infirmity," as used in a provision in an accident policy exempting insured from liability for injuries caused thereby, mean practically the same thing, and only include an ailment or disorder of a somewhat established or settled character, and not merely a temporary disorder arising from sudden and unexpected derangement of the system, though it produces unconsciousness. *Meyer v. Fidelity & Casualty Co.*, 65 N. W. 328, 96 Iowa, 378, 59 Am. St. Rep. 374.

### BODILY INJURY.

See "Great Bodily Injury"; "Serious Bodily Harm or Injury."

"Bodily injuries" does not necessarily mean injuries to the trunk or main part of the human form, as distinguished from the limbs or head, so that, under an allegation of "bodily injuries," evidence of injury to the eyesight may be introduced. *Quirk v. Siegel-Cooper Co.*, 60 N. Y. Supp. 228, 230, 43 App. Div. 464.

A provision in an accident policy that the insurance shall not extend to any "bodily

injury of which there shall be no external and visible sign upon the body of insured" does not apply to fatal injuries, but only to those not resulting in death. It would be utterly unjust if this condition applied in cases of death, as it would preclude recovery in all instances where death occurs by drowning, freezing, poisoning, suffocation, concussion—means of death leaving no outward mark—and also where insured has been killed and his body is missing. *McGlinchey v. Fidelity & Casualty Co.*, 14 Atl. 13, 16, 80 Me. 251, 6 Am. St. Rep. 190.

## BODY.

See "Deliberative Body"; "Public Body."

In an indictment for feloniously removing a "body" from the grave for the purpose of dissection or sale, the word "body" will be construed to mean a human body, without further description. *People v. Graves* (N. Y.) 5 Parker, Cr. R. 134, 141.

Rev. St. § 3764, prescribing a penalty against persons, etc., having unlawful possession of the body of any deceased person, does not relate or apply to the remains of persons long buried and decomposed. *Carter v. City of Zanesville*, 52 N. E. 128, 127, 59 Ohio St. 170.

### Of corporation.

The term "body," as used with reference to a corporation, means the object, corporate or politic; not the aggregate amount of property owned by the corporation, but the collective number of individual proprietors who are incorporated. *Taylor v. Griswold*, 14 N. J. Law (2 J. S. Green) 222, 239, 27 Am. Dec. 33.

### Of instrument.

"Body," as used in Code 1882, § 3392, requiring that a copy of "what appears upon the face and in the body of the policy" should be attached to the complaint, does not mean anything less than if applied to contracts other than insurance policies, and covers all that precedes the maker's signature. *Southern Mut. Ins. Co. v. Turnley*, 27 S. E. 975, 976, 100 Ga. 296.

### Of person.

See "Dead Body."

"Body," as used in an indictment for murder stating "the part of the body on which the mortal wound was inflicted," means the trunk of the human frame, as distinguished from the head and limbs. It is that portion which, excluding the arms, lies between the upper part of the thighs or hips and the neck. *Walker v. State*, 16 South. 80, 82, 34 Fla. 167, 43 Am. St. Rep. 186.

Where the indictment for murder alleged that the mortal wound was inflicted "on the

body" of deceased, such phrase seems to mean the trunk, in contradistinction from the head or limbs. *Sanchez v. People*, 22 N. Y. 147, 149.

Where an indictment charges that a wound was inflicted on the body, the word "body" clearly means "that part of the human frame to which the head and arms are attached." *State v. Edmundson*, 64 Mo. 398, 402.

## BODY CORPORATE.

See "Corporate Body."

Any body corporate, see "Any."

School district as, see "School District."

## BODY OF COUNTY.

Such parts of rivers, arms, and creeks of the sea are deemed to be within the bodies of counties where persons can see from one side to the other. Lord Hale uses more guarded language, and says that the arm or branch of the sea which lies within the fauces terræ, where a man may reasonably discern between shore and shore, is, or at least may be, within the "body of a county." *Hawkins* (2 P. C. c. 9, § 14) has expressed the rule in its true sense, and confines it to such parts of the sea where a man standing on the one side may see what is done on the other. *United States v. Grush* (U. S.) 26 Fed. Cas. 48, 51.

Vessels are lying "within the body of the county," within St. 1804, c. 131, when lying within the water which flows within the county, and not upon the high seas. *Commonwealth v. Francis* (Mass.) 1 Thatcher, Cr. Cas. 240, 242.

As used in Revision, § 2738, providing that where the persons summoned to serve as grand or petit jurors failed to appear, or where the court decides that they have been illegally elected or drawn, the court may set aside the precept under which they were summoned and cause a precept to be issued commanding the sheriff to summon a sufficient number of persons from the "body of the county" to serve as jurors at the term of court then being holden, means from the county at large, from the people of the county at large competent to act as jurors, and it is not necessary that jurors should be summoned from every township in the county in order to be summoned from the body of the county. *State v. Arthur*, 39 Iowa, 631, 632.

In order to constitute a jury of the county or from the body of the county, it is not necessary that the jury or the list from which it is drawn shall be selected from all parts of the county. *State v. Bolln*, 70 Pac. 1, 5, 10 Wyo. 439.

Within the rule that a common-law jury must be drawn from the body of the county, the term "body of the county" is a generic

term applied to the representation of the citizens of the vicinage embodied in the list of qualified jurors selected by officers appointed by law. It does not require an absolutely perfect representation of the entire body. Whether that representation, on a primary examination by the same or other officers, in a less extensive list, the inherent character of the selections is the same. They are still representative of the body of the county. *People v. Dunn*, 52 N. Y. Supp. 968, 970, 31 App. Div. 139.

### BODY OF ESTATE.

In Code, § 1835, providing that no contract between a husband and wife shall be valid to impair or change the body or capital of the personal estate of the wife for a longer time than three years next ensuing unless it shall be in writing, "body" includes a vested interest from which no present income is derived, though it has a present value, dependent upon facts which need not be enumerated. The "body" of one's personal estate manifestly does not include the income derived from it, but does include every such vested interest as a policy of insurance. *Sydnor v. Boyd*, 26 S. E. 92, 93, 119 N. C. 481, 37 L. R. A. 734.

The word "body," in a will authorizing the trustees to apply to the use of testator's sister during her natural life "the whole or any portion of the body or capital" of the property held in trust for her benefit, authorizes the trustees to dispose of the realty as well as the personalty, where both were blended in the same residuary provision. *Ames v. Ames*, 22 Atl. 1117, 1118, 15 R. I. 12.

Within the provision of a will whereby testator directed the division of his residuary estate into six parts, and the disposition to be made by his executor of each part, and of the codicil in which he revoked the disposition thus made as to two parts, and gave them to two trustees to invest and apply so much of the income, and in such sums, as might seem proper to the trustees, to certain specified persons or into the "body of my estate," the term "body of my estate" refers to the general estate represented by the executor, as the decedent's legal representatives, as distinguished from the trust created by the codicil, the trust not being the general body of the estate, but a particular fund carved out of it. *Meldon v. Devlin*, 53 N. Y. Supp. 172, 176, 31 App. Div. 146.

### BODY POLITIC OR CORPORATE.

A "body politic," says Lord Coke, is a body to take in succession, formed as to its capacity by policy, and is therefore called by Littleton (sections 4, 13) a "body politic." It is called a "corporation" or "body corporate" because the persons are made into a body

politic, and are of capacity to take, grant, etc., by a particular name. *Coyle v. McIntire* (Del.) 30 Atl. 728, 730, 7 *Houst.* 44, 40 *Am. St. Rep.* 109.

"A body politic, as aptly defined in the preamble of the Constitution of Massachusetts, is 'a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.'" *Munn v. Illinois*, 94 U. S. 113, 124, 24 L. Ed. 77.

"The body politic," says the preamble of the Constitution of Massachusetts, "is formed by a voluntary association of individuals. It is a social compact by which the whole people covenants with each citizen, and each citizen covenants with the whole people, that all shall be governed by certain laws for the common good." It is the duty of the people, therefore, in framing a Constitution of government, to provide for an impartial interpretation and a faithful execution of them, that every man at all times may find his security in them. *Williams v. Village of Port Chester*, 76 N. Y. Supp. 631, 634, 72 App. Div. 505.

Bodies politic and corporate have "been known to exist as far back at least as the time of Cicero, and Gaius traces them even to the laws of Solon of Athens, who lived some 500 years before. Pothier's *Pand.* of Just. bk. 3, p. 109 (Paris Ed. 1823). These associated bodies or communities of individuals with certain rights and privileges belonging to them by law in their aggregative capacity were styled by the Romans 'collegium,' and sometimes 'universitas,' as 'collegia tibicinum,' 'collegia aurificum,' 'collegia architectorum,' or society, corporation, or community of flute players, goldsmiths, architects, etc. *Id.* bk. 20, p. 110. The term as used by one of the Roman consuls to describe the nature of such a corporation or associated body of individuals under the laws of the republic is perhaps as appropriate as any general language which can be used to describe a corporation aggregate at the present day, without referring to the specific object for which any particular corporation is organized. I have thus translated from the Latin Digest: 'But those who are permitted to form themselves into a body under the name of a "corporation," "society," or other community, have within their peculiar jurisdiction, as in the similar case of the republic, property in common and a common chest or treasury, and an agent or head of the corporation or society, by whom, as in the republic, whatever is necessary to be done for the benefit of the community may be transacted.' Dig. lib. 8, tit. 4a. And from time immemorial, as at the present day, this privilege of being a corporation or artificial body of individuals, with power of holding their property, rights, and immuni-

ties in common, as a legally organized body, and of transmitting the same in such body by an artificial succession, different from the natural succession of the property of individuals, has been considered a franchise, which could not be lawfully assumed by any associated body without a special authority for that purpose from the government or sovereign power." *Warner v. Beers* (N. Y.) 23 Wend. 108, 122.

The term "body politic or corporate" as used in Revision, p. 539, § 7, relating to justices' courts, which provides that any body politic or corporate in this state may sue or be sued in any court for the trial of small cases in any action or proceeding over which said court has jurisdiction, means a domestic corporation. *Wheeler & Wilson Mfg. Co. v. Carty*, 21 Atl. 851, 53 N. J. Law (24 Vroom) 336.

#### **Municipal corporation.**

A "body politic or corporate," as defined by Lord Coke, "is a body to take in succession, framed as to its capacity by policy, and therefore is called by Littleton 'a body politic'; and it is called a 'corporation' or 'body corporate' because the persons are made into a body, and are of capacity to take, grant, etc., by a particular name." A public corporation is also defined to be "an investing the people of a place with the local government thereof." This latter description is the most appropriate, and is justified by the history of these institutions and the nature of the powers with which they were and are invested. The words do not include municipal corporations, but apply to private corporations only. *People v. Morris* (N. Y.) 13 Wend. 325, 334.

The term "body corporate," when applied to a municipal corporation, must be construed as a body constituted of all the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are merely the public agents of the corporators. *Mathewson v. Hawkins*, 31 Atl. 430, 432, 19 R. I. 16.

A "body corporate," as used in Political Act, c. 21, § 13, includes an organized county within the territory. *Spencer v. Sully County*, 33 N. W. 97, 4 Dak. 474.

#### **State.**

Webster defines the words "body politic" to be the collective body of a nation or state as politically organized or as exercising political functions; also, a corporation. Rev. St. 1894, § 6678 (Rev. St. 1881, § 4953), authorizing recovery in the name of the state of money lost at gaming, is not inconsistent with Rev. St. 1894, §§ 251, 252 (Rev. St. 1881, §§ 251, 252), requiring every action to be prosecuted in the name of the real party in

interest, except that a person expressly authorized by statute may sue without joining the person for whose benefit the action is prosecuted; the state being a person under Rev. St. 1894, § 1309 (Rev. St. 1881, § 1285), declaring that the word "person" extends to bodies politic and corporate. *Ervin v. State*, 48 N. E. 249, 251, 150 Ind. 332.

#### **United States.**

For the purpose of receiving legacies and for many other purposes, the United States is to be regarded as a body politic and corporate. In *United States v. Maurice* (U. S.) 26 Fed. Cas. 1211, Chief Justice Marshall says, at page 1216: "The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers, for important purposes." In *re Merriam's Estate*, 36 N. E. 505, 506, 141 N. Y. 479.

#### **BOGUS CHECK.**

The term "false or bogus checks," within the meaning of the statute making it criminal for any person to obtain or attempt to obtain from any other person or persons any money or property by means of the use of any false or bogus checks, does not include a note or order given by defendant and signed by himself. *Pierce v. People*, 81 Ill. 98, 101.

#### **BOGUS PEDDLER.**

"The phrase 'bogus peddler,' as applied to a person, has no fixed legal meaning, whether he is one who deals in counterfeit money, or wooden nutmegs, or tinware is uncertain. The words have not acquired by usage any certain signification to enable it to be said, as a matter of law, that they designate one engaged in a criminal occupation." *Pike v. Van Wormer* (N. Y.) 5 How. Prac. 171, 175.

#### **BOHEA TEA.**

"Bohea tea," as used in Act Cong. April 27, 1816, c. 107, wherein a duty is imposed on Bohea tea, means a compounded tea made in China of various kinds of the lowest priced black tea. *Two Hundred Chests of Tea v. Smith*, 22 U. S. (9 Wheat.) 430, 439, 6 L. Ed. 128.

#### **BOLT.**

In flour milling, until a few years prior to 1882, a "bolt" was a cylindrical, hexagonal, or prismatic hollow structure, mounted

upon a revolving shaft, and consisting of a skeleton frame over which was stretched bolting cloth of the degree of fineness required for the particular work to be done. *Jonathan Mills Mfg. Co. v. Whitehurst* (U. S.) 56 Fed. 589, 591.

## BOLTING CLOTH.

Bolting cloth is a thin silk fabric made very carefully, usually in widths of 48 inches, and designed and adapted primarily for use by millers, but it is capable of use also for decorative purposes in making tidies, scarfs, banners, and art novelties. In *re Van Blankensteyn* (U. S.) 66 Fed. 474, 476, 5 C. C. A. 579.

## BONA.

"Bona," as used in the civil law, is almost as extensive as "personal property" itself, and in many respects it has nearly as large a signification in the common law. *Tisdale v. Harris*, 37 Mass. (20 Pick.) 9, 13.

The word "bona," in the civil law, includes chattels, real as well as personal, and also lands. *Penniman v. French*, 34 Mass. (17 Pick.) 404, 405, 28 Am. Dec. 309.

## BONA FIDE.

See, also, "Good Faith."

The distinction between bona fides and mala fides is that the former requires the thing to be in fact what it purports to be, and nothing can be further from the simple definition of "bona fide" than an absolute sale of property on execution, voidable by reason of some secret understanding between the parties to create a mere lien. *Webster v. Denison*, 25 Vt. 493, 498.

"The statute declares that a stockholder must be a bona fide stockholder to entitle him to vote. This phrase, 'bona fide,' in this connection, is used in contradistinction to 'bad faith.'" In *re Argus Printing Co.*, 12 L. R. A. 781, 788, 26 Am. St. Rep. 639, 48 N. W. 347, 1 N. D. 434.

The term "bona fide," as used in the law with reference to bona fide purchasers, means only that the purchase shall be a real, and not a feigned, one; otherwise the knowledge would not be held immaterial, as it is in all the books. *Hill v. Ahern*, 135 Mass. 58, 159 (citing *Ricker v. Ham*, 14 Mass. 137).

"The use of the words 'bona fide' in an instruction cannot be understood as calculated to obscure the questions before the jury. These words are used so often by our legislators and by persons frequenting the judicial tribunals of the country that they may be considered as well understood, if not

anglicized." *Johnson v. Sullivan*, 23 Mo. 474, 481.

In *Knowles Loomworks v. Vacher*, 57 N. J. Law (28 Vroom) 490, 31 Atl. 306, 33 L. R. A. 305, it was held that the meaning of the words "bona fide," as used in the statute providing that every unrecorded conditional sale of chattels shall be void as against subsequent purchasers and mortgagors in good faith, excluded the idea that the purchaser or mortgagor must also hold for value. Cited in *Tate v. Security Trust Co.*, 52 Atl. 313, 315, 63 N. J. Eq. 559.

The words "bona fide," as used in Code, § 3853, providing that, when any person has bona fide purchased real estate and been in possession for four years, the same shall be discharged from the lien of any judgment, were intended to mean the same thing as the words "without actual notice of such judgment," which are the words used in the prior act. *Phillips v. Dobbins*, 56 Ga. 617, 623.

## BONA FIDE CLAIMANT.

Judge Washington defines a "bona fide claimant" to be "one who supposes that he has a good title, and knows of no adverse claim." *Morrison v. Robinson*, 31 Pa. (7 Casey) 456, 459 (citing *Thompson v. Gray*, 14 U. S. [1 Wheat.] 79, 4 L. Ed. 40).

A bona fide pre-emption claimant is one who has settled on public land subject to pre-emption with the intention to acquire a title, and who has complied or is proceeding to comply in good faith with the requirements of the law to perfect his right thereto. The words "bona fide," as applied to a pre-emption claimant, do not change the qualifications of such claimant, nor the conditions on which, under the general law, a settlement with a view to pre-emption is permitted. *Hosmer v. Wallace*, 97 U. S. 575, 581, 24 L. Ed. 1130.

Act Cong. July 23, 1866, relating to public lands, and declaring that nothing therein shall be construed to interfere with the right of "bona fide pre-emption claimants," means one who, having the proper qualifications, in good faith settled on a parcel of land subject to pre-emption, with the intention to pre-empt it, and who had performed or was proceeding in good faith to perform the necessary conditions when the claim was presented. *Rutledge v. Murphy*, 51 Cal. 388, 3 Cent. Law J. 178, 179.

A "bona fide claimant," under Rev. St. § 2259, is one who supposes he has good title, and knows of no adverse claim; and the fact that strict examination of the records might show his title to be void does not prevent him from being an innocent claimant, so as to preclude his recovery for improvements made on the property. *Hill v. Tiasier*, 15 Mo. App. 299, 306.

**BONA FIDE CREDITOR.**

A "bona fide creditor," within the meaning of a statute declaring that every marriage contract and every voluntary settlement made by the husband on the wife, whether in execution of marriage articles or not, must be recorded in the office of the clerk of the superior court of the county of the residence of the husband within three months after the execution thereof, and that, on failure to comply with such provisions, such contract or settlement shall not be of any force or effect against a purchaser or a creditor or surety who, bona fide, and without notice, may become such before the actual recording of the same, is a creditor who gives credit to the husband on the faith of the property contained in the marriage settlement. *Brown v. Spivey*, 53 Ga. 155, 159.

The term "good faith," as applied to the purchaser, *ex vi termini*, means one who purchases without notice and for value. This term has no natural application to a creditor who is of necessity such for value; and, without value, either express or implied, he is not a creditor. The term "creditor," as used in a statute making certain chattel mortgages void against creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith, will not be held to be modified by the term "good faith." *Cardenas v. Miller*, 89 Pac. 783, 785, 108 Cal. 250, 49 Am. St. Rep. 84.

**Of corporation.**

Code 1876, § 2043, provides that when, by the charter, articles of association, or by-laws and regulations of an incorporated company, a transfer of the stock is required to be made upon the book or books of such company, no transfer of stock shall be valid, as against bona fide creditors or subsequent purchasers without notice, except from the time that such transfer shall have been registered or made upon the book or books of such company. Held, that the words "bona fide creditors" meant judgment creditors having a lien. *Jones v. Lathan*, 70 Ala. 104, 106.

Code, § 2043, providing that no transfer of corporate stock on the books of the corporation shall be valid as against bona fide creditors and subsequent purchasers without notice, includes attaching creditors who afterward perfect their liens. *Berney Nat. Bank v. Pinckard*, 6 South. 364, 365, 87 Ala. 577.

**BONA FIDE ENTRYMAN.**

A person cannot be deemed to be a bona fide entryman, under the homestead law, if at the time he attempts to make an entry in the land office when another person is in the actual, open, and known possession of the land. In other words, under such circumstances the entryman is charged with

notice of the rights and equities of the actual occupant. *Manley v. Tow* (U. S.) 110 Fed. 241, 254

**BONA FIDE HOLDER.**

In the language of the law of merchants, "a bona fide holder for value" is a phrase of well-ascertained meaning. He is such a one as in good faith, in the usual course of business, without notice or knowledge of any defect in the title or the consideration of a note, acquires it for value paid. *Matthews v. Poythress*, 4 Ga. 287, 306. See, also, *Lawrence v. Clark*, 36 N. Y. 127, 128.

A bona fide holder for value of commercial paper is one who takes it before maturity, for a valuable consideration, in the usual course of business, without knowledge of facts which impeach its validity as between the antecedent parties, and without knowledge of facts or circumstances that would lead a careful and prudent man to suspect that the paper was invalid as between antecedent parties. *Limerick Nat. Bank v. Adams*, 40 Atl. 166, 168, 70 Vt. 132.

A bona fide holder of negotiable paper is one who before maturity has acquired the title in good faith, for a valuable consideration, from one capable of transferring it, or from one in possession of the paper with an apparent right to transfer it, and without any evidence of any defect in his right to transfer. *Kneeland v. Miles* (Tex.) 24 S. W. 1113, 1115. One who obtains the transfer of negotiable paper before maturity and for full value, without notice of any defect in the title of the apparent owner, has all the rights of a bona fide holder by title derived from the actual owner. *Central Bank of Brooklyn v. Hammett*, 50 N. Y. 158, 159.

A bona fide holder of a negotiable paper is one who takes it in good faith for consideration, from one capable of transferring, without notice of the consideration or attendant facts and circumstances. *Longwell v. Day*, 1 Mich. N. P. 286, 290.

In order to destroy the standing of a purchaser of a note as a bona fide holder, it must be shown that he did in fact know its character, or willfully refrained from learning when opportunity offered; but knowledge may be established by circumstantial evidence, so that, where the fact of the invalidity of the note was published in papers to which purchaser was a subscriber, it is sufficient to show that he was not a bona fide holder. *Haggard v. Petterson*, 78 N. W. 53, 54, 107 Iowa, 417.

A purchaser of negotiable railroad bonds in good faith and for their full market value may be a bona fide holder, although some of the interest coupons attached thereto were past due and unpaid at the time of the pur-

chase. *Long Island Loan & Trust Co. v. Columbus, C. & I. C. R. Co.* (U. S.) 65 Fed. 455, 457.

One who pays a note for valuable consideration, without any notice or ground to suspect any defect in the title of the person from whom it was taken, or any defense against the note. The bona fide holder of negotiable paper, who has received it for a valuable consideration, without notice or reasonable ground to suspect any defect, is entitled to full protection; but, where he received it for an antecedent debt, either as a nominal payment or as a security for payment, without giving up any security for such debt which he previously had, or paying any money or giving any new consideration, he is not a holder for a valuable consideration. The principle of protecting the bona fide holder of paper, who has paid value for it or relinquished some valuable security therefor, is derived from the doctrines of the courts of equity in other cases where a purchaser has obtained the legal title without notice of the equitable rights of a third person. *Stalker v. McDonald* (N. Y.) 6 Hill, 93, 96, 40 Am. Dec. 389.

#### **Payee.**

A bona fide holder of a negotiable instrument is one to whom the instrument has been transferred by the payee or by some subsequent indorsee for value and before due, and without any notice of any defect in the instrument. A payee is not a bona fide holder. *Hagan v. Bigler*, 49 Pac. 1011, 5 Okl. 575.

#### **Pledgee.**

A party receiving negotiable paper before due, as collateral security to a loan then made, without notice of any infirmity in the note, is a bona fide holder. *First Nat. Bank v. Shue*, 78 N. W. 647, 119 Mich. 560.

A person who gives his money, goods, or credit for a note at the time of receiving it, or who then on account of it sustained loss or incurred liability, is a holder in due course of commercial transactions; and, where one holds a note in such a manner, the fact that the collateral taken with it was transferred in fraud of a third person will not affect the holder's rights in relation thereto, he not knowing of the fraud. Consequently, where bank stock was given as security at the time of the renewal of a note by the execution of a new one, the holder of such note and security was a bona fide holder thereof in the due course of trade. Such a transaction is not like the receipt of collaterals upon an old note which continues to exist, and is not based on a consideration of the collaterals. In the one case the collaterals may be surrendered to the rightful owner, leaving the consideration of the debt unaffected. In the other case the collaterals cannot be taken without depriving the creditor of a part of

the consideration of his contract. *Cherry v. Frost*, 75 Tenn. (7 Lea) 1, 6.

#### **Purchaser from bona fide holder.**

A purchaser of a negotiable instrument from a bona fide holder for value acquires a good title to it as an innocent purchaser, and is himself a bona fide holder for value, and may recover thereon, free from equities, though he may have had notice of infirmities or equities in the note when he took it. *Bodley v. Emporia Nat. Bank*, 16 Pac. 88, 89, 38 Kan. 59.

A bona fide holder for value of negotiable instruments includes a purchaser of such paper, though he has knowledge of equities existing between the original parties to the paper, which his vendor did not have when he became the owner, for the purchaser is not affected by such equities, but stands on the title of the prior owner, and his title is intact. *Butterfield v. Town of Ontario* (U. S.) 32 Fed. 891, 892.

#### **BONA FIDE OCCUPANT.**

A bona fide occupant is one who supposes he has a good title, and knows of no adverse claim. *Phillips v. Stroup* (Pa.) 17 Atl. 220, 221.

A bona fide occupant is one who not only honestly supposes himself to be vested with the true title, but is ignorant that the title is contested by any other person claiming a superior right to it. *Gresham v. Ware*, 79 Ala. 192, 199.

#### **BONA FIDE POSSESSOR.**

A bona fide possessor of real estate is one who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it. *Green v. Biddle*, 21 U. S. (8 Wheat.) 1, 79, 5 L. Ed. 547; *Canal Bank v. Hudson*, 4 Sup. Ct. 303, 311, 111 U. S. 66, 28 L. Ed. 354; *Dorn v. Dunham*, 24 Tex. 366, 379 (citing *Green v. Biddle*, 21 U. S. [8 Wheat.] 1, 5 L. Ed. 547; *Bright v. Boyd* [U. S.] 4 Fed. Cas. 127; *Houston v. Sneed*, 15 Tex. 310; *Saunders v. Wilson*, 19 Tex. 194); *Henderson v. Pickett's Heirs*, 20 Ky. (4 T. B. Mon.) 54, 60, 16 Am. Dec. 130; *Sartain v. Hamilton*, 12 Tex. 219, 222, 62 Am. Dec. 524; *McLaughlin v. Barnum*, 31 Md. 425, 454.

Adams' Glossary defines a "bona fide possessor" as one who, being in actual possession, is excusably ignorant of the facts which show he is not entitled to possess. Possession in good faith involves not only the honest belief in the possessor's title, but the absence of all knowledge on his part of any facts or circumstances which ought to put him upon inquiry, or tend to render his possession unconscientious. *Lindt v. Uihlein*, 89 N. W. 214, 216, 116 Iowa, 48.

A "bona fide possessor" of land is one who not only supposes himself to be the true owner of land, but who is ignorant that his title is contested by any one claiming a better right to it. One is a bona fide possessor of land where he makes an innocent mistake in point of law; for instance, as to the construction of a demise, the due execution of a power, and the like, where, though aware of the opposing claim, he may have entered in full confidence of the validity of his title. *Sartain v. Hamilton*, 12 Tex. 219, 222, 62 Am. Dec. 524.

"He is a bona fide possessor who possesses as owner by virtue of an act sufficient in terms to transfer the property, the defects of which he was ignorant." Civ. Code, art. 503. *Beard v. Lufriu*, 15 South. 207, 209, 46 La. Ann. 875.

### BONA FIDE PURCHASER.

The term "bona fide purchaser" means a purchaser in good faith, without notice and for a valuable consideration. *Young v. Schofield*, 34 S. W. 497, 499, 132 Mo. 650; *Pickett v. Barron* (N. Y.) 29 Barb. 505, 507; *Merritt v. Northern R. Co.* (N. Y.) 12 Barb. 605, 609; *Ten Eyck v. Whitbeck*, 31 N. E. 994, 996, 135 N. Y. 40, 81 Am. St. Rep. 809; *Alden v. Trubee*, 44 Conn. 455, 459; *Webster v. Howe Mach. Co.*, 8 Atl. 482, 487, 54 Conn. 394; *Bowman v. Griffith*, 53 N. W. 140, 141, 35 Neb. 361; *Gregory v. Whedon*, 1 N. W. 309, 311, 8 Neb. 373; *Veith v. McMurtry*, 42 N. W. 6, 9, 28 Neb. 341; *Buchanan v. Wise*, 44 N. W. 458, 463, 28 Neb. 312; *Guard v. Rowan*, 3 Ill. (2 Scam.) 499, 501; *Scott v. McGraw*, 29 Pac. 260, 261, 3 Wash. St. 675; *Cloud v. Dupree*, 28 Ga. 170, 173.

"The term 'bona fide purchaser' has a well-settled meaning in the law. It does not require settlement or occupancy. Any one is a bona fide purchaser who buys in good faith and pays value." *United States v. Des Moines Nav. & R. Co.*, 12 Sup. Ct. 308, 312, 142 U. S. 510, 35 L. Ed. 1099.

A bona fide purchaser is one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside, and purchases in the honest belief that his vendor had a right to sell without notice, actual or constructive, of any adverse rights, claims, interests, or equities of others in or to the property sold. A mortgagee is a purchaser to the extent of his claim, and is entitled to protection, as a bona fide purchaser, against all secret equities and trusts of which he had no notice. A creditor who makes advancements under the security of a deed of trust, in good faith, without notice of a vendor's equitable lien for the purchase money, is entitled to the protection of a bona fide purchaser. It necessarily follows that when

a creditor makes advances or extends the time of the payment of his pre-existing debt for a definite time, or surrenders a valuable security on the condition that his debtor secures him in the payment of his advances and pre-existing debt by a deed of trust, and the debtor, in the performance of the condition, executes the deed of trust, the creditor is entitled to protection as a bona fide purchaser for a valuable consideration. *Fargason v. Edrington*, 49 Ark. 207, 214, 4 S. W. 763. A person who, without notice that his debtor has procured goods on credit by fraud, took \$4,900 worth of them in payment of a pre-existing debt of \$4,100, and pays the balance of \$800 in cash, is a bona fide purchaser, as against the debtor's vendor. *Woolridge v. Thiele*, 55 Ark. 45, 47, 17 S. W. 340.

A bona fide purchaser is one who buys property of another without notice that some third party has a right to or interest in such property, and pays a full price for the same at the time of such purchase, or before he has notice of the interest of such other in the property. *Salmon v. Norris*, 81 N. Y. Supp. 892, 894, 82 App. Div. 862.

A bona fide purchaser, entitled to protection against prior equities or latent infirmities in the title of his vendor, who is apparently seised, and, in the transaction with him, pretends to be seised, in fee of the legal estate, is one who, in good faith, without notice, parts with value or changes his position for the worse under the belief that he is acquiring the legal estate. Good faith and a valuable consideration are the essential elements of a bona fide purchaser a court of equity will not disturb. The two must concur. *Webb v. Elyton Land Co.*, 18 South. 178, 180, 105 Ala. 471 (quoting and approving *Thames v. Rembert's Adm'r*, 68 Ala. 561).

The essential elements which constitute a bona fide purchaser are a valuable consideration, the absence of notice, and the presence of good faith. *Citizens' Bank v. Shaw*, 84 N. W. 779, 782, 14 S. D. 197; *United States v. Winona & St. P. Ry. Co.* (U.S.) 67 Fed. 948, 962, 15 C. C. A. 96; *Id.*, 17 Sup. Ct. 368, 371, 165 U. S. 463, 41 L. Ed. 789; *United States v. California & O. Land Co.*, 13 Sup. Ct. 458, 462, 148 U. S. 31, 37 L. Ed. 354.

A purchaser of land, who has paid a valuable consideration therefor, is a bona fide purchaser, and mere absence of knowledge at the time of the purchase is the test of his bona fide character, not absence of that which might induce inquiry. *Varwig v. Cleveland, C., C. & St. L. R. Co.*, 44 N. E. 92, 94, 54 Ohio St. 455.

The term "bona fide," when used in speaking of bona fide purchasers of property, in the law relative to fraudulent conveyances, means only that the purchase shall be a real,



and not a feigned, one. *Jones v. Light*, 30 Atl. 71, 73, 86 Me. 437.

By a "bona fide purchaser," as the term is used in the statute providing "that no mortgage, nor any deed, or conveyance or writing in the nature of a mortgage, shall defeat or prejudice the title or interest of any bona fide purchaser of any lands, tenements, or hereditaments, unless the same shall have been duly registered," etc., is meant a person who buys without knowledge of the prior mortgage, and who would in fact be defrauded if such prior incumbrance were to stand in opposition to his title. *Dunham v. Dey* (N. Y.) 15 Johns. 555, 568, 8 Am. Dec. 282.

To constitute a bona fide purchaser upon a foreclosure sale, the purchase must be made for a valuable consideration and without notice. *Jordan v. Humphrey*, 18 N. W. 450, 451, 81 Minn. 495.

A bona fide purchaser is one who purchases for an honest, legitimate purpose, as counterdistinguished from one who purchases for some fraudulent or improper purpose, and hence every person buying at a sheriff's or constable's sale for the purpose of satisfying an honest debt is a bona fide purchaser. *Wood v. Moorhouse* (N. Y.) 1 Lans. 405, 412.

#### **Sufficiency of consideration.**

A bona fide purchaser is one who has either paid or advanced money on the faith of the debtor's actual title to the property transferred. *Tyler v. Abergh*, 3 Atl. 904, 65 Md. 18; *Wells, Fargo & Co. v. Smith*, 2 Utah, 39, 52. Where a vendee, by an agreement with the vendor, indorsed the purchase price on a note he held against the vendor, he was not a bona fide purchaser. *Downs v. Belden*, 46 Vt. 674, 678.

A "bona fide purchaser" may be defined as one who advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside, so that a conveyance of goods, in consideration of which the purchaser cancels the seller's unsecured notes, does not render him a purchaser for value. *Hamilton-Brown Shoe Co. v. Lyons*, 25 S. W. 805, 806, 6 Tex. Civ. App. 633.

"A bona fide purchaser is one who buys property of another without notice that some person has a right to or interest in such property, and pays a full and fair price for the same at the time of such purchase, or before he has notice of the claim or interest of such other in the property." *Spicer v. Waters* (N. Y.) 65 Barb. 227, 231.

A bona fide purchaser is one purchasing property and obtaining the legal title thereto for full consideration, without notice of prior rights or equities. The payment of the pur-

chase price, or some portion thereof, before notice, is absolutely essential. *De Mott v. Starkey* (N. Y.) 3 Barb. Ch. 403, 406.

A bona fide purchaser for a valuable consideration must have purchased without notice, and with the money actually paid. *Savage v. Hazard*, 9 N. W. 83, 84, 11 Neb. 323; *Hunsinger v. Hofer*, 11 N. E. 463-465, 110 Ind. 390; *Baldwin v. Richman*, 9 N. J. Eq. 394, 400; *Lane v. Starkey*, 18 N. W. 47, 48, 15 Neb. 285; *Jewett v. Palmer* (N. Y.) 7 Johns. Ch. 65, 11 Am. Dec. 401.

#### **Sufficiency of notice.**

Where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with what he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a bona fide purchaser. *Salmon v. Norris*, 81 N. Y. Supp. 892, 895, 82 App. Div. 362 (citing *Williamson v. Brown*, 15 N. Y. 354, 362).

A person who takes a conveyance of lands after attachments have been issued thereon, and with full knowledge of the situation, the consideration for which was the securing of a debt which was then due, is not a bona fide purchaser. *Leathwhite v. Bennet* (N. J.) 11 Atl. 29, 30.

One who buys with notice or knowledge of the fraud of his vendor in obtaining the property is not a bona fide purchaser. To constitute good faith, there must be an absence not alone of participation in the fraud or collusion with the vendee, but also of knowledge or even notice of the fraud, or of facts and circumstances calculated to put an ordinarily prudent man on inquiry, so that he would ascertain the truth. *Wafer v. Harvey County Bank*, 26 Pac. 1032, 1036, 46 Kan. 597.

Where a vendee has knowledge of such facts as would lead an ordinarily prudent man, using ordinary caution, to make inquiries whereby the fraudulent intent would have been discovered, he cannot be deemed a bona fide purchaser of property. *Manwaring v. O'Brien*, 78 N. W. 1, 2, 75 Minn. 542.

Where a lender, as a condition of loaning money on a mortgage, required the satisfaction of a prior mortgage on the premises, and a fraudulent satisfaction piece was obtained and shown to the borrower, who then loaned the money in the belief that the prior mortgage had been paid and satisfied, the fact that the prior bond and mortgage were not produced when the satisfaction piece was delivered did not affect the lender's position as a bona fide purchaser. *Bacon v. Van Schoonhoven*, 87 N. Y. 446, 451.

A person may be a bona fide purchaser of land, notwithstanding he purchased with

notice of the lien of a judgment. Such notice is only prima facie evidence of mala fides, and may be rebutted by showing good faith toward the judgment creditor, and is a circumstance to be considered with other evidence on the question of the bona fides of the purchase and possession. *Danielly v. Colbert*, 71 Ga. 220, 222.

A purchaser who purchases with notice of the claims of any one having an interest in the property adverse to the interest of the vendor is not a bona fide purchaser. *Gerow v. Castello*, 19 Pac. 505, 506, 11 Colo. 560, 7 Am. St. Rep. 260.

A person cannot be deemed to be a bona fide purchaser of lands from a railroad company, if at the time he makes his purchase from the railroad company another person is in actual, open, and known possession of the land. In other words, he purchases with notice of the rights and equities of the actual occupant. *Manley v. Tow* (U. S.) 110 Fed. 241, 254.

The words "bona fide," as used in reference to the loss of the vendor's right of stoppage in transitu by a transfer of the bill of lading to a third person who bona fide gives value for it, do not mean without notice that the goods had not been paid for, but without notice of such circumstances as rendered the bill of lading not fairly and honestly assignable. Something more than the knowledge that the original vendor sold the goods on credit—e. g., knowledge that the vendee is insolvent or did not intend to pay—is necessary to convict the second purchaser of mala fides. *Shepard & Morse Lumber Co. v. Burroughs*, 41 Atl. 695, 696, 62 N. J. Law, 469.

One who purchases with knowledge of an outstanding claim of title, or information sufficient to put him upon inquiry, is not a bona fide purchaser. *Prickett v. Muck*, 42 N. W. 256, 258, 74 Wis. 199.

To constitute a bona fide purchaser, there must be a want of notice both at the time of the purchase and at the time of the actual payment of the purchase price. Notice before payment is equivalent to notice before the contract, even though the unpaid balance is secured. Thus, where a prospective lender of money on a real estate mortgage is advised that the borrower is without title, but that a deed conveying the property to him is deposited in escrow, and he neglects to ascertain the terms of the escrow, he is not a bona fide purchaser. *Balfour v. Hopkins* (U. S.) 93 Fed. 564, 570, 35 C. O. A. 445.

The doctrine of bona fide purchaser is not a rule of property. It does not determine the question of title between the parties. It means that equity will refuse to interfere to aid the plaintiff in his suit, because, under the circumstances of the case, it would be unconscionable that the plaintiff should have what he seeks to obtain. It enforces no

right, but simply refuses to interfere in the plaintiff's behalf. The doctrine of bona fide purchaser is not applied to protect an equity against a legal estate, but to protect the legal title against a prior equity, by uniting with such legal title an equity arising from the payment of money and securing the conveyance without notice and a clear conscience. A deed of an insane grantor is absolutely void, and therefore a bona fide purchaser from the grantee takes no title. *German Savings & Loan Soc. v. De Lashmutt* (U. S.) 67 Fed. 399, 400.

A bona fide purchaser is a purchaser of property without notice of any equity or claim of another relating thereto. He need not be an original purchaser from the person having notice, nor need he be a purchaser without notice himself, for, if a person who has notice, and is therefore not a bona fide purchaser, sells to a person who has no notice, and is a bona fide purchaser for a valuable consideration, the latter may protect his title, though it was affected with the equity arising from the notice in the person from whom he derived it. So, too, if a purchaser who has not notice, and is a bona fide purchaser, thereafter sells to a person who has notice, such person stands in the shoes of the bona fide purchaser, and therefore himself becomes a bona fide purchaser. *Deroin v. Jennings*, 4 Neb. 97, 100.

One who, having agreed to receive certain shares of stock in payment of notes held by him, learns of equities affecting such stock before he delivers up the notes, or in any way carries out the agreement, is not a bona fide purchaser of the stock. *Hayden v. Charter Oak Driving Park*, 63 Conn. 142, 147, 27 Atl. 232.

#### Assignee for creditors.

A voluntary assignee for the benefit of creditors is not a bona fide purchaser. He takes subject to all equities, and has no greater rights in the assigned estate than his assignee has. It comes into his hands charged with all the equities existing with respect to it at the time of the assignment. *Bertha Zinc & Mineral Co. v. Clute*, 27 N. Y. Supp. 342, 345, 7 Misc. Rep. 123.

#### Execution creditor.

The term "bona fide purchaser," as used in Gen. St. § 215, providing that all deeds of real estate shall be valid, as against subsequent bona fide purchasers, after being recorded, and not before, construed to include a judgment creditor purchasing the land of his debtor at an execution sale under his judgment. *McMurtrie v. Riddell*, 18 Pac. 181, 182, 9 Colo. 497.

An execution creditor who bids off property at a sale on his own execution, and applies the bid to the payment of his own judgment, is not regarded as a bona fide or inno-

cent purchaser. *Carnahan v. Yerkes*, 87 Ind. 62, 67.

A creditor buying at his own sale, and crediting his bid on the judgment, is not a bona fide purchaser for value. This doctrine proceeds on the principle that the creditor receiving the conveyance does not divest himself of any right or place himself in any worse situation than he would have been if he had received notice of a prior title existing in the property in favor of a third party. He is treated as advancing nothing on the faith of his purchase, and as losing nothing if the apparent title of his vendor should prove worthless. *McKamey v. Thorp*, 61 Tex. 648, 652.

The court, in *Carnahan v. Yerkes*, 87 Ind. 62, 67, says that "an execution creditor who bids off property at a sale on his own execution, and applies the bid to the payment of his own judgment, is not regarded as a bona fide or innocent purchaser." The statement is incomplete, because silent as to notice. Applied to a judgment-creditor purchaser with notice of the prior equity, it is right; to one without notice, wrong. The facts in the case disclose that the judgment-creditor purchaser had notice prior to the execution sale of the senior rights of his adversary. The quotation must be limited or regarded as dictum. A judgment creditor purchasing in good faith at a proper execution sale on his own valid judgment is a bona fide or innocent purchaser for value, and takes free from secret equities. *Pugh v. Highley*, 53 N. E. 171, 173, 152 Ind. 252, 44 L. R. A. 392, 71 Am. St. Rep. 327.

A judgment creditor who purchased land at a sale under his own judgment, without notice, and who merely credits the net proceeds upon such judgment, is a bona fide purchaser. *Foorman v. Wallace*, 17 Pac. 680, 681, 75 Cal. 552 (citing *Hunter v. Watson*, 12 Cal. 363, 377, 73 Am. Dec. 543).

#### **Purchaser of homestead entryman.**

A purchaser from persons claiming to represent a person making a homestead entry is not a bona fide purchaser from the latter. *Puget Mill Co. v. Brown* (U. S.) 59 Fed. 35, 38, 7 C. C. A. 643.

#### **Quitclaim grantee.**

A purchaser who takes by quitclaim deed is affected by a prior equity, and will not be protected as a bona fide purchaser for value. *Everston v. Central Bank*, 6 Pac. 605, 608, 33 Kan. 352; *Richards v. Snyder*, 6 Pac. 186, 192, 11 Or. 501 (citing *Baker v. Woodward*, 6 Pac. 173, 181, 12 Or. 3); *Baker v. Woodward*, 6 Pac. 173, 181, 12 Or. 3; *Utey v. Fee*, 7 Pac. 555, 560, 33 Kan. 683; *Johnson v. Williams*, 14 Pac. 537, 539, 37 Kan. 179, 1 Am. St. Rep. 243.

It is the settled law of the Supreme Court of the United States that one who

takes simply by a quitclaim deed is not a bona fide purchaser without notice. *Oliver v. Platt*, 44 U. S. (3 How.) 410, 11 L. Ed. 622; *May v. Le Claire*, 78 U. S. (11 Wall.) 232, 20 L. Ed. 50; *Villa v. Rodriguez*, 79 U. S. (12 Wall.) 338, 20 L. Ed. 406; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618. Consequently, the law of Nebraska not appearing to be otherwise, one deriving the title for mares by a deed which is designated in the granting clause as a quitclaim, and which contains a recital that the grantors will, as heirs, make no further claim to the property conveyed, is not a bona fide purchaser without notice, as against the grantee in the deed under a prior unrecorded conveyance from an ancestor during his lifetime. *Hastings v. Nissen* (U. S.) 31 Fed. 597, 600.

"A person who takes by a quitclaim deed is not a bona fide purchaser, and takes only the interest which his grantor has. Under the cloak of quitclaim deeds, speculators close their eyes to honest and reasonable inquiries, and traffic in apparent imperfections in titles. The usual method of conveying a good title—one in which the grantor has confidence—is by warranty deed. The usual method of conveying a doubtful title is by quitclaim deed." *Peters v. Cartier*, 45 N. W. 73, 74, 80 Mich. 124, 20 Am. St. Rep. 508.

It has been held that a person who held real estate by virtue of a quitclaim deed, only, from his immediate grantor, whether he is a purchaser or not, is not a bona fide purchaser in respect to outstanding and adverse equities, when shown by the records, and which are discoverable by the exercise of reasonable diligence in making proper examination and inquiry. *Johnson v. Williams*, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243. A quitclaim deed, duly recorded, taken by the purchaser in good faith for a valuable consideration, will prevail over a prior unrecorded deed, where the subsequent purchaser had no notice of the former deed, and could not have discovered its existence by an investigation of the public records, or by the exercise of reasonable diligence in making proper examination and inquiry. *Merrill v. Hutchinson*, 25 Pac. 215, 45 Kan. 59, 23 Am. St. Rep. 713.

#### **Tax purchaser.**

A purchaser of land for taxes is not a bona fide purchaser, because he is deemed to have notice of whatever defects the records in the county clerk's office, on which his deed is founded, disclose. *Simpson v. Edmiston*, 23 W. Va. 675, 680.

A tax purchaser clearly cannot be, in the strict technical sense, a "bona fide purchaser," as that term is understood in the law, because a bona fide purchaser is one who buys an apparently good title, without notice of anything calculated to impair or affect it, but a tax purchaser is always deemed to

have some notice when the records defects. *Pennock v. Douglas County*, 58 N. W. 117, 121, 89 Neb. 293, 27 L. R. A. 121, 42 Am. St. Rep. 579.

"A bona fide purchaser is one who buys an apparently good title, without notice of anything calculated to impair or affect it." A tax purchaser is not a bona fide purchaser, since he is chargeable with notice of defects appearing on the record. *Budge v. City of Grand Forks*, 47 N. W. 890, 393, 1 N. D. 309, 10 L. R. A. 165.

#### **Tax purchaser.**

A tax purchaser is not a bona fide purchaser, in the strict and proper legal sense. The rule caveat emptor applies to him, and he takes all the risks of his purchase. *Coles v. Washington County*, 35 Minn. 124, 128, 27 N. W. 497, 499 (citing *Cooley, Tax'n*, 329-375).

#### **Of public lands.**

Within the meaning of Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], providing for the sale of timber lands and lands valuable chiefly for stone, and that any grant or conveyance made by any person who has availed himself of the provisions of the act, except in the hands of bona fide purchasers, shall be null and void, one who purchases land before patent is issued is not an innocent purchaser, so far as there may exist reasons why the patent should not issue. He buys subject to the risk of the consequences of the inquiry depending in the department. At most, he acquires but an equitable title, the legal title being in the government; and it is a familiar rule that the purchaser of an equitable title takes and holds it subject to all equities upon it in the hands of the vendor, and has no better standing than he. A bona fide purchaser of land is one who is the purchaser of the legal title or estate, and a purchaser of a mere equity is not embraced in the definition. *Hawley v. Diller*, 20 Sup. Ct. 986, 990, 178 U. S. 476, 44 L. Ed. 1157.

A. entered upon public land within the limits of an incorporated city, and filed a declaration of intention to pre-empt the same. He afterwards made proof and received the usual patent certificate. Following this, the Department of the Interior, on a rigid investigation, vacated the entry made by him, and the land was sold at public auction by the commissioner, as a disconnected tract, to other parties. Following this, a new Secretary of the Interior reversed the former decision of the office, and granted a patent to A. Subsequent to his entry upon the land, but prior to the grant of the patent, A. sold to various parties. Held, that none of these were bona fide purchasers, so as to be entitled to the protection of a court of equity, as against those who purchased at the auction

sale: (1) Because the legal title, until the issue of the patent, remained in the United States, and the grantees took only an equity, and, being but an equity, it was overreached by the better equity of their adversaries; (2) because those purchasing were bound to know the law, and that the land, being within the incorporated limits of the city, was not liable to pre-emption; (3) because the defect in the title was as radical as if no entry had been made. *Root v. Shields* (U. S.) 20 Fed. Cas. 1160, 1167.

A pre-emptor who has his final certificate and certificate of purchase has only acquired right to a patent, provided his acts were legal and such as to warrant the issuance of a patent to him, so that one who purchases from him acquires only an equitable interest in the land, and is not, therefore, entitled to protection as a bona fide purchaser. *American Mortg. Co. v. Hopper* (U. S.) 64 Fed. 558, 560, 12 C. C. A. 293.

The assignee of a certificate of purchase of lieu lands from a state, issued to an applicant therefor, who purchased for value, without notice of the falseness of the affidavit of the applicant, is in no better position than the applicant, as he is a purchaser of an equitable interest in the land, the legal title being in the state, and is therefore not protected by the rule as to bona fide purchasers. *Taylor v. Weston*, 20 Pac. 62, 64, 77 Cal. 534.

#### **Of railroad lands.**

The expression bona fide purchaser is oftentimes used ambiguously, and is construed in various ways. We look to the context, and consider the term with reference to its use in the connection in which it is found. It may mean without fraud or deception. It may mean without notice of another's rights. It sometimes signifies honesty of purpose, as distinguished from bad faith. To be a bona fide purchaser may under some circumstances require the payment of the consideration or purchase price, but not always. As used in the fifth section of Act March 3, 1887, providing that when railroad companies have sold lands as parts of their grants coterminous with their constructed lines of road to citizens, or to persons who have declared their intention to become citizens, but for some reason these lands were excepted from the operation of the grants, and could not be conveyed to the companies, these citizens or persons, if bona fide purchasers, should have the right to buy of the government, and should thereupon be entitled to patents. The term "bona fide" is used as the opposite of "mala fide." *O'Connor v. Gertgens*, 89 N. W. 866, 871, 85 Minn. 481.

#### **Of trust property.**

A purchaser of real property from a trustee in good faith for a valuable consideration, and without notice, actual or constructive, of

the prior equity of the cestui que trust, is a bona fide purchaser, and is entitled, in a court of equity, to its protection against such equitable rights; but a party having actual notice of such trust, or constructive notice by reason of the record of instruments creating such trust, is not entitled to the protection of a bona fide purchaser. *Eversdon v. Mayhew*, 3 Pac. 641, 644, 65 Cal. 163.

One who, after two years' administration of an estate, for fair value, without notice of fraud in the devisee, buys land from him, and at once reconveys it for security for his purchase notes, is a bona fide purchaser for value, protected by Code, § 1442, against creditors of the estate. *Arrington v. Arrington*, 19 S. E. 351, 356, 114 N. C. 151.

#### **Of usurious contract or security.**

A bona fide purchaser, within the rule of law which declares usurious contracts and securities issued thereon void, except in favor of bona fide purchasers, is a purchaser for a valuable consideration, without notice of the usurious nature of the contract or security. *Jordan v. Humphrey*, 18 N. W. 450, 451, 31 Minn. 495.

#### **BONA FIDE SEARCH.**

As used in the statement of the rule to the effect that, where an instrument is claimed to be lost, in order to give evidence of its contents, it must be shown that a "bona fide and diligent search" has been unsuccessfully made for it, is a term so general in its character that it is impossible to give a precise definition as to what constitutes a bona fide and diligent search. The question must be determined in a great measure by the circumstances of each individual case. *Thayer v. Barney*, 12 Minn. 502, 510 (Gil. 406, 420).

#### **BONA FIDE STOCKHOLDER.**

A bona fide stockholder within a statute providing that no one shall be a director of the corporation, save a bona fide stockholder, is one who holds stock in good faith, and not one to whom stock has been issued so as to put title in him colorably, with a view to qualify him to be a director, for some dishonest purpose touching the organization or control of the company. In re Election of St. Lawrence Steamboat Co., 44 N. J. Law (15 Vroom) 529, 541.

#### **BONA FIDE SUBSCRIBER.**

A "bona fide subscriber to the stock of a corporation" means one who will in fact bring to the corporation the amount of capital which the subscription denotes, and upon which its creditors and all persons dealing with the corporation can rely; and so a subscription by one as a trustee for the proposed corporation is not bona fide, within a statute

forbidding the commencement of business until all the capital stock is subscribed for by bona fide subscribers. *Johnston v. Allis*, 41 Atl. 816, 818, 71 Conn. 207.

#### **BONA NOTABILIA.**

"Bona notabilia," as used in English probate law, means notable goods, or property worthy of notice, or of sufficient value to be accounted for. In order to come within this description, it must have amounted to at least £5. Thus, where a decedent left goods of a sufficient amount (bona notabilia) in different dioceses, administration is granted by the metropolitan, to prevent the confusion arising from the appointment of many different administrators. 2 Bl. Comm. 509; Rolle, Abr. p. 908. So, also, the rule became established that debts such as are evidenced by promissory notes, etc., are bona notabilia at the domicile of the debtor, authorizing an administration at such place. *Moore v. Jordan*, 13 Pac. 337, 339, 36 Kan. 271, 59 Am. Rep. 550.

#### **BONA PARAPHERNALIA.**

The phrase "bona paraphernalia," borrowed from the civil law, became the settled description of the wife's clothing and ornaments. The husband could not devise them away, and after his death the widow could hold them as against his executors or legatees, but was obliged to surrender them to his creditors where there was a deficiency of assets. Even the presents given by him to her before marriage, such as jewels, rings, etc., could not afterwards be saved from his creditors, and the paramount title of the husband was still preserved, since he could dispose of these articles absolutely in his lifetime. *Whiton v. Snyder*, 88 N. Y. 299, 303.

#### **BOND.**

See "Administrator's Bond"; "Appeal Bond"; "Baby Bonds"; "Bail Bond"; "Bottomry Bond"; "Corporate Bonds"; "Coupon Bond"; "Delivery Bond"; "Dissolving Bond"; "First Mortgage Bonds"; "Five-Twenty Bonds"; "Forthcoming Bond"; "Good Bond"; "Improvement Bond"; "Indemnity Bond"; "Joint Bond"; "Municipal Bond"; "New Bond"; "Official Bond"; "Probate Bond"; "Redelivery Bond"; "Registered Bond"; "Replevin Bond"; "Simple Bond"; "State Bonds"; "Statutory Bond"; "Stipulation Bond"; "Superseas Bond"; "Title Bond"; "United States Bonds."

Any bond, see "Any."

A bond is merely an obligation under seal. *Commonwealth v. Smith*, 92 Mass (10 Allen) 448, 456, 87 Am. Dec. 672.

A "bond" may be briefly defined to be a sealed obligation to pay money. It may be either single and absolute, or upon condition and contingency. However complicated may be the condition or contingency, and however alien from pecuniary considerations may seem the inducements to its execution or the circumstances surrounding the parties, a bond will always be found to resolve itself into an obligation to pay money sooner or later—either absolutely or upon some condition or on the happening of some future event. *Rawson v. Taylor* (Neb.) 95 N. W. 1033, 1036 (citing *Murfrep*, Off. Bonds).

A bond, as defined by Blackstone, is a deed whereby the obligor obligates himself, his heirs, executors, or administrators, to pay a certain sum of money on a day appointed. *Williams v. State*, 6 South. 831, 832, 25 Fla. 734, 6 L. R. A. 821; *Rondot v. Rogers Tp.* (U. S.) 99 Fed. 202, 209, 39 C. C. A. 462.

"A bond is what binds. Therefore any instrument in writing that legally binds a party to do a certain thing may be called a bond." *Courand v. Vollmer*, 31 Tex. 397, 401.

Bonds are obligations payable at a definite time, running through a series of years. They are payable when the time of their maturity arrives, independent of any presentation. *Shelley v. St. Charles County Court* (U. S.) 21 Fed. 699, 701.

The term "bond" is sometimes used as a generic term—as a written instrument by which a person has become bound or committed legally. Usually the word is taken to mean a secondary or accessory securing a primary obligation in favor of some third person. Thus, an instrument declaring, "I agree to stand security for L. to the amount of his contract," is not technically a bond. *State v. Leo*, 32 South. 447, 452, 108 La. 496.

The word "bond" has a definite legal signification. It is a clause, with a sum affixed as a penalty, binding the party to pay the same, conditioned, however, that payment of the penalty may be avoided by the performance by one or more of the parties of certain acts. *United States v. Rundle* (U. S.) 100 Fed. 400, 403, 40 C. C. A. 450 (citing *In re Fitch* [N. Y.] 3 Redf. Sur. 457).

A bond by specialty to pay a certain sum of money is a deed or instrument under seal, by which the maker or obligor binds himself to pay a designated sum of money to another, usually with a clause to the effect that, on the performance of a certain condition, the obligation shall be void. "A bond is said to be prima facie a penal obligation, and the sum mentioned therein is not construed as liquidated damages unless other language used in the instrument, or accompanying circumstances, shows that such was the intention of the contracting party; but, if the sum named is to be taken as penalty only, on a breach of the obligation the obligee is en-

titled to recover only such actual damages as he may suffer from the breach of the condition." *Turck v. Marshall Silver Min. Co.*, 5 Pac. 838, 839, 8 Colo. 113.

A bond is a deed or obligatory instrument in writing whereby one doth bind himself to another to pay a sum of money or do some other act. It contains an obligation with a penalty and a condition, which expressly mentions what money is to be paid or other thing performed, and the limited time for the performance thereof, for which the obligation is peremptorily binding. The ceremony, as necessary to a bond or obligation, consists of writing on paper or parchment, sealing, and delivering. *Boyd v. Boyd* (S. C.) 2 Nott & McC. 125, 126.

The word "bond" necessarily imports that there is a written instrument. *Pierson v. Townsend* (N. Y.) 2 Hill, 550, 551.

A bond implies an obligor bound to do what it is agreed shall be done. *Davenport v. Dodge County*, 105 U. S. 237, 241, 26 L. Ed. 1018, 1020.

An instrument with a scrawl annexed to the signature is a bond, without purporting to be such on its face. *Harden v. Webster*, 29 Ga. 427, 429.

An instrument in writing under seal, signed by the defendants, and obliging them to pay the plaintiff a sum of money named, is a bond, within the meaning of Act April 9, 1873, § 9, as amended by Act Feb. 27, 1879, providing that a married woman may give bond as if she were a feme sole. *Hurleton*, in his work on Bonds, uses this language: "A bond is an instrument under seal, whereby one becomes bound unto another for the payment of a sum of money, and for the performance of any other act or thing." No certain form is necessary. Any form of words, in writing under seal, acknowledging a debt and naming an obligee, is as obligatory as the most formal act. *Warden, Bushnell & Glessner Co. v. Stewart* (Del.) 36 Atl. 88, 2 Marv. 275.

The term "bond," in 16 Stat. 272, and Gen. Laws, c. 44, § 2, exempting bonds from taxation, includes the premium on such bonds, and therefore such premiums are not subject to taxation. "The premium is not something distinct from the bond, and cannot exist apart from the bond. It is inherent in it and goes with it. When the bond is transferred, that goes along, and as the bond approaches maturity it vanishes. The premium is part of the entire value of the bond, and when that is taxed the bond is taxed, or, what is equally condemned, the value or a part of the value of the bond is taxed. The conception of the premium upon a bond as a distinct entity for the purpose of taxation is too transcendental and metaphysical for common comprehension and judicial cognizance.

Rhode Island Hospital Trust Co. v. Arming-ton (R. I.) 41 Atl. 570.

The term "bonds" or "stocks," whenever used in the chapter relating to the revenue, shall be held to mean and include bonds or stocks of whatsoever kind, whether issued by incorporated or unincorporated companies, towns, townships, counties, states, or other corporations, held or controlled by persons residing in this state, whether for themselves, or as guardians, trustees, or agents, on which the holder or owner thereof is receiving or is entitled to receive interest for themselves or others. Rev. St. Mo. 1899, § 9123.

**As bill.**

See "Bill."

**As contract.**

See "Contract."

**As creation of fresh debt.**

"A bond is the creation of a fresh debt, and not the acknowledgment of a former one." Williams v. Mitchell, 1 Pen. & W. (Pa.) 9, 11.

**As debt or indebtedness.**

See "Debt"; "Indebted—Indebtedness."

**As effects.**

See "Effects."

**Land contract.**

Testator bequeathed to a legatee all bonds and mortgages for sales of real estate already made or hereafter to be made in the county of W. Held, that the words "all bonds and mortgages for sales," etc., could not be construed to embrace contracts for the sale of such lands where no deeds had actually been executed. Beck v. McGillis (N. Y.) 9 Barb. 35, 60.

**As liability.**

See "Liability."

**Memorandum on justice's docket.**

Rev. St. Wis. § 2590, providing that no attorney practicing in the state shall be taken as bail or security on an undertaking, bond, or recognizance, does not include a memorandum on a justice docket, required by Rev. St. § 3782, 3783, to be signed by sureties for costs in an action. Stark v. Small, 89 N. W. 359, 72 Wis. 215.

**As merchandise.**

See "Merchandise."

**As money.**

See "Money."

**As negotiable instrument.**

The term "bonds," as used in Austin City Charter, § 2, authorizing the raising of money

by issuing bonds of the city, implies something more than a mere promise to pay; that is to say, it implies bonds having the commercial quality of negotiability. Money may be borrowed by a city on a nonnegotiable instrument, but, in order to obtain advantageous terms, and to enter the market of the world in fair competition for the use of money, it must issue a commercial paper. The power to issue bonds was granted to the city of Austin for the purpose of enabling it to raise money, and it is not to be presumed that it was intended to restrict the power to the issuing of obligations that would not be effective for the purpose, and advantageous to the city. City of Austin v. Nalle, 22 S. W. 668, 674, 85 Tex. 520.

**Recognizance.**

Recognizance distinguished, see "Recognizance."

The term "bond," in a statute authorizing certain corporations to become sureties on bonds, includes a recognizance, as a recognizance is a bond, in the strict sense of the word. Lovejoy v. Isbell, 40 Atl. 531, 532, 70 Conn. 557.

Act June 14, 1836 (P. L. 633), is entitled "An act relative to bonds with penalties and official bonds," and the sixth section provides that every bond and obligation which shall be given to the commonwealth by any public officer may be sued and prosecuted in the manner therein prescribed, by which one suit and one judgment only can be entered, and the interests of all persons aggrieved may be from time to time suggested on the record, and proceedings had by writs of scire facias on such judgments to ascertain the amounts which each may be entitled to recover. Held, that the words "every bond and obligation" mean only official bonds, strictly so called, and do not include a recognizance. McMicken v. Commonwealth, 58 Pa. (8 P. F. Smith) 213, 218.

Under Gen. St. 1902, § 821, providing that the authority signing a writ of error shall, before its issue, take a good and sufficient bond, with surety, that the plaintiff in error shall prosecute his suit to effect, the certificate of the giving of the security is not defective because denominating such security a "recognizance," instead of a bond; it being held that a recognizance is a bond, within the meaning of the statute. Vincent v. Mutual Reserve Fund Life Ass'n, 55 Atl. 177, 178, 75 Conn. 650.

**As record.**

See "Record."

**As sealed instrument.**

The term "bond" means an instrument under seal, and an instrument without a seal is not a bond. Cuddelback v. Parks (Iowa) 2 G. Greene, 148, 150; Inhabitants of

*Boothbay v. Giles*, 68 Me. 160, 162; *Skinner v. McCarty* (Ala.) 2 Port. 19, 22; *Cantey v. Duren* (S. C.) Harp. 434, 435; *State ex rel. West v. Thompson*, 49 Mo. 188, 189. The term is so used in Rev. St. 103, § 20, providing that, if judgment shall have been rendered in favor of the plaintiff, the master, owner, agent, or consignee of the boat or vessel, or other person interested, may appeal, by giving bond. *The Lake of the Woods v. Shaw* (Iowa) 2 G. Greene, 91, 92. Likewise in Act May 10, 1800, requiring a receiver of public moneys to give a bond, with sufficient security, for the faithful discharge of his trust. *United States v. Linn*, 40 U. S. (15 Pet.) 290, 311, 10 L. Ed. 742. Such is its meaning in South Carolina executors' law of 1789, providing the order of payment of intestates' debts, and stipulating that "bonds or other obligations" shall be paid before debts due on open accounts. *Rippon's Ex'rs v. Townsend's Ex'rs* (S. C.) 1 Bay, 445, 447; *Lane v. Morris*, 10 Ga. 162, 167.

In order to constitute a "bond," legally speaking, sealing is essential. It is a deed, and the word therefore necessarily imports a sealed obligation. The meaning is the same in common parlance. *People v. Wiley* (N. Y.) 3 Hill, 194, 212.

The term "bond," at common law, was used to designate an instrument in writing, having a seal formed of wax or some tenacious substance that would receive and retain an impression. In the United States a scroll has been allowed to be used as a substitute for the wax seal, and hence a bond required by act of Congress to be given by receivers of public money means a bond having either a wax seal or a scroll. *United States v. Stephenson's Ex'rs* (U. S.) 27 Fed. Cas. 1305, 1306.

The term "bond," in its ordinary, popular signification, includes an instrument, not under seal, by which the maker binds himself to pay money or do some act specified, as well as instruments for like purposes under seal. *Lane v. Inhabitants of Town of Embden*, 72 Me. 354, 364.

The word "bond" imports a seal, and the word, when used in the statute authorizing the issue by a municipal corporation of written obligations negotiable in character, means specialties or writings under seal. By How. Ann. St. § 7778, it is provided that no bond, deed of conveyance, or other contract in writing shall be deemed invalid for want of a seal or scroll affixed thereto by such party, so that a township bond to which the officers neglected to affix a seal is naturally a sealed instrument, so as to make an action upon it an action of covenant. *Rondot v. Rogers Tp.* (U. S.) 99 Fed. 202, 209, 39 C. C. A. 462.

An instrument in writing will not be considered as sealed unless by some expres-

sion in the body of the instrument the maker shows that he intended it to be considered as a specialty. A mere scrawl at the end of a name, with the word "Seal" in it, will not make the writing a bond. *Glasscock v. Glasscock*, 8 Mo. 577, 578.

The word "bond," as used in the civil procedure act, does not necessarily imply sealed, but in other respects means the same kind of instruments as heretofore. *Horner's Rev. St. Ind.* 1901, § 1285.

The words "bond" and "indenture," when used in statutes, do not necessarily imply a seal. Code Iowa 1897, § 48, subd. 20.

The words "bond" and "indenture" do not necessarily imply a seal, but in other respects mean the same kind of instruments as heretofore. Gen. St. Kan. 1901, § 7342, subd. 20.

The word "bond" does not necessarily imply an instrument under seal, or with a penalty or forfeiture. *Stone v. Bradbury*, 14 Me. (2 Shep.) 185, 191.

The term "bond" is of frequent occurrence in the statutes of the republic of Texas passed prior to the adoption of the common law, and its signification, as used therein, has been defined by the courts; holding that the term was to be interpreted and construed according to its meaning and force in the civil law, and since no such word as "bond" was known to the civil law, but its equivalent under that law was the word "obligation," and as a seal was not required to give force and validity to an obligation, it was not necessary to the validity of a bond. The word "bond," as used in the law of Texas in force previous to the introduction of the common law (January 20, 1840), had a defined meaning and construction, which excluded the idea that a seal was at all essential to the validity of such an instrument. After the adoption of the common law in Texas, it was held that a seal was still unnecessary to the validity of a bond, since the adoption of the common law could not be construed to be an amendment of the statutes already in force with respect to bonds, or to impair the obligation of contracts already made, and to hold that statutes and contracts subsequently made were affected thereby would be to make the meaning of the statute, or the binding force of the contract, dependent on the date when it was enacted or made. *Foster v. Champlin*, 29 Tex. 22, 28.

The word "bond" does not, *ex vi termini*, imply a contract under seal, but, as used in popular language, imports the substantive action expressed by the verb "to bind," and, if one is bound, he is in bonds or under bonds; and the word implies nothing more than a binding contract, in whatever form, and though, in legal phraseology, the



term usually denotes a specialty, it does not necessarily imply a contract under seal. *Ide v. Passumpsic & C. R. R. Co.*, 32 Vt. 297, 299.

The term "bond," *ex vi termini*, signifies an instrument under seal. But since the enactment of the Code of Civil Practice that there shall be no difference in evidence between sealed and unsealed writings, and that every writing not sealed shall have the same force and effect that it would have if sealed, the term "bond," as used in statutes, does not necessarily imply a sealed instrument. *Wild Cat Branch v. Ball*, 45 Ind. 213, 215.

#### **Share of stock.**

The term "bonds," as used in a will bequeathing to the testator's widow all of his government and other bonds which he might possess at the time of his decease, does not include shares of stock in a bank. *Benton v. Benton*, 63 N. H. 289, 295, 56 Am. Rep. 512.

#### **Undertaking.**

The term "bond," when used in any statute, shall embrace every written undertaking for the payment of money or acknowledgment of being bound for money, conditioned to be void on the performance of any duty or the occurrence of anything therein expressed and subscribed, and delivered by the party making it, to take effect as his obligation, whether it be sealed or unsealed. *Code Miss.* 1892, § 1501.

#### **Undertaking on appeal.**

"Bond" includes an undertaking. *Rev. St. Wyo.* 1899, § 2724; *Laws N. Y.* 1892, c. 677, § 16; *Bates' Ann. St. Ohio* 1904, § 23; *Bates' Ann. St. Ohio* 1904, § 4947; *Bates' Ann. St. Ohio* 1904, § 6794; *Rev. St. Wyo.* 1899, § 5190.

An undertaking on appeal is within the term "bonds," as used in *Civ. Code* 1895, § 604, and provision 3, authorizing the creation of corporations to execute or guaranty any bonds required by law to be given in any proceeding in court. *King v. Pony Gold Min. Co.*, 62 Pac. 783, 787, 24 Mont. 470.

#### **Warrant distinguished.**

There is a vast difference between bonds and warrants. Warrants are general orders payable when funds are found, and bonds, are obligations payable at a definite time, running through a series of years. They are payable when the time of their maturity arrives, independent of any presentation. *Shelley v. St. Charles County Court* (U. S.) 21 Fed. 699, 701.

#### **BOND AND MORTGAGE.**

A "bond and mortgage" are distinct and separate securities, though for the same debt. As against the rights of third parties, payment in fact of either extinguishes the debt,

and therefore satisfies the other. And even between the parties the two securities are so far parts of the same transaction that the satisfaction of one is presumed to be payment of the debt, and therefore to include the satisfaction of the other, and the burden of proof is on the creditor to show the contrary. *Meigs v. Bunting*, 141 Pa. 233, 239, 21 Atl. 588, 589, 23 Am. St. Rep. 273.

#### **BOND FOR PAYMENT OF MONEY.**

A motion founded on a delivery bond is an action founded on a bond for the payment of money, within the meaning of Act 1827, c. 72, providing that in all actions founded on bonds for the payment of money, taken from an inferior to a superior jurisdiction, the securities of the parties appealing shall be bound for the payment of the latter debt, damages, costs, etc. *Banks v. Brown*, 12 Tenn. (4 Yerg.) 198, 199.

#### **BOND FOR TITLE.**

As conveyance, see "Conveyance."

A bond for title is not distinguishable, in its ordinary operation and effect, from a simple agreement for the same purpose. *Sayre v. Mohney*, 47 Pac. 197, 198, 30 Or. 238.

A bond for title does not purport to convey the title to the obligee, but is an executory agreement to make title in the future on the performance of certain conditions. *White v. Stokes*, 53 S. W. 1060, 1061, 67 Ark. 184.

#### **BOND OF RAILROAD.**

The bonds of a railroad corporation are personal securities, in contradistinction to public and real securities, and can only be upheld as proper subjects for the investment of trust funds under special circumstances, which ought to be made to appear by the guardian. *Allen v. Gaillard*, 1 S. C. (1 Rich.) 279, 282.

#### **BOND REQUIRED IN LEGAL PROCEEDING.**

The clause in the stamp acts of the state and of the United States exempting from stamp duty those bonds which are "required in a legal proceeding" is not confined to those bonds without which no action could be maintained or prosecuted, but is more general, and means the bonds required to give any party to a legal proceeding any advantage or privilege to which he would be legally entitled, in the course of that proceeding, by executing a proper bond. *Bowers v. Beck*, 2 Nev. 157, 160.

#### **BONDED DEBT.**

A "bonded debt" is defined by some lexicographers to be that part of the entire

indebtedness of a corporation or state which is represented by bonds it has issued, as distinguished from a floating debt. By others it is declared that it is a debt contracted under the obligation of a bond. The term "bonded debt," in the real as well as in the ordinary and generally accepted sense of the phrase, means not only the principal amount named in the bond, but also the sum of the interest which in the obligation is promised to be paid. If, however, the term "bonded debt" is not in every instance used to express the amount of both principal and interest, but sometimes to express the principal named, yet, if these words are in any case to be given that meaning, it must be so because of the context with which they are used, or from circumstances which show that the meaning of the phrase is to be restricted. As used in the Georgia Constitution, providing that the proceeds arising from the sale of public property owned by the state shall be applied to the payment of the bonded debt of the state, it includes the interest on the principal, as well as the principal itself, and an application of the money derived from such sales to the payment of interest was proper. *Park v. Candler*, 40 S. E. 523, 527, 114 Ga. 466.

Const. art. 12, § 11, forbidding corporations to incur "bonded indebtedness," except on certain conditions, does not embrace a nonnegotiable note and mortgage executed by a corporation to secure its indebtedness for money loaned, money paid, property purchased, or labor performed in the ordinary course of its authorized business, and actually received and used in such business. *Underhill v. Santa Barbara Land, Bldg. & Imp. Co.*, 28 Pac. 1049, 1050, 93 Cal. 300.

### BONDED WAREHOUSE.

See "Distillery Bonded Warehouse."

The term "bonded warehouse," as used in joint resolution of Congress of March 29, 1869, declaring that the proprietors of all internal revenue bonded warehouses shall reimburse the United States for expenses and salaries of all storekeepers put in charge of them, includes the distillery warehouses which distillers are required by the fifteenth section of the same act to keep situated on their distillery premises. *United States v. Powell*, 81 U. S. (14 Wall.) 493, 494, 20 L. Ed. 726.

### BONDSMAN.

The word "bondsman" is defined as a surety—one who is bound or gives surety for another; one who is bound by writing obligatory for the performance of the act of another—and as used in a will stating that from the share of a son should be deducted "an amount now unknown to me, which I, as one of his bondsmen, would have to pay for

him," the word "bondsmen" did not necessarily import an obligation under seal. *Haberstich v. Elliott*, 59 N. E. 557, 558, 189 Ill. 70.

### BONE BLACK.

Bone black is animal charcoal produced by burning bone or exposing it to the action of fire in the same manner that wood is exposed to the action of fire to produce vegetable charcoal. *Schriefer v. Wood* (U. S.) 21 Fed. Cas. 737, 738.

### BONIFICATION.

Chief Justice Fuller, in *United States v. Passavant*, 169 U. S. 16, 23, 18 Sup. Ct. 219, 222, 42 L. Ed. 644, speaking of import duties, says: "Doubtless to encourage exportation and the introduction of German goods into other markets, the German government could remit or refund the tax, pay a bonus, or allow a drawback. And it is found that in respect of these goods, when purchased in bond or consigned while in bond for exportation to a foreign country, this duty is remitted by the German government, and is called 'bonification of tax,' as distinguished from being refunded as a rebate. The use of the word 'bonification' does not change the character of this remission. It is a special advantage extended by government in aid of manufacturers and trades, having the same effect as a bonus or drawback. To use one of the definitions of 'drawback,' it is a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all." *Downs v. United States* (U. S.) 113 Fed. 144, 148, 51 C. C. A. 100.

### BONNET.

Tariff Act, par. 363, imposes a duty on flannels, blankets, hats of wool, knit goods and all goods made on knitting frames, etc., and paragraph 400 on bonnets, hats, and hoods for men, women, and children, composed of chip, grass, palm leaf, etc. Held, that the word "bonnet," in paragraph 400, was not sufficiently broad to include articles made of wool knit on frames, used as a covering for the head, and hence such articles were properly classified under paragraph 363. *Toplitz v. Hedden* (U. S.) 33 Fed. 617.

### BONUM VACANS.

In *Mason v. Hill*, 5 Barn. & Adol. 1, the learned judge speaks of a distinction mentioned by the civilians between a river and its waters; the former being, as it were, a perpetual body, and under the dominion of those in whose territory it is contained; the latter continually changing, and incapable,

"while it is there," of becoming the subject of property. He adds: "It seems that the Roman law considered running water, not as a bonum vacans, in which any might acquire a property, but as public or common, in this sense only—that all might drink it or apply it to the necessary purposes of supporting life—and that no one had any property in the water itself, except in that particular portion which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only." *Lux v. Haggin*, 10 Pac. 674, 708, 69 Cal. 255.

## BONUS.

"Bonus is a sum paid for services, or a thing given therefor, in addition to or in excess of what would ordinarily be given, but it is not a gift or gratuity. It is a premium given for a loan or a charter or other privilege granted to a company." *Kenicott v. Wayne County*, 83 U. S. (16 Wall.) 452, 471, 21 L. Ed. 319.

A bonus is a premium paid to a grantor, as a bank pays a bonus to the state for its charter—a consideration given for what is received. It implies an advantage—a benefit—given in return for the benefit received, or as an inducement to the grantor to confer that benefit. The term "bonus" has become a familiar one, and is associated, in its common acceptance, with the knowledge of some advantage, benefit, quid pro quo, stipulated for. *Consolidated Bank v. State*, 5 La. Ann. 44, 57.

Where banks, as the price for their charters, were required to contribute to the school fund, the tax or charge was the bonus or price or part of the price that they were to pay for their franchise. *Gordon v. Appeal Tax Court*, 44 U. S. (3 How.) 133, 145, 11 L. Ed. 529.

### As premium on loan.

"Bonus," in its strict sense, means good. In its popular sense it denotes a premium for a loan. *Leslie v. Leslie*, 24 Atl. 319, 322, 50 N. J. Eq. (5 Dick.) 103.

The term "bonus," within an act authorizing savings associations to contract for a bonus on loans made, imports a definite sum to be paid at one time for the loan of money for a specified period, distinct from and independent of the interest. *Mechanics' & Workingmen's Mut. Sav. Bank & Bldg. Ass'n v. Wilcox*, 24 Conn. 147, 154.

### Tax distinguished.

The power of taxation is an incident of sovereignty, and is coextensive with that of which it is an incident. All subjects, therefore, over which the sovereign power of the state extend, are, in its discretion, legitimate subjects of taxation, and this may be carried

to any extent to which the Legislature may choose. On the other hand, the idea of a consideration is always present when we speak of a bonus, which is a premium to a grantor or vendor, or a consideration given for what is received. In *Baltimore & O. R. R. Co. v. Maryland*, 88 U. S. (21 Wall.) 456, 22 L. Ed. 678, the distinction between a tax and a bonus is clearly drawn. *Commonwealth v. Erie & Western Transp. Co.*, 107 Pa. 112, 115.

A bonus is a "sum exacted by the state from a corporation for granting a charter. In such case it is clearly distinguished from a tax." 1 Bouv. Law Dict. (Rawle's Ed.) p. 254. The payment of such a bonus, as a consideration for the grant of the franchise to be a trading corporation, does not create a contract which implies a surrender by the state of any part of its taxing power. *Commonwealth v. Bailey, Banks & Biddle Co.*, 20 Pa. Super. Ct. 210, 218.

## BONUS BUILDING CONTRACT.

A bonus building contract is a plan adopted by real estate owners to induce builders to erect buildings on lots leased by the former; the amount of the bonus being added to the estimated value of the ground, and the ground rent being accordingly increased to secure returns on the investment. *Andrew v. Meyerdirck*, 40 Atl. 178, 174, 87 Md. 511.

## BOODLE.

The word "boodle" is defined as "money fraudulently obtained in public service—especially money given to be received by officials in bribery, or gained by collusive contracts, appointments, etc.; by extension, gain from cheating of any kind. Often used attributively." See Cent. Dict. Where it is charged that a franchise has been procured by the use of boodle, the inference is that the persons granting the franchise were, as officials, bribed by money to make the grant. *Boehmer v. Detroit Free Press Co.*, 94 Mich. 7, 9, 53 N. W. 822, 823, 34 Am. St. Rep. 318.

"The word 'boodle' has usually been applied to designate the money held to be paid or paid as a bribe for corrupt official action, and has mostly arisen in connection with the corruption of legislative action, although not limited to it. Its meaning may be said to be as broad as the use of money for any corrupt purpose—mostly confined to acts of an official character. It is therefore libelous." *Byrnes v. Mathews*, 12 N. Y. St. Rep. 74, 83.

## BOOK.

See "On the Books"; "Taxbook"; "Text-Book."

As appliances, see "Appliance."

As personal property, see "Personal Property."

A "book," in its popular sense, is understood to be a volume, bound or unbound, written or printed. The term is derived from the Saxon word "boc" (beech tree). *Scoville v. Toland* (U. S.) 21 Fed. Cas. 863, 864.

One of the definitions given by Worcester of "book" is "a collection of paper leaves, sewed or bound, used for any kind of writing." *Turbeville v. State*, 56 Miss. 793, 798.

Paper books in the German language, for the use of children, containing illuminated lithographic prints, are not entitled to free entry, under Act July 24, 1897, c. 11, § 2, Free List, par. 502, 30 Stat. 196 [U. S. Comp. St. 1901, p. 1681], as books and pamphlets printed exclusively in a foreign language. *F. H. Petry & Co. v. United States* (U. S.) 121 Fed. 207.

#### As books of account.

Under an insurance policy requiring the insured to keep a set of "books," the insurers must be held to have contracted with reference to the usages of the trade and the custom of merchants, and must have intended only such a set of books showing a complete record as good bookkeeping prescribed, and such as generally obtained among merchants engaged in a similar business. *Western Assurance Co. v. Althelmer*, 58 Ark. 565, 568, 25 S. W. 1067, 1069.

"Books," as used in the sheriff's return certifying to the levy on certain books, may mean only the physical articles, and is not to be taken as including debts due on accounts contained in such books. *Tullis v. Brawley*, 3 Minn. 277, 286 (Gil. 191, 197).

#### Blank books.

A "book" is commonly defined to be a number of sheets of paper, bound or stitched together, whether printed or blank. Thus we speak of a cashbook, a daybook, or merchant's account book. Ky. St. § 4218, provides that no person who sells books, pamphlets, or papers shall be deemed a peddler, within the statute requiring the license of peddlers; and it was held that a number of sheets of paper bound together, for the use of farmers in keeping a record of their transactions, with printed headings and some other printed matter, should be considered a book. *Coffey v. Hendrick* (Ky.) 65 S. W. 127, 128.

#### Manuscript notes.

A bequest of all "my books in and about my house," etc., includes manuscript notes of a physician of his attendance on a patient, which were bound up in volumes. *Willis v. Curtols*, 1 Beav. 189.

A manuscript may be a book. A bequest authorizing a legatee "to select such books as he may desire" out of the testator's library may include a manuscript copy of a

book made by the testator. In *re Beecher's Estate*, 17 Pa. Co. Ct. R. 161, 162.

#### Pamphlet.

A pamphlet of 24 pages, consisting of a sheet and a half secured together by stitching, and with a cover of 4 pages, and having a title page, is properly described as a book in an indictment under the federal statutes forbidding the depositing in the mail of any obscene or indecent book or other publication. *United States v. Bennett* (U. S.) 24 Fed. Cas. 1093, 1104.

#### Private letter.

In construing the statute prohibiting the mailing of obscene books, pamphlets, pictures, papers, writings, prints, or other publication, etc., the United States Supreme Court, in *United States v. Chase*, 10 Sup. Ct. 756, 135 U. S. 255, 34 L. Ed. 117, say: "In the statute under consideration the word 'book' is used as one of a group or class of words, 'book, pamphlet, picture, paper, writing, print,' each of which is ordinarily and prima facie understood to be a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and defines each, with the common quality indicated. It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written. *United States v. Warner* (U. S.) 59 Fed. 355, 356.

#### Stove patterns.

"Book or paper," as used in the New York Code, limiting the function of a subpoena duces tecum to the requirement that a witness produce "a book or paper," does not include stove patterns. In *re Shephard* (U. S.) 3 Fed. 12.

#### Work of two volumes.

An agreement to publish the memoirs of U. S. Grant declared that the parties were about to publish a book in two volumes, octavo form. Held that the use of such word "book" and the word "work" in the subsequent provisions of the contract had reference to the two volumes which composed the book and not each separate volume. *Little v. Webster*, 1 N. Y. Supp. 815, 317, 48 Hun, 620.

#### BOOK (In Copyright Law).

Though the legal definition of a book may be more extensive than that given by lexicographers, and may include a sheet of music as well as a bound volume, yet it necessarily conveys the idea of thought or conceptions clothed in language or in musical characters, written, printed, or published.

Its identity does not consist merely in the ideas, knowledge, or information communicated, but in the same conceptions, clothed in the same words, which make it the same compositions. *Stowe v. Thomas* (U. S.) 23 Fed. Cas. 201, 207.

Under Act 5 & 6 Vict. c. 45, § 2, relating to copyright, it is declared that, in the construction of the act, the word "book" shall be construed "to mean and include every volume, part or division of a volume, pamphlet, sheet of letter press, sheet of music," etc. *Jollie v. Jacques* (U. S.) 13 Fed. Cas. 910, 913.

#### **As any composition.**

Any composition, whether large or small, though found in company with other compositions, is a book, within 54 Geo. III, § 156, granting a copyright to the authors of books. *White v. Geroch*, 2 Barn. & Ald. 298, 301.

The term "book," within the meaning of the copyright laws, includes any composition, large or small, which includes results of successive mental processes rationally combined, whether it fill a great volume, or be contained in a single sheet. *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 194.

#### **As blank applications.**

"Book," as used in the act of Congress providing that a copyright may be granted to the author, etc., of any "book," etc., includes a blank form of application for a license to sell liquor at retail, composed of three applications, a petition upon a warrant, and a justification, all intended to be filled up and filed by the applicant. *Brightley v. Littleton* (U. S.) 37 Fed. 103, 104.

#### **As bound volume.**

In a copyright statute, "book" is not to be understood in its technical sense of a bound volume, but any species of publication which the author selects to embody his literary production. Under 4 Stat. 436, which provided that no person should be entitled to its benefits unless he should, before publication, deposit a printed copy of the title of his book as therein prescribed, the printing of a literary composition in serial parts in a magazine constituted a publication of the book, so that a subsequent copyrighting of the collective work, when completed and published in book form, would not prevent another from reprinting the uncopyrighted parts from the magazine. *Holmes v. Hurst*, 19 Sup. Ct. 606, 609, 174 U. S. 82, 43 L. Ed. 904.

#### **Collected sheets of literary work.**

The collected sheets containing, in orderly and connected fashion, the record of the intellectual and literary work of the author, is a "book," unless for some particular and special purpose a narrower definition is pre-

scribed by law. *In re Hempstead* (U. S.) 93 Fed. 967, 968.

#### **Musical compositions in book form.**

In Copyright Act March 3, 1891, c. 565, § 3, 26 Stat. 1107 [U. S. Comp. St. 1901, p. 3407], providing that, in case of a book, the two copies required to be delivered to the Librarian of Congress shall be manufactured in this country, a book does not include musical compositions published in book form or made by lithographic process. The word as used in the dictionaries has many different senses. It may refer to the subject-matter, as literary composition, or to form, as a number of leaves or paper bound together, or a written instrument or document, or a particular subdivision of a literary composition, or the words of an opera, etc. *Littleton v. Oliver Ditson Co.* (U. S.) 62 Fed. 597, 599.

#### **Single sheet.**

A single sheet of music is a book, within the meaning of 8 Ann. c. 19, relating to copyrights. *Clementi v. Goulding*, 11 East. 244.

The Latin word "liber" ("book") has no reference to the collection of writings in a volume, but primarily signifies the bark of a tree. Webster says "book" is derived from the Saxon "boc" meaning a beach tree. A single sheet may be considered a book. *Drury v. Ewing* (U. S.) 7 Fed. Cas. 1113, 1115.

"Book," as the term is used in English copyright statutes, has a very extended signification. It was held in *Clementi v. Goulding*, 2 Camp. 25, to include a copyrighted song printed on a single sheet of paper, which decision was approved and followed in two cases arising under United States copyright statutes, in which it was held that a book, within these statutes, is not necessarily a book in the ordinary and common acceptance of the words, but may consist of a single sheet of paper, as well as a number of sheets bound together. *Clayton v. Stone* (U. S.) 5 Fed. Cas. 999, 1000 (citing *Drury v. Ewing* [U. S.] 7 Fed. Cas. 1113; *Harper v. Shoppell* [U. S.] 26 Fed. 519).

"Book," as used in copyright law, need not be a book in a common and ordinary acceptance of the word—that is, a volume made up of several sheets bound together—but it may be printed only on one sheet, as the words of a song and the music accompanying it. *Clayton v. Stone* (U. S.) 5 Fed. Cas. 999, 1000.

#### **Trade label.**

A trade label is not a book, within the provisions of the statute. *Coffeen v. Brunton* (U. S.) 5 Fed. Cas. 1184.

The term "book," within an act passed in 1851 providing for the recording of grants of lands in California in some book of record,

was satisfied, within the meaning of the act, by copies of the deed on sheets not bound or fastened together in any manner, but folded; the name of the purchaser being indorsed thereon, and each distinct class kept in a separate bundle; the sheets not being bound into the form of books until 1856. *Mumford v. Wardwell*, 73 U. S. (6 Wall.) 423, 18 L. Ed. 756.

### BOOK ACCOUNT.

In law the words "book account" have a well-settled meaning. A book account is detailed statement kept in a book, in the nature of debit and credits between persons, arising out of contract or some fiduciary relation. *Rap. Law Dict.* A less technical definition given by the general lexicographers is "an account or record of debit or credit kept in a book." See *Webst. Dict.* A memorandum kept in a small book as follows: "Alex and Anna sold the land to Henry Buck, March 4, 1886. \$125.00. John Cosgrove paid \$764, Jan. 6, 1888"—was not a book account. *Taylor v. Horst*, 52 Minn. 300, 303, 54 N. W. 734, 735.

A "book account" means a book as it is well known to be universally kept, containing a statement in detail of the transactions between parties, including prices, made contemporaneously with the transaction, and entered in a book. A tally on a board or loose sheets of paper does not constitute a book account. *Stieglitz v. O. J. Lewis Mercantile Co.*, 76 Mo. App. 275, 280.

To constitute a book account, the account, in the first place, must be kept in a book. A tally or a board or a slate or loose sheets of paper is not a book account. Also it must be an account; that is, a formal statement in detail of the transaction between two parties, made contemporaneously with the transactions themselves. A list of charges and credits, without showing on its face against whom and in whose favor they are made, is not a book account; and the definition fails if the entries are not original, made at the time the transaction took place, or immediately thereafter. *Richardson v. Wingate* (Ohio) 10 West Law J. 145, 146.

"Book accounts," as used in a statute permitting parties to suits to be sworn to their book accounts, if not of more than 18 months' standing, cannot be construed to include a loose piece of paper on which an account is made out. It is not a book account, within the meaning of the statute. *Kennedy v. Ankrum* (Ohio) Tapp. 40.

The term "book account" is unknown in the law, and in common parlance it may mean money, goods, labor, and whatever may be brought into account. It is too indefinite to be used in an indictment charging forgery of "a receipt against a book account." *State v. Dalton*, 6 N. C. 379, 380.

### Bond and mortgage.

The term "book account," as used in a will devising all testator's notes of hand and book accounts, could not be construed to embrace a debt due from one of the devisees to the testator, evidenced by a bond and mortgage. *Hopkins v. Holt*, 9 Wis. 228, 232.

### Signed account.

The term "book account" may comprehend a signed account as well as an open one; and, where the judgment of a single magistrate appeared to be given on a warrant of more than \$60 due by book account, it is to be taken, in support of the magistrate's jurisdiction, that the book account was a signed account. *Turner v. Edwards*, 19 N. C. 539.

### Stubs of checkbook.

The stubs of a checkbook from which the checks have been cut, leaving the stub containing a memorandum of the amount, date, etc., of each check, is not a book account. *Wilson v. Goodin* (Ohio) Wright, 219.

### BOOK DEBT.

A "book debt," as used in Act March 28, 1835, § 2, means debts for "goods sold and delivered, and for work, labor, and services." *Hamill v. O'Donnell* (Pa.) 2 Miles, 101.

A book debt does not include a checkbook containing a memorandum, on the margin opposite to the place where a check was cut, of the defendant's name, as the person to whom it was given, the amount, date, etc., to prove the giving of the money evidenced by the check, as a loan. *Wilson v. Goodin* (Ohio) Wright, 219.

### BOOK DEBT (Action of).

A form of common-law action to recover a debt which was the subject of a book account. *Bowers v. Dunn* (Conn.) 2 Root, 59; *Mills v. St. John*, Id. 188; *Mnor v. Erving's Ex'rs* (Conn.) 1 Kirby, 158; *Phenix v. Prindle*, Id. 207; *Peck v. Jones*, Id. 289.

The action of book debt was a statutory action in Connecticut, founded on book accounts. *Terrill v. Beecher*, 9 Conn. 344, 348.

The action of book debt is an action to recover on an account, and is only maintainable where the gist of the action is for accounts which are properly chargeable as items of account; hence the action cannot be maintained to recover a balance on an account stated or agreed to be paid by a special promise, for which assumpsit will lie. *Stocking v. Sage*, 1 Conn. 75. It does not lie, however, for use in occupation of real estate. *Beech v. Mills*, 5 Conn. 493. It does not apply to a right of action for

damages for tort or breach of contract, such claims never having been held to be proper subjects of book accounts. *Green v. Pratt*, 11 Conn. 205, 206.

An action of book debt includes all actions of debt or on the case which might previously have been brought, in which plaintiff would have declared either *emisit*, *indebitatus assumpsit*, *quantum valebant*, or *quantum meruit*, for goods, wares, and merchandise by him sold and delivered, or for work and labor done and performed. The action, therefore, was maintainable to recover for the hire of a horse and wagon, which, though not "work and labor," in the strict acceptance of that term, is so in substance. *Easley v. Eakin*, 3 Tenn. (Cooke) 388.

An action of book debt is an action for the recovery of a balance due on a book account for such claims for services rendered or property sold as may be properly the subject of a book account, which may properly include lottery tickets regularly issued and authorized by the laws of Vermont, which were sold as chances on books, the value of which may be properly recovered in an action of book debt. *May v. Brownell*, 3 Vt. 463, 469.

The action of book debt will lie for work and services performed by plaintiff for defendant, which services were such as are usually charged on book, and being in themselves proper subjects of book charge. A special agreement as to the mode of payment—as to make payment in cattle—will not preclude plaintiff from the right to charge them on book, and sue for them in the action of book debt. *Newton v. Higgins*, 2 Vt. 366, 369.

### BOOK ENTRIES.

Under the old affidavit of defense law, the defendant was not put to his affidavit of defense unless the copy of book account filed showed a *prima facie* case. "Book entries" meant the entries in the original book, which should be competent to go to the jury as evidence of plaintiff's claim. Book entries were required to be a registry of a sale and delivery, actually made, of the thing therein contained, and the time of their being so entered. *Fairchild v. Dennison* (Pa.) 4 Watts, 258. And a book account showing, as the one filed does, lump charges for merchandise, was invariably held insufficient. *Appel v. Stein* (Pa.) 6 Wkly. Notes Cas. 451. A statement of claim alleged that the suit was for merchandise sold, furnished, and delivered August 17, 1892; and the copy of book account was, "To merchandise, August 17, 1892." Held, that the item was insufficient to require an affidavit of defense. *Loeb v. Heere*, 19 Pa. Co. Ct. R. 641, 642.

Act March 25, 1835 (P. L. 89), declares that in all actions instituted for the recovery of book debts to entitle the plaintiff to a judgment for want of an affidavit of defense, he shall file in the office of the prothonotary, within two weeks after the return of the original process, a copy of the book entries on which the action has been brought. Held, that the term "book entries," as used in that act, meant the entries in plaintiff's book of original entry, which, under ordinary rules of evidence, would be competent to go to the jury as evidence in support of plaintiff's claim. *Hamill v. O'Donnell* (Pa.) 2 Miles, 101 (cited and approved in *Wall v. Dovey*, 60 Pa. [10 P. F. Smith] 212, 213).

### BOOK OF ACCOUNT.

See "Proper Books of Account."

Worcester defines a "book" as "a collection of paper leaves, sewed or bound, used for any kind of writing." The assessment levies, usually called "rolls," constitute a book of accounts. That it is used by law for the keeping of accounts of a municipality against the taxpayers, as well as to show the state of accounts between the city and its collector, we know officially, as well as by the proof in the records, so that, in every point of view, the assessment roll was a book of accounts, within Code, § 2582, declaring every person guilty of perjury, who, with the intent to defraud, "shall make any false entry in any book of accounts kept in any public office," etc. *Turbeville v. State*, 56 Miss. 793, 798.

Code Iowa, § 8658, providing that "books of account" are receivable in evidence, etc., means a book containing charges, and showing a continuous dealing with persons generally. A book, to be admissible, must be kept as an account book, and the charges made in the usual course of business. *Security Co. v. Graybeal*, 52 N. W. 497, 498, 55 Iowa, 543, 39 Am. St. Rep. 311.

A statute permitting the admission in evidence of books of account meant books as it was known they were universally kept, which was by entering therein not only the articles sold or received in payment, but also the prices. *Colbert v. Piercy*, 25 N. C. 77, 80.

"Books of account," as used in a policy of fire insurance providing that, if required, the assured shall produce books of account and other proper vouchers, original or duplicate invoices, and all property thereby insured, whether damaged or not damaged, indicates and implies such books of account only as related, like the other proper vouchers, original or duplicate invoices, to the property thereby insured, or to the business of the plaintiff connected therewith. *Pierson*

v. Springfield Fire & Marine Ins. Co. (Del.) 81 Atl. 966, 972, 7 Houst. 307.

The general rule established throughout all the courts in this state, allowing books of account to be introduced in evidence in their owners' favor, extends to no other entries than for goods and articles sold, work, labor, and services performed by a man, and means and materials provided. *Wilson v. Wilson*, 6 N. J. Law (2 Southard) 95, 96.

Within the meaning of Rev. St. c. 126, § 17, making it larceny to take any book of accounts for or concerning money or goods due, or to become due, or to be delivered, etc., a book of accounts would include a book kept by a person who works for a tailor by the piece, and in which entries are made of the names of persons owning the garments worked upon, and the price of the work done. *Commonwealth v. Williams*, 50 Mass. (9 Metc.) 273, 276.

A book of account is a record of sales or other transactions involving credits and debts, and a book containing minutes of cash paid, only, is not properly a book of account. *Parris v. Bellows' Estate*, 52 Vt. 351.

A diary kept by decedent, wherein all the transactions of the day are noted, is not an account book, and cannot be admitted in evidence as such. *Costello v. Crowell*, 2 N. E. 698, 700, 139 Mass. 588.

### BOOK OF ORIGINAL ENTRIES.

A book of original entries is one in which a detailed history of business transactions is entered. It, in general, corresponds with the daybook in bookkeeping. It is not necessary, in order to constitute a book one of original entries, that it should be the very first memoranda made of the transaction; and hence the fact that memoranda were made, by a servant of a merchant, of meat delivered at the time, from which memoranda the bookkeeper entered original charges against the customers, did not render the book in which such charges were entered the less a book of original entries. *Ingraham v. Bockius* (Pa.) 9 Serg. & R. 285, 287, 11 Am. Dec. 730.

Whether a book is one of original entries depends to a large extent on the nature and character of the subject-matter of the item, and the nature and character of the evidence outside of the book which naturally exists to prove the item. Thus, in *Leighton v. Manson*, 14 Me. (2 Shep.) 208, the book of original entries was held incompetent to prove an account of two charges for beef bearing date the same day, one for 355 pounds and another for 360 pounds; the exclusion appearing to have been sustained by reason of the articles having been of such bulk and weight that they were not deliv-

erable without assistance, and therefore better evidence than the book was attainable. See, also, *Thomas v. Dyott* (S. C.) 1 Nott & McC. 186; *Pelzer v. Cranston* (S. C.) 2 McCord, 328; *Shoemaker v. Kellogg*, 11 Pa. (1 Jones) 310. The charges, in order to be admissible, must be reasonably specific and particular. This is the more necessary, inasmuch as, when received, the books are prima facie evidence both of the item charged and the price in value carried out. *Corr v. Sellers*, 100 Pa. 169, 170, 171, 45 Am. Rep. 370.

Books of original entries are books kept for the purpose of charging goods sold and delivered, in which the entries are made contemporaneously with the delivery of the goods, and by the person whose duty it was for the time being to make them. The entry must be made at the delivery of the goods or immediately after—at or about the time when there is a transmutation of the property from the seller to the buyer. *Laird v. Campbell*, 100 Pa. 159, 165.

Where a butcher carried meats around in a cart, and made his original entries on the cart in chalk scores, which were transferred to the books on the same day, whereupon the scores were rubbed off and new scores made as the meat was delivered from time to time, if they were honestly made on the cart and honestly transferred to the book, the book is a book of original entry. *Smith v. Sanford*, 29 Mass. (12 Pick.) 139, 140, 22 Am. Dec. 415.

A book into which it appeared that entries were transcribed from time to time, as the parties had leisure, from a counter book or blotter, was not a book of original entries, though the plaintiff had stated on his voir dire that it was such. *Breinig v. Meitzler*, 23 Pa. (11 Harris) 156.

### BOOKS OF RECORD.

The words "books of record," in their ordinary sense, when applied to a statute providing that the "books of record" of a justice shall be open to inspection, do not include the files and entries thereon, which are but the material from which the record is to be made, but they plainly apply to the books in which the statute requires that the record shall be made up and written out. *Perkins v. Cummings*, 29 Atl. 675, 676, 66 Vt. 485.

### BOOKKEEPER.

"Bookkeeper," as used in the bond of a person employed as "bookkeeper and collector," conditioned for the faithful performance of his duties and pay over all moneys received in that capacity, did not of itself indicate an employment which would give control of the entire cash in a job printing business, the volume of which amounted to from



\$80,000 to \$100,000 a year, so as to make the sureties liable for moneys lost by reason of their principal acting as cashier of the business. *Kellogg v. Scott*, 44 Atl. 190, 192, 58 N. J. Eq. 344.

#### As a clerk.

A bookkeeper is in one sense a clerk. Any person who performs clerical duties is in one sense a clerk, but a bookkeeper is not a clerk, within the meaning of the statute authorizing service of process on certain officers or a clerk of a corporation. *Chambers v. King Wrought-Iron Bridge Manufactory*, 16 Kan. 270, 278.

A bookkeeper who, from his isolated position, can have but little means of knowledge personally as to the transactions done or the information relating thereto, except what is derived from others, is not a clerk, within the rule excluding books of account kept by a party who keeps a clerk. *McGoldrick v. Traphagen*, 88 N. Y. 334, 335.

#### As employé or laborer.

See "Employé"; "Laborer."

### BOOKKEEPING.

"Bookkeeping" is defined as the art of recording in a systematic manner the transactions of merchants, traders, and other persons engaged in pursuits connected with money; the art of keeping accounts. In the commercial world bookkeeping has come to be a distinct profession—an exact science—requiring peculiar adaptation and thorough training on the part of those who would master the subject. *Western Assur. Co. v. Altheimer*, 25 S. W. 1067, 1069, 58 Ark. 505.

### BOOKMAKING.

"Bookmaking" is the recording or registering of bets or wagers on any trial or contest of speed or power of endurance of man or beast, or selling pools. *Murphy v. Board of Police (N. Y.)* 11 Abb. (N. C.) 337, 338, 63 How. Prac. 396, 399.

The word "bookmaking" imports some method of recording bets. *New York v. Bennett (U. S.)* 113 Fed. 515, 516.

#### As applicable to clerk.

A clerk who attends his employer on a race track, and records in a book bets which his employer makes on the races, but makes no bets himself, is not guilty of bookmaking, within Pen. Code, § 351, providing a punishment for such offense. *People v. Fallon*, 46 N. E. 302, 304, 152 N. Y. 1, 37 L. R. A. 419.

#### As gambling on horse races.

The business of bookmaking is betting on horse races, and is called "bookmaking" because the bets are booked or a record kept

of them in a book. *Spies v. Rosenstock*, 39 Atl. 268, 269, 87 Md. 14.

A fair association made a contract selling the exclusive bookmaking privileges on its race track for a certain period. Held, that the term "bookmaking" in the contract was but another name for betting and gambling in horse races, as in bookmaking the betting is with bookmakers. *Ullman v. St. Louis Fair Ass'n*, 66 S. W. 949, 951, 167 Mo. 273.

### BOOM.

A boom is an inclosure or artificial harbor for logs and lumber, of which one side is furnished ordinarily by the natural bank of the stream, and the other is provided by the piers and timbers or other obstruction to the passage of logs which connect them together. *Appeal of Powers*, 17 Atl. 254, 256, 125 Pa. 175, 11 Am. St. Rep. 882.

A boom consists not only of the timber by which the commodity boomed is inclosed, but also the piers, piles, or other things by which it is held in place; and piles to which the boom-stick is secured are a part of the boom, as well as the piles in the dock to which the other extremity of the boom-stick is fastened. *John Spry Lumber Co. v. The C. H. Green*, 43 N. W. 576, 579, 76 Mich. 320.

The word "boom," as used in the logging business as a part of the term "boom and deliver," means to completely inclose logs floating in a boom chained, and fastened together at the ends ready to be delivered in a raft. *Gasper v. Heimbach*, 60 N. W. 1080, 59 Minn. 102; *Gasper v. Heimbach*, 53 Minn. 414, 55 N. W. 559.

An authority given to a corporation to boom lumber and receive tolls does not entitle it to demand tolls for driving lumber, as driving lumber is not included in the term "booming" lumber. *Bangor Boom Corp. v. Whiting*, 29 Me. (16 Shep.) 123.

### BOOMAGE.

The word "boomage" is a term of rather indefinite meaning. The usual definition of a "boom" is an inclosure formed upon the surface of a stream or other body of water by means of spars, for the purpose of collecting or storing logs or timber; and boomage, as used in a contract giving a right of boomage, would be for the purpose of entering on the land to fasten booms and boom sticks, as might be reasonably necessary to the maintenance and operation of the boom. *Farrand v. Clarke*, 65 N. W. 361, 362, 63 Minn. 181.

### BOOSTER.

"Booster" is a technical term used in gambling establishments describing a person

who, in the interest of the proprietor, takes a hand in the game to keep it from stopping for want of a sufficient number of players, and who is furnished money to bet with, and allowed to keep his winnings as compensation for his services. *Ex parte Meyer* (Cal.) 40 Pac. 853.

## BOOTH.

"Booth," as used in Pen. Code, § 504, providing that the term "building," as used in section 498, defining "burglary," shall include a booth, means a house or shed built of boards or other slight materials for temporary occupation. *People v. Hagan*, 14 N. Y. Supp. 233, 234, 60 Hun, 577.

An ordinance prohibiting liquor dealers from constructing or maintaining any "stall, booth, or other inclosure" in any room or building where liquor is sold will be limited to inclosures which are or may be used as lounging or drinking places, or for any immoral purpose, and not such as are innocent and necessary inclosures. *State v. Barge*, 84 N. W. 911, 913, 82 Minn. 256

## BOOTY.

In all works on international law, captures of personal property by land forces on land are spoken of as "booty." *United States v. Two Hundred and Sixty-Nine and One-Half Bales of Cotton* (U. S.) 28 Fed. Cas. 302, 309.

Chancellor Kent says: In a land war movable property, after it has been in the complete possession of the enemy 24 hours, goes by the name of "booty," and not "prize," and becomes absolutely his without any right of postliminy. 1 Kent, Comm. (Last Ed.) 120. Vattel says: As the towns and lands taken from the enemy are called "conquests," all movable property taken from him comes under the denomination of "booty." This booty naturally belongs to the sovereign prosecuting the war, no less than his conquests. *Coolidge v. Guthrie* (U. S.) 6 Fed. Cas. 461, 463.

## BORAX.

Borax is a salt formed by boracic acid and soda. *In re Schaeffer* (D. C.) 2 App. Cas. 1, 8.

## BORDERING.

In Acts 1894, c. 380, § 46, providing that the owner of any land "bordering" on any of the navigable waters of the state, the lines of which extend into and are covered by such waters, shall have the exclusive privilege of using the same for protecting oysters within the lines of his own land,

"bordering" means approaching; coming near; verging. It conveys the idea of immediate proximity. *Handy v. Maddbx*, 87 Atl. 222, 225, 85 Md. 547.

### As adjoining.

"Bordering," as used in Act March 22, 1895, § 8 (P. L. p. 424), requiring a petition for review of an improvement assessment to be signed by the owners of at least two-thirds, either in lineal feet or in area, of the lands and real estate fronting or bordering on the road or section of road to be improved, means adjoining at some point the road or section of road involved. *Erisman v. Chosen Freeholders of Burlington County*, 45 Atl. 998, 999, 64 N. J. Law, 516.

Under the act of Congress of March 3, 1811, providing that every person who owns a tract of land bordering on any river, creek, or water course in the territory of Orleans, and not exceeding in depth 40 arpents, shall be entitled to a preference on becoming a purchaser of any vacant tract of land adjacent thereto, the word "bordering" means to front on a navigable water course. *Surgett v. Lapice*, 49 U. S. (8 How.) 48, 69, 12 L. Ed. 982.

### As within.

"Bordering on," as used in a charter providing that no part of the expense of grading or paving a street shall be assessed on any lands not "bordering on or touching" the street, does not apply to or include a street railroad in the street, and hence such railroad could not be assessed. *Indianapolis & V. Ry. Co. v. Capitol Pav. & Const. Co.*, 54 N. E. 1076, 1077, 24 Ind. App. 114 (citing *O'Reilley v. City of Kingston*, 114 N. Y. 439, 21 N. E. 1004).

## BORN.

See "Natural Born."

"Born," as ordinarily understood and in fact, means 'brought forth,' and a child is completely born when delivered or expelled from and becomes external of the mother, whether the placenta has been separated or the cord cut or not." *Goff v. Anderson*, 15 S. W. 866, 91 Ky. 303, 11 L. R. A. 825.

A child en ventre sa mere for all purposes for his own benefit is considered as absolutely born. He takes by descent, and in executory devises is a life in being. *Swift v. Duffield* (Pa.) 5 Serg. & R. 38, 40.

A premature birth is not of a character to give completeness to the inchoate right of an infant in esse to take by devise or descent. *Harper v. Archer*, 12 Miss. (4 Smedes & M.) 99, 108, 43 Am. Dec. 472.

The use of the words "born or to be born" in a will bequeathing property to the

children of a person named when they attain the age of 21 are not sufficient in themselves to show an intention that after-born children shall take, and therefore such language does not create an exception to the rule that such a bequest only applies to the children born at the period fixed for distribution. *Heisse v. Markland* (Pa.) 2 Rawle, 274, 275, 21 Am. Dec. 445.

### BORN ALIVE.

In an indictment for child murder, "born alive" means that the whole body must be brought into the world alive, and it is not sufficient that the child respires in the progress of the birth. *Rex v. Poulton*, 5 Car. & P. 329, 330.

"Alive," as used in defining an element of an estate by curtesy requiring that a child should be born alive, means that it should be alive and have an independent life of its own for some period after delivery. There is no legal presumption in such a case in favor of the separate life of a newly born child, and, while respiration or breath is evidence of such life and existence, proof of respiration from actual observation is not necessary to establish the fact. Other indications of life, such as the beating of the heart, and the pulsation of the arteries after the separation of the child from the body of the mother, may be satisfactory evidence of it, because they show the fact that circulation has been established and is maintained and carried on in the body of the child independently of the mother, and proof of such fact sufficiently establishes independent life of the child for the purpose of curtesy. *Canon v. Killen* (Del.) 5 Houst. 14, 19.

### BOROUGH.

Any borough, see "Any."  
As town, see "Town."

"Boroughs" are very ancient municipal organizations, with well-defined powers, privileges, duties, and liabilities. We inherited an aptness for their organization from England, and the word conveys the idea adopted from England of a compact settlement, as distinguished from a township and county. So, through all legislation since, the suggestion in thought is of a town or village identical with the borough. *Dempster v. United Traction Co.*, 54 Atl. 501, 503, 205 Pa. 70.

A borough is a mere agency of the state for governmental purposes. *City of Philadelphia v. Fox*, 64 Pa. (14 P. F. Smith) 169, 180; *Darby v. Sharon*, 112 Pa. 66, 4 Atl. 722. The powers and rights of boroughs are regulated by the statutes under which they are created, and are confined to the particular subjects therein referred to. *Webster v. Hopewell Borough*, 19 Pa. Super. Ct. 549, 554 (citing

*Millerstown Borough v. Bell*, 123 Pa. 151, 16 Atl. 612).

Town is a generic word. Of the genus, cities and boroughs are species. *New York & L. B. R. Co. v. Drummond*, 46 N. J. Law (17 Vroom) 644, 646.

The words "borough" and "village" are to be understood as duplicate or cumulative names of the same thing, and proof of either will sustain an indictment using the other. *Brown v. State*, 18 Ohio St. 496, 507.

### BORROW.

All borrowed money, see "All."

It is true we often use this word in the sense of returning the thing borrowed in specie, as to borrow a horse. But it is not limited to this sense. Among the definitions given by Webster are the following: First, "to take or receive from another on trust, with the intention of returning or giving an equivalent for"; and, second, "to take from another for one's own use; to adopt from a foreign source; to appropriate; to assume." We need not give the apt illustrations with which the learned lexicographer adorns his text. While the borrowing of money is usually accompanied with a contract for the return of the principal at a stated time, it is not always nor necessarily so. The object of loaning money is to obtain a return in the way of interest. The interest is the consideration for the loan; the hire or price which is paid for the use of it. If I agree to pay \$60 for the use of \$1,000 for one year, it is a borrowing of money. It is equally so if I contract at the same rate for the use of it for ten years. Is it any the less so when the contract is perpetual and the loan irredeemable? The equivalent is paid annually in the shape of interest. We do not think trading corporations any more than individuals are restricted in their moneyed transactions to the narrow meaning of the word "borrow." In its broader sense it implies a contract for the use of money. *Philadelphia & R. R. Co. v. Stichter* (Pa.) 11 Wkly. Notes Cas. 325, 327.

"The word 'borrow' is often used in the sense of returning the thing borrowed in specie; as to borrow a book or any other thing to be returned again. But it is evident that where money is borrowed the identical money loaned is not to be returned, because if this was so the borrower would derive no benefit from the loan. In the broad sense of the term, it means a contract for the use of money." And it is so used in Act Feb. 15, 1869, § 30, authorizing school districts to borrow money. *State v. School Dist. No. 4*, 12 N. W. 812, 815, 13 Neb. 82.

"Borrow money," as used in United States Constitution, which gives to Congress power to borrow money on the credit of the United States, is the power to raise money

for the public use on the pledge of the public credit, and it may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form—as stocks, bonds, bills, or notes. *The Legal Tender Cases*, 4 Sup. Ct. 122, 128, 110 U. S. 421, 28 L. Ed. 204.

#### **As contracting debts.**

"Borrowing money," as used in a Constitution providing the grounds for borrowing money or contracting debts by a municipal corporation, is not the same as contracting debts. *Ketchum v. City of Buffalo* (N. Y.) 21 Barb. 294, 305.

#### **Change in nature of obligation.**

Where a note was given by a corporation in exchange for a partnership note held by the bank, which the corporation had assumed, the corporation, in effect, borrowed from the bank the amount of such note. *Herman v. Hecht*, 48 Pac. 611, 612, 116 Cal. 553.

A contract by a city to pay a person who has assumed the payment of interest on some of the city's debt is not a "borrowing of money," but is a contract for the payment of a debt. *Gelpcke v. Dubuque*, 68 U. S. (1 Wall.) 221, 223, 17 L. Ed. 519.

#### **Guaranty of payment.**

A power to a city to borrow money for works of internal improvement authorizes the city to make a guaranty of the payment of bonds issued by railroad companies for money to pay debts incurred for constructions already made and for after improvements. *City of Savannah v. Kelly*, 2 Sup. Ct. 468, 471, 108 U. S. 184, 27 L. Ed. 696.

#### **Hiring distinguished.**

Borrowing is a mere gratuitous loan. It is a species of bailment called by Sir William Jones a commodatum, or loan for use without pay. Blackstone, in distinguishing between hiring and borrowing, says "hiring and borrowing are contracts by which a qualified property may be transferred to the hirer or borrower, in which there is only this difference: that hiring is always for a price, a stipend, or additional recompense; borrowing is merely gratuitous." An agreement by which a person undertakes to make a horse gentle, and fit for use of the owner's family, in consideration of permission to ride it, is a contract of hiring, and not a borrowing. *Neel v. State*, 26 S. W. 726, 33 Tex. Cr. R. 408.

#### **Issuing bonds or notes.**

The power to borrow money to pay debts, given to a municipality, includes the power to issue bonds. In substance, the money is borrowed from the purchasers of the bonds. It is advanced on the faith of the

state's obligations. *Commonwealth v. Select and Common Council of City of Pittsburgh*, 34 Pa. (10 Casey) 496, 511.

The term "borrow money," or the right to borrow money, as applied to a municipal or other corporation, is a power to create indebtedness, and procure for its payment funds from others, to be paid at a future date, and implies the power to issue bonds or other evidences of indebtedness to secure the payment of the funds borrowed. *Orchard v. School Dist. No. 70*, 15 N. W. 730, 14 Neb. 378.

"Borrow," as used in Acts 1869, § 60, declaring that school districts shall have power to borrow money, means the power to make a contract for the use of money, to be repaid at a later date. The power to borrow money carries with it the authority to determine the time of payment, and to issue bonds or other evidence of indebtedness therefor. "Borrow," as defined by Webster, is "to take or receive from another on trust, with intention of returning or giving an equivalent therefor, or to take from another for one's own use; to adopt from a foreign service; to appropriate; to assume." *State v. School Dist. No. 4*, 13 Neb. 82, 12 N. W. 812.

The phrase "to borrow money on the credit of the United States," as used in the federal constitution, designating a power vested in the national government, should not receive that limited and restricted interpretation and meaning which it would have in a penal statute, or in an authority conferred by law or by contract on trustees or agents for private purposes. The power to borrow money on the credit of the United States is a power to raise money for the public use on a pledge of the public security, and may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligation of the United States in any appropriate form of stock, bonds, bills, or notes; and, in whatever form they are issued, being instruments of the national government, they are exempted from taxation by the governments of the states. *The Legal Tender Cases*, 4 Sup. Ct. 122, 128, 110 U. S. 421, 28 L. Ed. 204.

The power given county commissioners to "borrow" money on credit of the county authorizes them to issue bonds, as the power to borrow carries with it the power to issue the ordinary evidences of a loan. *Board of County Commissioners v. Lewis*, 10 Sup. Ct. 286, 290, 133 U. S. 198, 33 L. Ed. 604.

Under a statute authorizing a town to borrow money to aid in the construction of a road, a sale of bonds at par, and paying over the proceeds to the company, was a substantial borrowing. *Scipio v. Wright*, 101 U. S. 665, 673, 25 L. Ed. 1037.

The power to borrow money for the erection of a courthouse does not authorize the issuing of bonds for that purpose. *Lewis v. Sherman County Com'rs* (U. S.) 5 Fed. 269, 272.

The power given to the federal government to borrow money was agreed by all the justices in the legal tender cases to authorize the issuance of government notes. *Legal Tender Cases*, 79 U. S. (12 Wall.) 457, 639, 20 L. Ed. 287.

#### **Loan of credit.**

A corporate power to borrow money, through it might doubtless well be held to include the power to execute the obligation or security for payment, cannot be construed to authorize the loan of the credit of the city to a corporation for its private and corporate purposes. *Chamberlain v. City of Burlington*, 19 Iowa, 395, 402.

#### **Payment distinguished.**

There is a difference between borrowing money and the paying of an indebtedness. The purchase of a lot and agreeing to pay the consideration therefor is not borrowing money. *City of Richmond v. McGirr*, 78 Ind. 192, 193.

#### **Perpetual loan.**

In its broadest sense, "borrow" implies a contract for the use of money, and, where a corporation had authority to borrow money, it had the power to contract for a perpetual loan, since such a contract only implies the voluntary loan of a sum of money, the repayment of which is not to be demanded, presumably for some benefit to the lender. *Appeal of Philadelphia & R. R. Co. (Pa.)* 39 Leg. Int. 98.

#### **Possession implied.**

An information charging that defendant did "borrow and obtain the use of" a ring sufficiently charges that he obtained the possession of the same. *State v. Kasper*, 31 Pac. 636, 637, 5 Wash. 174.

#### **Promise to repay or return implied.**

"The idea of borrowing is not filled out unless there is an agreement therefor; a promise or understanding that what is borrowed will be repaid or returned—the thing itself, or something like it, of equal value—with or without compensation for the use of it in the meantime. To borrow is the reciprocal action with lend or to loan, which is the parting with a thing of value to another for a time fixed or indefinite, yet to have some time an ending, to be used and enjoyed by that other, and the thing itself, or the equivalent of it, to be given back at the time, or when lawfully asked for, with or without compensation for the use, as may be agreed upon." *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 177.

A writing stating, "borrowed from H. \$270.00 for which I place in his hands as security a negro girl," etc., imports an obligation to return the thing borrowed, or to return its kind and value, and constitutes an acknowledgment by the borrower that he had agreed to refund the amount borrowed, or was under a legal obligation to do so. *Hart v. Burton*, 30 Ky. (7 J. J. Marsh.) 322, 324.

A note containing a recital, "I have borrowed," etc., "for the benefit of my father," imports a promise to repay the amount borrowed as strongly as if the word "due" had been used, and hence the instrument constituted a note for the direct payment of money. *Harrow v. Dugan*, 36 Ky. (6 Dana) 341.

#### **Receiving deposits.**

"Receiving deposits," as understood in the practice of banking, is different from borrowing money, in the ordinary acceptance of that term; and agreeing to allow interest on moneys deposited with a bank, and giving notes or certificates or any other evidence of debt therefor, does not constitute the doing so an act of borrowing. Hence the power of receiving deposits does not necessarily include the power of borrowing. *Leavitt v. Yates* (N. Y.) 4 Edw. Ch. 134, 172.

### **BORROWER.**

Any borrower, see "Any."

The borrower is the servant of the lender. *Dunton v. Sharpe*, 70 Miss. 850, 864, 12 South. 800, 801.

The term "borrower," in the usury law, designates only the party bound by the original contract to pay the loan. *Wright v. Clapp* (N. Y.) 28 Hun, 7, 8; *Schermerhorn v. Talman*, 14 N. Y. 93, 126; *Wheelock v. Lee*, 64 N. Y. 242, 247.

#### **Devisee.**

The term "borrower," as used in 1 Rev. St. § 8, declaring the payment or offer of payment of a sum borrowed at usurious interest to be unnecessary, as a condition precedent to a suit by the borrower for relief against such loan, does not include a devisee of lands mortgaged to secure such usurious loan by the testator. *Buckingham v. Corning*, 91 N. Y. 525, 530, 64 How. Prac. 503, 506.

#### **General assignee.**

In the usury law the term borrower "designates only the party bound by the original contract to pay the loan." It does not include a general assignee of an insolvent debtor. *Wright v. Clapp* (N. Y.) 28 Hun, 7, 8.

The tendency of judicial opinion is to limit the application of the word "borrower," as it is used in the usury laws, to the person who borrowed the money, and was at the

time a party to the contract, and who continued to stand in the position of borrower. In *Schermerhorn v. Talman*, 14 N. Y. (4 Kern.) 93, it was held that the actual borrower, who had after the usurious loan become bankrupt, and subsequently repurchased the property covered by the usurious loan on a sale by the assignee in bankruptcy, could not maintain an action to set aside the usurious security; the decision proceeding on the ground that, though he was the borrower in fact, he had lost his character as such by the transfer and repurchase of the property, and was not entitled to the benefit of the act. An assignee in bankruptcy cannot maintain an action to compel a lender to deliver up collaterals turned out by the bankrupt to secure a usurious loan, or to have an obligation given by him therefor declared void, without paying or offering to pay the sum loaned, because the assignee is not a "borrower," within the meaning of Laws 1837, c. 430, authorizing a borrower to file his bill for relief without payment or deposit of the sum loaned; the word "borrower," in the statute, designating only the party bound by the original contract to pay the loan. *Wheelock v. Lee*, 64 N. Y. 242, 247.

#### Grantee of mortgaged premises.

The term "borrower" has a well-known and definite meaning. It is used in contradistinction to "lender," and is intended to designate one of the parties to a contract for the loan; and may be extended to those standing in his place in a representative capacity, as heirs at law, executors, or administrators. The term as used in the statutes relating to usury does not include a subsequent grantee of premises covered by a usurious mortgage. *Post v. Bank of Utica* (N. Y.) 7 Hill, 391, 397.

"Borrower," as used in Laws 1837, p. 486, § 4, providing that any borrower of money, goods, or things in action may file a bill for relief against usury, without offering to pay any part of the sum loaned, does not embrace the grantee of property covered by a usurious incumbrance. *Schermerhorn v. Talman*, 14 N. Y. (4 Kern.) 93, 126.

Under Laws 1837, p. 487, "borrower" is not to be restricted to the individual to whom the loan was made, but embraces his sureties, heirs, devisees, and personal representatives, and may include a subsequent grantee who took the premises subject to a usurious mortgage. *Cole v. Savage* (N. Y.) 10 Paige, 583, 588.

The purchaser of an equity of redemption is not a borrower, so as to relieve him from the prior usurious mortgage. *Bissell v. Kellogg*, 65 N. Y. 432, 438.

#### Indorser.

"Borrower," as used in 3 Rev. St. (5th Ed.) p. 73, §§ 8, 74, 13, declaring that the

borrower shall be entitled to defend against usurious interest charged, does not mean and is not limited to the person who actually borrowed and received the money, as such, but includes, as well, indorsers and others liable on usurious paper, who, being liable for the payment of the usurious interest, are embraced within the term "borrower" as it is there used. *Hungerford's Bank v. Potsdam & W. R. Co.*, 10 Abb. Prac. 24, 25.

#### Receiver of corporation.

1 Rev. St. p. 772, § 8, which provides that a borrower need not offer to pay interest or principal in order to maintain a suit in equity against a usurious security, does not include an accommodation indorser of a note, who did no act toward procuring the loan, except to indorse the note. *Allerton v. Belden*, 49 N. Y. 373, 376. CONTRA, see *National Bank v. Lewis*, 75 N. Y. 516, 523, 31 Am. Rep. 484.

The term "borrower," as used in Act 1837, to prevent usury, means, not only the principal debtor, but also any privy to the transaction, as a survey, heir, devisee, or personal representative of the person to whom the loan was made, and hence includes a receiver of an insolvent corporation. *Leavitt v. De Launcy* (N. Y.) 4 Sandf. Ch. 281, 298.

#### Sureties.

"Borrowers," as used in Act May, 1837, entitled "An act to prevent usury," and enacting that borrowers may come into a court of chancery, either for discovery or relief, without making any deposit or payment, means not only the one who obtains the money borrowed, but also embraces a surety. *Post v. Boardman* (Pa.) 1 Clarke, 523, 527; *Hungerford's Bank v. Dodge* (N. Y.) 30 Barb. 626, 627; *Livingston v. Harris* (N. Y.) 11 Wend. 329, 343. CONTRA, see *Vilas v. Jones*, 1 N. Y. 274, 279.

Both the principal debtor and his surety are borrowers, within an act relating to usury. *Perrine v. Striker* (N. Y.) 7 Page, 598, 602.

#### Subsequent mortgagee.

A mortgagee of real estate subject to a lien of a prior judgment confessed by the mortgagor upon usurious consideration is not a borrower, within the meaning of the statute relating to usury. *Rexford v. Widger*, 2 N. Y. (2 Comst.) 131; *Rexford v. Widger* (N. Y.) 3 Barb. Ch. 640, 641.

## BOSS.

"Boss" originally meant master, in the sense of owner or proprietor. *Grueber v. Lindenmeier*, 42 Minn. 99, 101, 43 N. W. 964, 965.

A "boss" is one who oversees or gives directions. To say that a party acted as

boss, is another way of saying he gave directions in reference to the work. Evidence that a party was boss, held a mere statement of facts, and not an expression of an opinion. *Applebee v. Albany Brewing Co.*, 12 N. Y. Supp. 576, 578, 58 Hun, 605.

## BOTCH.

A statement in regard to a mason that he is no mechanic, that he cannot make a good wall or do a good job of plastering, that he is no workman, and that he is a botch, are slanderous per se, as imputing want of skill or knowledge. *Fitzgerald v. Redfield* (N. Y.) 51 Barb. 484, 491.

## BOTH.

An entry of land, reciting that S. enters 3,000 acres of land on the south fork of a certain creek, including "both the bottoms below the road," means the two bottoms upon the stream next to the road. *Coleman's Heirs v. Kenton*, 28 Ky. (5 J. J. Marsh.) 44, 45.

The general incorporation act, art. 9, § 1, authorizing cities and villages to make local improvements by "special assessment or by special taxation or both" of contiguous property, does not mean that the two diverse and distinct systems may be combined in a single improvement, but that the improvement may be made in both ways by each of the methods. In this sense the words "or both" appropriately occur immediately following the special method which may be pursued, and add perspicuity to the section. *Kuehner v. City of Freeport*, 32 N. E. 372, 375, 143 Ill. 92, 17 L. R. A. 774.

### As either.

A joint deed reserving the use and control of the premises conveyed so long as they both shall live will be construed to mean so long as either of them shall live. *Bank of Greenbrier v. Eflingham*, 41 S. E. 143, 51 W. Va. 267.

The term "either" does not include "both," nor does "both," the greater, intend and therefore include the less, "either." *Martin v. Mahoa*, 4 Hawaiian, 427, 429.

### As including.

Where the testator made a full disposition of his property, directing that the interest of his real and personal estate be applied by his wife for the benefit of herself and children, and, on her second marriage or death, deprived her of all power and benefit under the will, and added a subsequent clause directing that his executors shall order all his property, "both" freehold and leasehold, to be sold, the word "both" should be construed as if the testator had said "including." *Lachlan v. Reynolds*, 9 Hare, 796, 799.

## BOTTLE.

An indictment alleging a larceny of a number of bottles of whisky means bottles containing whisky, and is not a sufficient averment to support proof of larceny of whisky from a barrel, which the thief put into bottles for the purpose of carrying it away. *Commonwealth v. Gavin*, 121 Mass. 54, 55, 23 Am. Rep. 255.

### Demijohn.

A demijohn is not a bottle, within the meaning of the customs law, requiring them to be packed in packages of a dozen each. *United States v. Ninety Demijohns of Rum* (U. S.) 8 Fed. 485, 487.

### In tariff act.

Hollow, translucent vessels, moulded from glass, and etched with fluoric acid, representing female figures, the head separable from the body, and fitting closely on a narrow neck, so as to form a stopper, of a capacity of 7½ and 18½ fluid ounces, respectively, are dutiable as "bottles" under Act Cong. Oct. 1, 1890 (Supp. Rev. St. U. S. [2d Ed.] p. 817) par. 103. Such vessels were therefore not within the term "pressed glassware," dutiable under paragraph 105. In re Smith (U. S.) 55 Fed. 476, 478.

"Bottle glass," as used in Tariff Act March 3, 1883, par. 133, is probably synonymous with the term "bottle glassware," and means glassware of a nature like that of glass bottles, and therefore would, with reasonable clearness, include pickle and preserve jars, which ordinarily have a neck and inside shoulder. *United States v. Leggett* (U. S.) 66 Fed. 300, 302, 13 C. C. A. 448.

Secondhand bottles, capable of being used as bottles, are assessable as bottles, under paragraph 99, Tariff Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], and not as junk. *Carberry v. United States* (U. S.) 116 Fed. 773, 774.

## BOTTLED GOODS.

"Bottled goods," as the same is used in an ordinance authorizing the granting of licenses for the sale of liquor, means liquors put up and sold in bottles, and does not authorize the licensee to keep and sell beer by the keg, quart, or vessel, though some of the sales may be made in less quantities than a quart. *Harris v. People*, 28 Pac. 1133, 1 Colo. App. 239.

## BOTTOMED.

Title may be bottomed in various ways, and therefore where it appeared that the plaintiff in an action in ejectment was claiming under an application and warrant entered in his name, after apparent abandonment

of a settlement on the land in dispute by defendant's ancestor, an instruction that, if plaintiff's title was bottomed on that of defendant's ancestor, limitations would not apply, was too indefinite. For example, the plaintiff may have contracted with the immediate descendants of defendant's ancestor to take out a warrant for their benefit, or he may have entered on the vacant possession with an intent to procure an adverse title for himself, and in these two cases the operation of limitations might have been very different. *Smith v. Thompson* (Pa.) 2 Serg. & R. 49, 51.

## BOTTOMRY.

See "Contract of Bottomry."

Judge Story defines "bottomry" as "a contract for a loan of money on the bottom of a ship, at an extraordinary interest upon maritime risks, to be borne by the lender for the voyage or for a definite period." *The Draco* (U. S.) 7 Fed. Cas. 1032. The form of an instrument of bottomry varies in different countries. In some it binds the owners personally. In England and the United States it does not do so, and, if the terms rendered them responsible, they would be inoperative. They will only be liable for any funds which may have come to their hands, arising from the ship which was pledged. *The Virgin*, 33 U. S. (8 Pet.) 538, 8 L. Ed. 1036. The money is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel. *Braynard v. Hoppock*, 20 N. Y. Super. Ct. (7 Bosw.) 157, 164 (citing *The Mary* [U. S.] 16 Fed. Cas. 938).

"Bottomry" is a contract by which a ship or its freightage is hypothecated as security for a loan, which is to be repaid only in case the ship survives a particular risk, voyage, or period. Civ. Code Cal. 1903, § 3017; Rev. Codes N. D. 1899, § 4770; Civ. Code S. D. 1903, § 2130. It is of the essence of a contract of bottomry that the lender run the risk of the voyage, and that both principal and interest be at hazard. It is laid down in 2 Marsh. 739, that a contract of bottomry must be in writing, and must specify the sum loaned, with the stipulated marine interest and the voyage proposed, with the duration of the risk which the lender is to run. To constitute a bottomry where the interest reserved is more than legal interest, it is essential that the money loaned and the interest should be put at risk. If they are payable at all events, or if there is collateral security given for them, which is payable at all events, no matter by what name it is called in the instrument of writing which contains it, it is not bottomry. *Jennings v. Insurance Co. (Pa.)* 4 Bin. 244, 251, 5 Am. Dec. 404.

It is essential to a bottomry transaction that the money lent should run the hazard of

the voyage. *The William & Emmeline* (U. S.) 29 Fed. Cas. 1288.

Bottomry is a maritime contract by which the keel or bottom of the ship is pledged as security for a loan of money usually made for the purpose of repairing the ship when in a foreign port or fitting it up for a voyage. "A contract of 'bottomry,' which is not only a contract of great sanctity but also of great peculiarity, is not a mere agreement for security. It is neither a sale, a partnership, nor a loan, properly speaking, nor an insurance, nor a compound of different constructions, but is a contract having a specific name and a character peculiar to itself." The creditor in a bottomry bond must look entirely to the security for his payment, for the owners of the ship are not rendered liable personally by a contract of bottomry. *The Irma*, 13 Fed. Cas. 93, 94. It is where the owner of a ship takes up money to carry on his voyage, and pledges the keel or bottom of the ship as security for repayment, in which case it is understood that, if the ship be lost, the loaner loses his money, but, if it return in safety, then he receives back his principal, and also the premium or interest. It is a contract of hazard. *White v. Cole* (N. Y.) 24 Wend. 116, 128.

Bottomry is a loan of money on the security of a vessel, which money so loaned is payable only in the event of the safe arrival of the vessel at the port of destination; the lender taking responsibility of the sea risk, and being entitled to charge extraordinary interest. *Carrington v. The Anna C. Pratt*, 59 U. S. (18 How.) 63, 67, 15 L. Ed. 267; *Braynard v. Hoppock*, 32 N. Y. 571, 573, 88 Am. Dec. 349; *Bray v. Bates*, 50 Mass. (9 Metc.) 237, 250; *The Dora* (U. S.) 34 Fed. 343, 344.

"Bottomries" are defined as securities given for advances to aid in fitting out the ship on whose bottom they are founded. *Greely v. Smith* (U. S.) 10 Fed. Cas. 1076, 1083 (citing 2 Emerig. Ins. 385; 2 Bl. Comm. 457).

A master's draft is held to be but an abbreviated form of bottomry. *Hanschell v. Swan*, 51 N. Y. Supp. 42, 44, 23 Misc. Rep. 304.

## BOTTOMRY BOND.

A bottomry bond is a contract for a loan of money on the bottom of a ship at an extraordinary interest upon maritime risks, to be returned by the lender, for a voyage or a definite period. *The Draco* (U. S.) 7 Fed. Cas. 1032, 1039, 1042.

A bottomry bond, properly speaking, is given in a foreign court by the master of a vessel to enable the voyage to be prosecuted. *Knight v. The Attila* (U. S.) 14 Fed. Cas. 755, 758.

"A bottomry bond is a bond given for a loan of money upon the security of a vessel



and its accruing freight, its payment being dependent upon maritime risks to be borne by the lender. The condition of the bond is the safety of the hypothecated vessel. The loan is on condition that, if the vessel hypothecated be lost by the perils of the sea, the lender shall not be repaid. It is for a specific voyage more ordinarily, but sometimes for a specified time, and, as it substitutes the risk of the adventure to the unconditional responsibility of the borrower, the rate of interest is universally, though not of necessity, such as would, without that risk, be usurious. The lender becomes to that amount an insurer. The forms of the bonds vary. They more commonly, with us, I believe, specify the risks assumed, which resemble those of the insurer; but some of the older forms covenant that the bond is to become absolute, with a certain rate of interest, or with a specified premium on the safe completion of the voyage, or the safety of the ship at the expiration of the specified term." *Cole v. White*, 28 Wend. 511, 515.

A bottomry bond is a bond given to secure the loan of money, and pledging the keel or bottom of the ship as security therefor. There is no element of personal liability connected with a bottomry bond proper, and, if one be otherwise good, it will be void if made by a master where the personal liability of the owner had first been relied on. *Greely v. Smith* (U. S.) 10 Fed. Cas. 1077, 1082.

"A bottomry bond is an obligation executed generally in a foreign port by the master of a vessel for repayment of advances to supply the necessities of the ship, together with such interest as may be agreed on, which bond creates a lien on the ship, which may be enforced in admiralty in case of her safe arrival at the port of destination, but becomes absolutely void and of no effect in case of her loss before such arrival." *The Grapeshot*, 76 U. S. (9 Wall.) 129, 135, 19 L. Ed. 651.

A bottomry bond is an obligation in the nature of a mortgage on a vessel to secure necessary moneys or supplies for the continuance of a voyage, which can be procured in no other way, and does not create a personal obligation on the owner till the vessel reaches port. *Theo. H. Davies & Co. v. Soelberg*, 64 Pac. 540, 542, 24 Wash. 308.

A bottomry bond gives no claim against the shipowner. If it binds him personally, it is not a contract of bottomry. But its validity is not affected by the circumstance that additional security is given for the performance of the bottomry contract. *The Sophie Wilhelmine* (U. S.) 58 Fed. 890, 893, 7 C. C. A. 569.

**As negotiable instrument.**

See "Negotiable Instrument."

**BOUGHT.**

"Bought and paid for," as used in Supp. Rev. St. U. S. (2d Ed.) pp. 897, 898, providing that, when lands are occupied by Indians who have "bought and paid for" the same, they may be leased, etc., means lands that they have acquired the ownership of or right to exclusive possession, either by purchase, exchange, or surrender, and not that there has been an actual sale by the government, and an actual payment by the Indians. *Strawberry Valley Cattle Co. v. Chipman*, 45 Pac. 348, 349, 13 Utah, 454.

**As contract to buy.**

In an action for not delivering foreign stock, the declaration alleged that the plaintiff "bargained with the defendant to buy, and then bought, from him, and the defendant then agreed to sell, and then sold, to the plaintiff, certain foreign stock, to wit, 28,000 Spanish Active Stock," etc. Held that the words "bought" and "sold" must be construed with reference to the subject-matter of the contract, and as meaning an agreement to buy and sell, and that a contract for the sale of stock, exchequer bills, and securities of that description, in which the property passes by delivery, differs from a contract for the sale of a specific chattel, inasmuch as a contract for the sale of stock, exchequer bills, etc., would be satisfied by the delivery of any stock or bills of the description bargained for, and consequently the contract for sale cannot mean an actual sale, but only a contract to deliver. *Heseltine v. Siggers*, 1 Exch. 856, 861.

**As orders accepted.**

As used in a commission contract authorizing the agents to charge commissions on "all goods bought by houses whose accounts are opened through us," "bought" means all goods for which orders have been accepted by the manufacturer principal, though, in consequence of his inability to supply the goods, they were not ultimately delivered to the buyer; the goods being "bought," within the meaning of the term, when a contract for their purchase is concluded. *Lockwood v. Levick*, 8 C. B. (N. S.) 603, 608.

**As equivalent to purchase.**

Assignment Act (Sayles' Civ. St. art. 65) § 9, declares that all property conveyed or transferred by the assignor in contemplation of assignment, with intent to defraud creditors, shall pass to the assignee, notwithstanding the transfer, but if it shall appear that the purchaser of any such property bought the same of the assignor in good faith and for a valuable consideration, and without reason to believe that it was fraudulently transferred, he shall acquire a good title. Held, that the word "bought" was used as equivalent to "purchase" in its en-

larged legal sense. *Simmons Hardware Co. v. Kaufman*, 8 S. W. 283, 286, 77 Tex. 131.

The word "bought," in a warehouse receipt reading "bought at owner's risk of fire," as applied to wheat, where it was the custom to mix the wheat, and return owner's wheat of like quality, though it would, unexplained, import a sale, when taken in connection with the expression "at owner's risk of fire," and in the light of the parol evidence, clearly shows that a sale was not contemplated by the parties. *Irons v. Kentner*, 51 Iowa, 88, 50 N. W. 73, 33 Am. Rep. 119.

#### BOUGHT NOTE.

A bought note is a note or memorandum of a sale made by a broker, and given by him to the one whose property is sold. *Saladin v. Mitchell*, 45 Ill. 79, 83.

The term "bought and sold notes" is used to designate memorandums of sales of merchandise. *Keim v. Lindley* (N. J.) 80 Atl. 1063, 1070.

#### BOULEVARD.

The word "boulevard" is thus defined in the *Century Dictionary*: "Originally a bulwark or rampart of a fortification or fortified town; hence a public walk or street occupying the site of a demolished fortification. The name is now sometimes extended to any street or walk encircling a town, and also a street which is of especial width, is given a park-like appearance by reserving spaces at the sides or center for shade trees, flowers, seats, and the like, and is not used for heavy teaming." Also quoting *Worcester, Webster, and the Standard Dictionary*. Where the context of a park act does not show a more restricted meaning, a boulevard is included in the word "street." *West Chicago Park Com'rs v. Farber*, 171 Ill. 146, 160, 49 N. E. 427, 432; *Howe v. City of Lowell*, 51 N. E. 536, 541, 171 Mass. 575; *People v. Green*, 52 How. Prac. 440, 445.

#### BOUND.

See "Held and Firmly Bound."

The word "bound," as used in an instruction that if it appears from the testimony that a certain person, acting for the plaintiffs, so acted and conducted himself that another, representing a certain firm, was "bound" to understand that plaintiffs were simply representing a certain other person, and not themselves, going along and taking no part, except that of agents of such other person, then the set-off is not sustained, etc., means no more than "ought" or "bound in reason." *Stewart v. Morris* (U. S.) 96 Fed. 703, 704, 37 C. C. A. 562.

#### As affected or concluded.

A person interested in property against which a mechanic's lien is sought to be established, who is not made a party to the proceeding, is not "bound"—that is, affected—thereby. *Russell v. Grant*, 122 Mo. 161, 175, 26 S. W. 958, 43 Am. St. Rep. 563.

The word "bound," in a statute providing that parties to a contract not made parties to the suit shall not be bound thereby, is used in a narrow sense—mainly as meaning concluded. *Real Estate Investment Co. v. Haseltine*, 53 Mo. App. 308.

A charge to the jury that a defendant, not having been a party to the action, was not bound by the judgment therein, was held not to have misled the jury, though the word "estopped" would have been better than "bound." *Finch v. Finch*, 42 S. E. 615, 618, 131 N. C. 271.

#### As liable to pay.

A written instrument requesting a bank not to protest any notes on which the defendant was indorser, and that the defendant would consider himself bound in the same manner as if the notes had been legally protested, means that the defendant would pay the debt. *Stone v. Bradbury*, 14 Me. 185, 193.

An agreement by the indorser of a note to consider himself bound renders him liable to pay the debt, but, to bind him to pay the debt, all the incidents of protest and notice are indispensable, and may well be supposed to have been in the contemplation of the party when entering into the contract. *Union Bank v. Hyde*, 19 U. S. (6 Wheat.) 572, 574, 5 L. Ed. 333.

An acknowledgment that the maker of an instrument is bound to pay is equivalent to a promise to pay. *Milner v. Bainton* (Del.) 1 Har. 144.

An acknowledgment that a party is bound to pay is no different from any acknowledgment that he owes and is indebted. *Shattuck v. People*, 5 Ill. (4 Scam.) 477, 481.

#### Limit or border synonymous.

"Bound" is synonymous with "limit" or "border." *Barney v. Dayton*, 8 Ohio Cir. Ct. R. 480, 481.

#### BOUNDARY.

See "Lost Boundary"; "Natural Boundary."

"Boundary" includes every separation which marks the confines or line of division of two contiguous estates. When boundaries of land are fixed by known and unquestionable monuments, although neither courses nor distances nor the computed contents cor-

respond, the monuments must govern. With respect to courses, from errors in surveying instruments, variation of the needle, and other causes, different surveyors often disagree. The same observations apply to distances, arising from the inaccuracy of measures or of the party measuring, and computations are often erroneous. But fixed monuments remain. About them there is no dispute or uncertainty. What may be uncertain must be governed by monuments, about which there is no dispute." *Pernam v. Wead*, 6 Mass. 131, 133.

By "boundary" is understood, in general, every separation, natural or artificial, which makes the confines or line of division of two contiguous estates. Trees or hedges may be planted, ditches may be dug, and walls or inclosures may be erected to serve as boundaries. But we most usually understand by "boundaries" stones or pieces of wood inserted in the earth on the confines of two estates. Civ. Code La. 1900, art. 826.

#### Of judicial district.

"Boundary," as used in Const. 1890, § 260, which provides that the boundary of any judicial district in a county cannot be changed, except by a two-thirds vote at an election held for such purpose, means the line drawn in the county whereby the county is divided into judicial districts, and has no reference to the boundaries of the county. *Lindsley v. Coahoma County Sup'rs*, 11 South. 336, 337, 69 Miss. 815.

#### On river.

A "boundary on a river" implies a boundary changing as the shore line changes, either by accretion or erosion. *Stockley v. Cissna* (U. S.) 119 Fed. 812, 822, 56 C. C. A. 824 (citing *City of St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941; *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186).

#### BOUNDARY CASE.

Where the matter in controversy is the true location of the line dividing the north half from the south half of certain lots, the action is a boundary case, so that the decision of the Court of Civil Appeals thereon is final. *Wright v. Bell*, 63 S. W. 623, 94 Tex. 577.

Where the rights of parties to an action involving the title to land depend solely on location, which must be determined by the boundaries of different tracts of land, then we have what the law designates as a "case of boundary." Such a case arose where the dispute was as to whether the boundary lines of two claims were contiguous, so as to leave no vacant land between subject to location by plaintiffs. *Schley v. Blum*, 22 S. W. 667, 668, 85 Tex. 551.

"Boundary" is a word having no technical signification. A precise definition of the words "all cases of boundary," as used in Rev. St. 1895, art. 996, providing that the judgment of the Court of Civil Appeals shall be conclusive in all cases of boundary, is difficult. Broadly stated, every action for the recovery of land, and in which a question of the true location of any line of a survey may become involved, is a boundary case. The words admit of that construction. On the other hand, a narrow limitation of the scope of the terms would restrict their meaning to cases brought by one owner of a tract of land against the owner of a contiguous survey to determine one or more of the boundary lines between them. Every action to try title to land may involve a question of boundary, but this does not of itself make a boundary case. It was held, in effect, in *Schley v. Blum*, 85 Tex. 551, 22 S. W. 667, that the right of the case must depend upon a question of boundary, and it may be added that the right of the whole case must so depend. *Cox v. Finks*, 43 S. W. 1, 91 Tex. 318.

The Supreme Court of Texas is by statute denied jurisdiction over boundary cases. As to what constitutes a boundary case, the court held that, in order to be a boundary case, the right of the whole case must depend upon a question of boundary, and the question of whether or not it is a boundary case depends upon the answer to the question, if there had been no question of boundary, would there have been a case? If so, it is not a boundary case. If not, it is a case of boundary, pure and simple. It was ruled that the statute did not exclude the jurisdiction of the court over an action on notes given for the purchase price of land, and to foreclose a vendor's lien thereon, in which defendants deny that plaintiffs had title to the land sold, and in which the sole issue of fact is the location of a certain boundary. *Steward v. Coleman County*, 67 S. W. 1016, 95 Tex. 445.

#### BOUNDING.

The words "bounding and abutting," in Rev. St. § 2264, providing that, when a special municipal assessment is by the front foot, it shall be on the property bounding and abutting on the improvement, are not to be so restricted in their application as to exclude property fronting on the side of a street which is widened by the taking of property on the opposite side. *City of Cincinnati v. Batsche*, 40 N. E. 21, 24, 52 Ohio St. 324.

#### BOUNDS.

See "Within the Bounds."

A legal and imaginary line by which different parcels of land are divided. *Walton v. Tift*, 14 Barb. 216, 219.

## BOUNTY.

A bounty is a grant of money or lands to persons doing military or naval services for the government. Congress, under the Constitution, has on numbers of times granted land and money to soldiers, which habitually and repeatedly have been called "bounty"—such as "bounty of three months' pay and 160 acres of land," "military bounty lands," "bounty in money and land," "money bounty," "bounty of 160 acres of land," "bounty in land," "bounty right." *State of Iowa v. McFarland*, 4 Sup. Ct. 210, 216, 110 U. S. 471, 28 L. Ed. 198.

"Bounty" signifies money paid or a premium offered to encourage or promote an object, or procure a peculiar act or thing to be done. *Fowler v. Danvers*, 90 Mass. (8 Allen) 80, 84. A sum of money or other things given, generally by the government, to certain persons, for some service they have done or are about to do to the public. *Abbe v. Allen*, 39 How. Prac. 481, 484, 488.

"Bounties" for killing wolves and other animals are a means for the protection of stock raisers, and a law giving bounties is within Const. 1876, art. 16, § 23, providing that the Legislature may pass laws for the protection of stock raisers in the stock-raising portion of the state. Such a statute is not in contravention of a clause of the Constitution forbidding the granting of public money to any individual, as the act in question does not contemplate the granting of public money to any individual, but the individual is to be recompensed for the killing of the wild animals mentioned in the act merely as the means or instrument chosen by the Legislature, within its proper discretion, by which the public calamity wrought by these animals is to be averted. *Weaver v. Scurry County (Tex.)* 20 S. W. 836.

### Acceptance required.

In the term "bounty," as applied to bounties given by statute, there is a consideration implied. So long as the consideration is not rendered, it remains a mere offer or privilege, which may be taken away by the repeal of the statute; but, when earned, by complying with the conditions of the statute, the right to the bounty becomes vested. *Ingram v. Colgan*, 38 Pac. 315, 317, 106 Cal. 113, 28 L. R. A. 187, 46 Am. St. Rep. 221 (citing *East Saginaw Mfg. Co. v. City of East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82; *East Saginaw Salt Mfg. Co. v. Same*, 80 U. S. [13 Wall.] 373, 20 L. Ed. 611; *People v. State Auditors*, 9 Mich. 327).

"A bounty law is not a contract, except to bestow the promised bounty on those who earn it, so long as it is not repealed. There is no pledge that it shall not be repealed at any time. There is no obligation on the part of any person to comply with the conditions

of such a law. It is a matter purely voluntary, and, as it is purely voluntary on one part, so it is purely voluntary on the other part; that is, on the part of the Legislature to continue or not to continue the law." *East Saginaw Salt Mfg. Co. v. East Saginaw*, 80 U. S. (13 Wall.) 373, 376, 377, 20 L. Ed. 611.

Under St. Mo. 1863, p. 39, authorizing counties to pay bounties to volunteers enlisting in the military service, a county which offered bounties to parties volunteering to fill the quota, in effect, entered into a contract with the parties volunteering, which contract could be enforced by action. *State ex rel. Bohannon v. Howard County Court*, 39 Mo. 375, 377.

### As extra compensation.

"Bounty" is defined by Bouvier to be "an additional benefit conferred upon, or a compensation paid to, a class of persons." It differs from a reward, which is usually applied to a sum paid for the performance of some specific act of some person or persons. Bounty warrants and bounty lands were a premium offered and given to induce men to enlist in the public service, as extra compensation offered by the government to those who should enlist and faithfully discharge the duties of a soldier. *Kircher v. Murray* (U. S.) 54 Fed. 617, 624.

### As gift or gratuity or compensation.

The word "bounty," ex vi termini, implies a gratuity, not compensation; an inducement to enlist. *Eichelberger v. Sifford*, 27 Md. 320, 330. It means a gift, and negatives the idea of a consideration, in the legal sense of the word. *Fowler v. Danvers*, 90 Mass. (8 Allen) 80, 81.

The term "bounty," used in a law providing for payments to persons enlisting in the military service, would ordinarily imply that the money so raised was to be used as an inducement to enter the service, and not as a gratuity or acknowledgment for services already rendered. *Kidder v. Selectmen of Stewartstown*, 48 N. H. 290, 292.

The term "bounty," as used in reference to bounties given by statute, implies a consideration. *Ingram v. Colgan*, 38 Pac. 315, 317, 106 Cal. 113, 28 L. R. A. 187, 46 Am. St. Rep. 221.

"According to the more common usage of the language, 'bounty' means money paid or a premium offered to encourage or promote an object, or procure a particular act or thing to be done. As used in statutes relative to the enlistment of soldiers, it means a payment made to procure or induce soldiers to enlist, as distinguished from a reward or gratuity to those already in the service." *Fowler v. Selectmen of Danvers*, 90 Mass. (8 Allen) 80, 84.

**Grant distinguished.**

"The word 'bounty,' in its ordinary signification, may be defined to be an additional benefit conferred upon, or a compensation paid to, a class of persons. 1 Bouv. Law Dict. (Ed. 1897) p. 260. It is important to observe that section 5 of the tariff act of 1897, providing that whenever any country shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, an additional duty shall be collected, etc., does not use the word 'bounty' in any narrow or technical sense. It embraces any bounty or grant bestowed or conferred by the government, whether directly or indirectly. The word 'grant' is more comprehensive in meaning than the word 'bounty.' It implies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character, upon a corporation, person, or class of persons." Downs v. United States (U. S.) 113 Fed. 144, 147, 51 C. C. A. 100.

**Reward distinguished.**

A reward is not the same thing as a bounty, but the term "reward" is usually applied to a sum paid for the performance of some specific act to some person or persons. Kircher v. Murray (U. S.) 54 Fed. 617, 624.

The terms "bounty" and "reward" are nearly allied in meaning, the distinction being the former is said to be the appropriate term where the services or action of many persons are desired, and each who acts upon the offer may entitle himself to the promised gratuity without prejudice from or to the claims of others, while a reward applies to the case of a single service, which can be only once performed, and therefore will be earned only by the person or co-operating persons who succeed while others fail. A primary meaning of "bounty" is goodness, kindness, virtue, worth; (2) liberality in bestowing gifts or favors, gracious or liberal giving, generosity, munificence; (3) a premium offered or given to induce men to enlist in the public service, or to encourage any branch of industry, as husbandry or manufactures. Ingram v. Colgan, 38 Pac. 315, 317, 106 Cal. 113, 28 L. R. A. 187, 46 Am. St. Rep. 221 (citing Webst. Dict.).

"Bounty," as used in the tariff act of 1890, providing that on and after a specified date there shall be paid, from moneys in the treasury not otherwise appropriated, a sugar bounty, of a certain amount, is not a gratuity or donation by the government, but was intended to be, and is in fact, a standing offer of reward and compensation to sugar producers, to encourage and stimulate them in the otherwise losing business of producing sugar in the United States. It was intended to be, and is in fact, a guaranty of reimbursement to sugar producers accepting the terms of the statute of part, at least, of the cost of production. A claim for such bounty

earned by raising sugar is a vested right, constituting property. *Calder v. Henderson* (U. S.) 54 Fed. 802, 804, 4 C. C. A. 584.

**BOWIE KNIFE.**

A "bowie knife" or "dagger," as the terms are used in the Penal Code, means any knife intended to be worn on the person, which is capable of inflicting death, and not commonly known as a "pocketknife." Pen. Code Tex. 1895, art. 606.

**BOWLING.**

Bowling is not an offense within St. 17 Geo. 2, c. 5, § 2, describing the offenses of idle and disorderly persons, rogues, and vagabonds. One convicted of playing at bowls is not a disorderly person, within the meaning of the act. *Rex v. Clark*, 1 Cowp. 35, 36.

**BOWLING ALLEY.**

Every building or space where bowls are thrown, or where games of billiards or pool are played, and that are open to the public, with or without price, shall be regarded as a bowling alley or billiard room, respectively, within the meaning of the war revenue act of 1898. U. S. Comp. St. 1901, p. 2288.

**BOX.**

See "Axle Box."

A "box," within the meaning of a receipt given by a common carrier providing that the company shall not be liable for any loss or damage to any box, package, or thing, for over \$50, means each separate box, although a number of such separate boxes are included in one receipt. *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523, 524, 34 Am. Rep. 191.

**Barrel.**

"Box," as used in a statute relative to the drawing of jurors, which require their names to be put on cards and drawn from a box, will be construed to include a barrel. *Commonwealth v. Bacon*, 135 Mass. 521, 525.

**BOX BOARD.**

A box board is used to make boxes, or for sheathing a house. *Sloan v. Allegheny Co.*, 46 Atl. 1003, 1004, 91 Md. 501.

**BOX CAR.**

A box car is an inclosed and covered freight car, and a freight car is a railroad car for carrying freight, so that a box car is a rail or railroad car; and hence an information charging one with burglary from a box car complies with a statute making it burglary to enter a rail car with intent to steal. *State v. Green*, 39 Pac. 322, 15 Mont. 424.

**BOY.**

A "boy" is defined by Webster to be a male child, and generally applies to males under 10 or 12 years of age; and hence where, on an indictment for larceny, the record shows that a boy drew the grand jury, it will be presumed that he was a child under 10, as required by Code, § 4015. *Zachary v. State*, 66 Tenn. (7 Baxt.) 1, 3.

In a statute providing a penalty for an assault on a child, the word, when applied to a boy, means a male child under the age of 14. *Bell v. State*, 18 Tex. App. 53, 56, 51 Am. Rep. 293.

A will, by a testator having four minor sons and three adult sons, devising certain property to the "four boys," will be construed to mean the four minor sons of testator. *Bradley v. Rees*, 118 Ill. 327, 332, 55 Am. Rep. 422.

**BOYCOTT.**

As conspiracy, see "Conspiracy."

"The word 'boycotting' is not easily defined. It is frequently spoken of as passive, merely; a let-alone policy; a withdrawal of all business relations, intercourse, and fellowship. We may gather some of its real meaning by reference to the circumstances in which the word originated. These circumstances are thus narrated by Mr. Justin H. MacCarthy, an Irish gentleman of learning and ability, who will be recognized as good authority. In his work entitled 'England under Gladstone,' he says the strike was supported by a form of action, or rather inaction, which soon become historical. Captain Boycott was an Englishman, and agent of Lord Earne, and a farmer in Lough Mask, in the wild and beautiful district of Connemara. In his capacity as agent, he had served notices upon Lord Earne's tenants, and the tenantry suddenly retaliated in the most unexpected way—by, in the language of schools and society, sending Captain Boycott to Coventry in a very thorough manner. The population of the region for miles around resolved not to have anything to do with him, and, as far as they could prevent it, not to allow any one else to have anything to do with him. His life appeared to be in danger. He had to claim police protection. His servants fled from him as servants flee from their masters in some plague-stricken Italian city. The awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him. No one would supply him with food. He and his wife had to work in their own fields themselves, in most unpleasant imitation of Theocritean shepherds and shepherdesses, and play out their grim eclogue in their deserted fields, with the shadows of armed constabulary ever at their heels. The

Orangemen of the North heard of Captain Boycott and his sufferings, and the way in which he was holding his ground, and they organized assistance, and sent him down armed laborers from Ulster. To prevent civil war, the authorities had to send a force of soldiers to Lough Mask, and Captain Boycott's harvests were brought in and his potatoes dug by the armed Ulster laborers, guarded always by the little army. If this is a correct picture, the thing we call a boycott originally signified violence, if not murder." *State v. Glidden*, 8 Atl. 890, 896, 55 Conn. 46, 3 Am. St. Rep. 23.

"The essential idea of boycotting is a confederation, generally secret, of many persons, whose intent is to injure another by preventing any and all persons doing business with him, through fear of incurring the displeasure, prosecution, and vengeance of the conspirators." *In re Crump*, 6 S. E. 620, 627, 84 Va. 927, 10 Am. St. Rep. 895.

The term "boycott" has acquired a significance in the vocabulary of the court and the literature of the law, and it implies a combination to inaugurate and maintain a general proscription of articles manufactured by the party against whom it is directed. *Oxley Stave Co. v. Coopers' International Union* (U. S.) 72 Fed. 695, 699.

A boycott is an organized effort to exclude a person from business relations with others, by persuasion, intimidation, and other acts which tend to violence, and thereby force him, from fear of resulting injury, to submit to dictation in the management of his affairs. *Casey v. Cincinnati Typographical Union No. 3* (U. S.) 45 Fed. 135, 143, 12 L. R. A. 193.

"Boycott" is defined as a combination between persons to suspend or discontinue dealings or patronage with another person or persons because of refusal to comply with a request of him or them. The purpose is to constrain acquiescence or to force submission on the part of the individual who, by non-compliance with the demand, has rendered himself obnoxious to the immediate parties, and perhaps to their personal and fraternal associates. *Anderson's Law Dictionary*. In *Brace v. Evans*, 3 Ry. & Corp. Law J. 561, it is stated: "The word in itself implies a threat. In popular acceptance, it is an organized effort to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence; and they coerce him, through fear of his own injury, to submit to dictation in the management of his affairs." The term therefore comes within the statutory definition of "unlawful conspiracy," and will be enjoined. *Matthews v. Shankland*, 56 N. Y. Supp. 123, 128, 25 Misc. Rep. 604; *Barr v. Essex Trades Council*, 30 Atl. 881, 888, 53 N. J. Eq. (8 Dick.) 101.

The word "boycott" is usually understood as a combination of many to cause loss to one person by coercing others, against their will, to withhold from him their beneficial business intercourse, through threats that, unless the others do so, the many will cause similar loss to them. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (U. S.)* 54 Fed. 730, 736, 19 L. R. A. 387; *Beck v. Railway Teamsters' Protective Union*, 77 N. W. 13, 24, 118 Mich. 497, 42 L. R. A. 407, 74 Am. St. Rep. 421; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 121, 30 Atl. 881, 888; *Brace Bros. v. Evans*, 5 Pa. Co. Ct. R. 163, 171.

Though the word "boycott," as it first came into use in connection with the treatment which the tenants of Capt. Boycott extended to their landlord, embodied the notion of combination, yet it quickly and generally came to have a more enlarged sense; and the common colloquial use of the word at present is that of injurious discrimination, without any special agreement or understanding on the part of those who discriminate. Hence it is held that the word "boycott" does not necessarily involve the idea of combination, so that where a plaintiff in an action for slander alleged special damage, in that he had been specially injured in his business as a trader by persons boycotting his store on account of the slander charged, the word "boycotting" did not require plaintiff to prove a combination to injure, but under the allegation of special damage he was entitled to recover on showing a refusal to trade on the part of the old customers on account of defendant's slander, whether such refusal was with or without combination. *Davis v. Starrett*, 55 Atl. 516, 518, 97 Me. 568.

A boycott is an illegal conspiracy in restraint of trade. *Walsh v. Association of Master Plumbers*, 71 S. W. 455, 459, 97 Mo. App. 280 (citing *Casey v. Cincinnati Typographical Union*, No. 3 [U. S.] 45 Fed. 135, 12 L. R. A. 193).

A "boycott" means a refusal to sell to or to do business with the concern, and preventing anybody else from doing business with it on any conditions. *John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n*, 67 N. E. 136, 139, 175 N. Y. 1, 62 L. R. A. 632, 96 Am. St. Rep. 578.

#### Strike distinguished.

The distinction between a boycott and an ordinary lawful and peaceable strike, entered upon to obtain concessions in the terms of the strikers' employment, is not a fanciful one, or one which needs the power of fine distinction to determine which is which. A combination by employes of railway companies to injure the owner of cars operated by the companies in his business, by compelling such companies to cease using the cars by threats of quitting their service, thereby

inflicting on them great injury, where the relation between him and the companies is mutually profitable, and has no effect whatever on the character or reward of the services of the employed so combining, is a boycott. *Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (U. S.)* 62 Fed. 803, 818.

#### BRACE.

According to the *Seaman's Manual*, to brace in the yards of a sailing vessel is to lay them nearly square, as used in the definition of a vessel running free, as being when she has a fair wind, when her yards are braced in. *The Queen Elizabeth (U. S.)* 100 Fed. 874, 876.

According to the *Seaman's Manual*, to brace up the yards of a sailing vessel is to lay them more fore than aft. *The Queen Elizabeth (U. S.)* 100 Fed. 874, 876.

#### BRACK.

A complaint charged that the defendant answered an inquiry to the plaintiff in figures, words, signs, and abbreviations as follows: "Gentlemen: Could you furnish the following: 40 Brack 3x5, 8 Mem.; 36 Brack 12x8, 8 Mem.? At what price, and how soon?" The complaint averred that, by the usages and customs of the business of manufacturing, buying, and selling dressed lumber and brackets, the abbreviation "brack" is intended to, and does, mean bracket; that the character "x" is a substitute for and means "by"; and that the abbreviation "mem." stands for the word "member." Held, that the terms in the complaint were per se intelligible in themselves, and hence plaintiff properly alleged their meaning in the trade and business in which they were used, and he was entitled to prove such meaning by parol at the trial. *Jaqua v. Witham & A. Co.*, 106 Ind. 545, 547, 548, 7 N. E. 314.

#### BRACKETS.

The ordinary use of "brackets" is to inclose a parenthesis, which is defined by lexicographers to be "a sentence so inclosed in another sentence as that it may be taken out without injuring the sense of that which incloses it"; and where, under the name of the signer of a note, there is inclosed in brackets the words "for H. E.," it means that, as between the promisor and H. E., the latter was the real debtor. *Early v. Wilkinson (Va.)* 9 Grat. 68, 72.

#### BRAID.

Braids of cotton and india rubber are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 180 [U. S. Comp. St. 1901, p. 1662], as braids composed

wholly or in chief value of cotton or other vegetable fiber, not elsewhere specially provided for. *Calhoun v. United States* (U. S.) 122 Fed. 894.

## BRAKEMAN.

A brakeman is a man whose business it is to manage the brake on railways, and the duty to expel trespassers from a freight train cannot be implied merely from the fact that he is in the service of the company in that capacity. *Chesapeake & O. R. Co. v. Anderson*, 25 S. E. 947, 948, 93 Va. 650.

### Extra conductor distinguished.

The term "extra conductor" is more comprehensive than that of "brakeman." The former includes within its distinction such persons as may be engaged as brakemen, whereas the latter does not include the former. In other words, all extra conductors are in a sense brakemen, but all brakemen are not extra conductors. *Standard Life & Accident Ins. Co. v. Koen*, 83 S. W. 133, 137, 11 Tex. Civ. App. 273.

## BRANCH.

See "Main Branch."

### Of legislature.

"Branch," as used in Const. art. 4, § 3, declaring that the legislative power of the state shall be vested in two branches, one being styled the "Senate" and the other the "House of Representatives," means not a part of the Representatives or Senators, but the whole of the constituent members of the respective houses or branches of the Legislature. *Green v. Weller*, 32 Miss. 650, 678.

### Of manufacture.

A machine for quarrying and breaking stones for macadamizing roads and similar purposes is not employed in a branch of manufacture, within Pub. St. c. 11, § 20, cl. 12, providing that all personal property shall be assessed to the owner in the city or town where he is an inhabitant on May 1st, except all machinery employed in any branch of manufacture, which shall be assessed where it is situated or employed. *Wellington v. Inhabitants of Belmont*, 41 N. E. 62, 164 Mass. 142.

Merely sawing logs into boards is not a branch of manufacture. Something more of a transformation of the raw material is necessary to create such sawing a branch of manufacture. *Ingram v. Cowles*, 23 N. E. 48, 49, 150 Mass. 155.

## BRANCH OF THE SEA.

The term "branch of the sea," as used at common law, included rivers in which the

tide ebbed and flowed. *Arnold v. Mundy*, 6 N. J. Law (1 Halst.) 1, 86, 10 Am. Dec. 356.

## BRANCH PILOT.

A branch pilot, though appointed by the governor, is not a public officer. His is merely an employment on account of his skill, and the Governor, for the advantage of commerce and to regulate the business, grants a license to pursue the vocation. In pursuance of his employment he exercises none of the sovereign powers of the state, nor is he paid by the state, nor are his duties prescribed by any law of the state. He is merely a navigator—one who is, or ought to be, familiar with taking charge of a ship, and taking it into or out of the port at the particular place where he is engaged in the business. *Petterson v. State* (Tex.) 58 S. W. 100 (citing *United States v. Forbes* [U. S.] 25 Fed. Cas. 1141; *Dean v. Healy*, 66 Ga. 503).

A pilot appointed under Rev. Civ. St. arts. 3796-3810, authorizing the Governor to appoint branch pilots, who shall have the exclusive right to pilot vessels in and out of seaports, is not one of the executive officers of the state enumerated in Const. art. 4, § 1; and hence one who falsely pretended to be a duly appointed pilot was not guilty of a violation of Pen. Code, art. 293, making it an offense to falsely assume to be an executive officer of the state. *Petterson v. State* (Tex.) 58 S. W. 100.

The duties of a branch pilot are to be performed afloat. The office is aquatic—of a marine character. Its duties are all performed on water, and are not such as to enforce any domicile on land as the situs of performance. *State ex rel. Egan v. Follett*, 33 La. Ann. 228, 230.

## BRANCH RAILROAD.

The charter of a railroad company, authorizing it to build branch roads, will be construed to mean more than side tracks. "It denotes a road connected, indeed, with a main line, but not a mere incident of it—not constructed simply to facilitate the business of the chief railway, but designed to have a business of its own for the transportation of persons or property to and from places not reached by the principal route." *State v. United New Jersey R. & Canal Co.*, 43 N. J. Law (14 Vroom) 110, 111.

Whether a particular portion of a railway is a lateral or branch railroad, or not, does not depend upon its length or direction, but it must be connected with and lead from a main line already constructed, in order to be such; and, where a charter of a railroad company empowers it to construct only one specified branch road, another road, incorporated by the law of a different state, operated by the first road, is not a branch of such



road, within a deed reserving a right of way over the granted premises in favor of such road or any of its branches; the word "branches" being taken to mean such branches as the railroad company was or might be legally authorized to construct. *Biles v. Tacoma, O. & G. R. Co.* 32 Pac. 211, 213, 5 Wash. 509.

#### As incident to main line.

The usual and ordinary meaning of "branch road," as applied to railroads, denotes, as was said by Mr. Justice Dixon in *Akers v. United New Jersey R. & Canal Co.*, 43 N. J. Law (14 Vroom) 110, 112, a road connected, indeed, with the main line, but not a mere incident of it, or constructed simply to facilitate the business of the chief railway, but designed to have a business of its own for the transportation of persons and property to and from places not reached by the principal route. *Grey v. Greenville & H. Ry. Co.*, 46 Atl. 638, 644, 59 N. J. Eq. 372.

"Branch railroad," as used in a deed of land reserving a strip 400 feet wide on each side of any branch railroad thereafter constructed, is a phrase of such ambiguous import that its meaning cannot be determined without a reference to the circumstances surrounding the parties when they used it. "The phrase is nowhere accurately defined, and although each of the words composing it has a sufficiently exact meaning, the question is unsettled whether the idea expressed by the phrase embraces something more or something less than the word 'railroad' standing by itself—whether, in other words, a branch railroad must be not only a branch of a main line, but must also have all the elements of a separate road, as termini, and freight and passenger traffic between its termini, or whether, being a branch of another road, it need have no distinct termini or traffic of its own." *Grennan v. McGregor*, 20 Pac. 559, 560, 78 Cal. 258.

A "lateral road" is but another name for a branch road. Both must have a principal road from which they proceed. They are appendages to, and are properly a part of, the main line, and must proceed from some part of the main trunk between its termini. *Newhall v. Galena & C. U. R. Co.*, 14 Ill. (4 Peck) 273, 274.

#### Extension of main line.

According to Worcester, the word "branch" may mean any distinct article or portion; a section; a subdivision. As used in Act April 1, 1868, authorizing a railroad to construct one or more branches, it will be construed to authorize the railroad to build lines either in continuance from its terminus, or from points along its lines. *McAbory v. Pittsburgh & Connellsville R. Co.*, 15 Pittsb. Leg. J. 268, 271; Appeal of *McAbory*, 107 Pa. 548, 558.

Where a railroad company is authorized to build its line from a junction with another road to a fixed point, and to extend branch lines into any county that the directors may deem advisable, a road extended from the junction with such other line is a branch road, and not an extension of the main road. *Howard County v. Boonville Cent. Nat. Bank*, 2 Sup. Ct. 689, 690, 108 U. S. 314, 27 L. Ed. 738.

Under Pub. St. c. 156, § 18, providing that a railroad may build a branch road if it is decided that such road is for the public good, the railroad has a right to construct an extension longer than the existing line, and in effect constituting a new system. In *re Laconia St. Ry.*, 52 Atl. 453, 71 N. H. 355.

#### Road running in same general direction.

According to Webster, "lateral" means proceeding from the side, as the lateral branches of a tree—lateral shoots—and this is the sense in which this word is to be understood when branch or lateral railroads are spoken of, and a branch or lateral railroad is nothing more than an offshoot from the main line or stem; and the mere fact that a contemplated road runs in the same general direction with the main track will not deprive it of the character of a branch or lateral road, within the meaning of a charter giving the railroad power to construct branch or lateral roads. *Blanton v. Richmond, F. & P. R. Co.*, 10 S. E. 925, 926, 86 Va. 618.

## BRAND.

In Pasch. Dig. art. 4659, providing that no brands, except such as are recorded, shall be recognized in law as any evidence of ownership, "brand" does not include marks, and the prohibition is not applicable to marks. *Johnson v. State*, 1 Tex. App. 333, 345.

Civ. Code, § 2248, makes it the duty of overseers or track menders of railroads to file with the station agents "a list of the different marks and brands of all stock killed upon their respective sections the preceding week." Held, that "brand" indicates some figure or device burned on the animal by a hot iron, a means of identification, and is more commonly used on animals, such as horses, mules, and the like, while others are identified by marks made by knife cuts in the ear, such as cattle, hogs, and the like. *Churchill v. Georgia R. & Banking Co.*, 33 S. E. 972, 973, 108 Ga. 265.

"Brand" means generally to stamp or to mark, and, as used in the statute requiring that every manufacturer of butter shall brand in legible letters on the side of each tablet, etc., his name and the weight of the vessel, means that the name and weight shall be marked on the tub in a distinct manner, as

by a stencil plate and chisel, but it is not necessary that they be actually branded into the tubs. *Dibble v. Hathaway*, 11 Hun, 571, 575.

## BRANDON MONEY.

In a promissory note made payable in "Brandon Money," the term "Brandon Money" means currency different from gold or silver. *Gift v. Hall*, 20 Tenn. (1 Humph.) 480, 484.

## BRANDY.

The term "brandy" is a name given to certain spirituous and intoxicating liquors. It is sufficient, in an indictment, to charge the illegal sale of brandy, without stating the kind of brandy—as French brandy, California brandy, etc. *State v. Tisdale*, 55 N. W. 903, 904, 54 Minn. 105.

Rum, brandy, and gin are different species of spirituous liquors; and the words, in and out of themselves, import them to be spirituous liquors. Thus an indictment charging the sale of rum, brandy, and gin is not defective, in failing to charge that such liquors are spirituous. *State v. Munger*, 15 Vt. 290, 293.

The words "rum," "brandy," etc., in the statute prohibiting the sale of brandy, rum, etc., or other spirituous liquors, without a license, are not used to constitute a distinct offense or class of offenses, but they are put in the statute by way of instance, so connected with the larger term, "spirituous liquors," as to give efficiency to the rule of construction, *ejusdem generis*, and qualify these more general words. It is not necessary, in an indictment for the violation of the statute, to charge the particular kind of liquors sold. *Commonwealth v. Odlin*, 40 Mass. (23 Pick.) 275, 276, 279.

Courts and juries will take knowledge of the fact that whisky and brandy are intoxicating liquors. It needs no evidence to support a fact so well known. *State v. Lewis*, 90 N. W. 318, 86 Minn. 174.

As long as laws for licensing the sale of intoxicating liquors have existed, brandy, whisky, gin, rum, and other alcoholic liquids have been held to be intoxicating liquors per se, simply because it is within the common knowledge and ordinary understanding that they are intoxicating liquors. *Snider v. State*, 7 S. E. 631, 632, 81 Ga. 753, 12 Am. St. Rep. 350.

"Brandy" is judicially known to be a spirituous liquor. *Pedigo v. Commonwealth*, (Ky.) 70 S. W. 659.

## BRANDY CHERRIES.

Brandy cherries is a drink or intoxicating liquor, which is bottled, and the bottles

partly filled with cherries. The device of so filling the bottles was conceived for the purpose of violating the revenue and intoxicating liquor laws, on the ground that the cherries was the article sold, and not the liquor. The bottles, however, were filled with liquor or distilled spirits consisting of whisky, brandy, or other liquor, which was drunk, and the cherries were not eaten. Hence it was held that the sale of such article was a sale of intoxicating liquors. *United States v. Stafford* (U. S.) 20 Fed. 720, 722.

"Brandy cherries" preserved in liquor which is intoxicating, and put up in bottles, are within the prohibition of law against the sale of intoxicating liquors. *Ryall v. State*, 78 Ala. 410.

## BRANDY PEACHES.

Brandy peaches contained in a bottle are not intoxicating liquors, within the prohibition of the law. *Rabe v. State*, 39 Ark. 204.

Where evidence in a prosecution against one charged with unlawfully selling spirituous liquors on Sunday without a prescription shows that the prosecuting witnesses drank from bottles of brandy peaches, and became drunk thereby, it was for the jury to determine whether the liquor was intoxicating. The defendant contended that the liquid was sirup, and not brandy. *State v. Scott*, 21 S. E. 194, 116 N. C. 1012.

Branded peach preserves is preserved peaches flavored by brandy. "The method of making branded peach preserves is laid down in the standard authorities on the subject of the preservation of food. The fruit, after being properly prepared, is boiled in a sirup made of refined sugar, and is then placed in a bottle, the sirup poured over it, and a sufficient quantity of pure pale brandy to impart to it the desired brandy flavor, just as brandy is used as an ingredient in our pudding sauce or mince pies for the purpose of improving their flavor." *United States v. Stafford* (U. S.) 20 Fed. 720, 722.

## BRASS.

Brass is not found as a native metal. It is an alloy of copper and tin, or copper and zinc. *United States v. Ullman* (U. S.) 28 Fed. Cas. 323, 326.

The tariff act of March 2, 1861 (12 Stat. 178), imposed a duty of 30 per cent. on manufactures, not otherwise provided for, of brass, copper, or other metal, "or of which either of these metals, or any other metal, shall be the component material of chief value." The tariff act of February 24, 1869 (15 Stat. 274), imposed a duty of 45 per cent. on "all manufactures of copper, or of which copper shall be a component of chief value, not otherwise herein provided for." Held, that under the tariff acts brass must be taken

to be a metal as well as copper, and that if "Dutch metal" was a manufacture of brass, although copper was the chief component of brass, yet "Dutch metal" would not be included in the act of 1869 as being a manufacture of which copper was the component of chief value. *United States v. Ullman* (U. S.) 28 Fed. Cas. 323.

Old cannon composed of 91.09 per cent. copper and 7.05 per cent. tin, though practically worthless for use against modern implements of war, are not free from duty as brass, but dutiable as manufactures of metal. *Downing v. United States* (U. S.) 116 Fed. 779.

#### **BRASS BUTTONS.**

"Brass buttons," as used in a statute providing a duty thereon, means such buttons as are known in trade and commerce as brass buttons, and hence evidence is admissible to show what buttons are included within the term. *Erhardt v. Ullman* (U. S.) 51 Fed. 414, 416, 2 C. C. A. 319.

#### **BRASS FITTING.**

A "fitting" has been defined to be anything used in fitting up, specially in the plural, necessary fittings or apparatus; as the fittings of a church or study. It has also been defined as anything employed in fitting up, permanently used, generally in the plural, in the sense of fixtures, tackle, apparatus, equipment. Hence the term as used in an indictment charging a theft of a "certain lot of brass fittings," is too indefinite to identify the articles alleged to have been stolen. *Brown v. State*, 42 S. E. 795, 116 Ga. 559.

#### **BRASS KNUCKLES OR KNUCKS.**

"Brass knuckles" as used in a statute prohibiting the carrying of brass knuckles, include knuckles made of steel, which are similar in shape, size, use, etc., to brass knuckles. "Brass knuckles" is the name of the weapon, and is not intended to designate the materials of which it is made. *Harris v. State*, 3 S. W. 477, 478, 22 Tex. App. 679.

An indictment charging the carrying of "brass knuckles" does not necessarily mean that the knuckles must be made of a metal known as "brass," but includes knuckles made out of any hard metal. *Morrison v. State*, 43 S. W. 113, 38 Tex. Cr. R. 392; *Harris v. State*, 3 S. W. 477, 478, 22 Tex. App. 677; *Louis v. State*, 35 S. W. 377, 378, 36 Tex. Cr. R. 52, 61 Am. St. Rep. 832.

"Brass knucks," as used in the statute, means "knucks" that are made of brass or other metal. It is the weapon, and not the metal, which is condemned by the law. *Patterson v. State*, 71 Tenn. (3 Lea) 575.

#### **BRAWL**

Rev. St. c. 113, declares that no person shall make any "brawl or tumult" in a street, lane, alley, or public place. Held, that the Legislature intended to provide a punishment for one offense, "brawl" and "tumult" being relative terms, the one employed to express the meaning of the other. *State v. Perkins*, 42 N. H. 464, 465.

#### **BRAWLER.**

See "Common Brawler."

#### **BREAD.**

Bread "is an article sold for immediate consumption, and never enters into commerce, and, as one of the prime necessities of life, is of no use unless it is good to eat"; hence, in a sale to a middleman, there is an implied warranty that the bread is good to eat. *Sinclair v. Hathaway*, 23 N. W. 459, 460, 57 Mich. 60, 58 Am. Rep. 327.

#### **BREACH.**

The breaking or violating of a law right or duty, either by commission or omission; the violation or nonfulfillment of an obligation, contract, or duty. *Black, Law Dict.*

#### **BREACH OF CONTRACT.**

A "breach of contract" is a commission of some act, or the omission of an act, specified or implied in contract. This commission or omission is not just or unjust, inequitable or equitable, for the law does not look for those qualities in adjudicating on a contract, but simply at the contract and its terms. If, however, the words are to be taken in a moral sense, then the offense would be doing something in connection with a breach of contract that was morally unjust and inequitable. *People v. New York Produce Exchange*, 29 N. Y. Supp. 307, 308, 8 Misc. Rep. 552.

A renunciation does not create a "breach" of a contract. There must be an adoption of the renunciation. *Wells v. Hartford Manilla Co.*, 55 Atl. 599, 602, 76 Conn. 27.

#### **BREACH OF GOOD BEHAVIOR.**

See "Good Behavior."

#### **BREACH OF THE LAW.**

A life insurance policy provided that it should be void in case death was caused by duelling, fighting, or other "breach of the law." The assured was driving a sulky in a horse race, which was made illegal by statute, and, on a collision ensuing, jumped it

the ground from his sulky, and was clear from the sulky and uninjured, and then started forward to get hold of the reins, which were hanging across the axletree, and in attempting to get hold of them, or after grasping them, was killed by getting tangled in them, falling down and being dragged against a stone. Held, that the leap from the sulky, and securing the reins, and the subsequent fall and injury, were so close and immediate in their relation to the racing, and all so manifestly a part of the illegal transaction, that it could not be said that there was a new and controlling influence to which the disaster could be attributed, but that the accident occurred and was caused by a "breach of the law." *Travelers' Ins. Co. v. Seaver*, 86 U. S. (19 Wall.) 531, 532, 22 L. Ed. 155.

### BREACH OF THE PEACE.

The term "breach of the peace" is a generic term, which includes riotous and unlawful assemblies and affrays, forcible entry and detainer, wanton discharge of firearms in public streets, or so near the chamber of a sick person that it will cause injury, the sending of challenges to a duel, provoking a fight, the going armed in public, without lawful occasion, in such a manner as to alarm the public, and many other acts of a similar character. *People v. Bartz*, 19 N. W. 161, 53 Mich. 493.

"Breach of the peace" is a breach of the tranquility enjoyed by the citizens of a municipality or community where good order reigns among its members, and which is the right of all persons in political society, and any intentional violation of that right is a breach of the peace. Actual personal violence is not an essential element of the offense, but any wicked language and conduct of a guilty party, destructive of the peace of the citizens and of good morals, is sufficient to establish such offense. *People v. Rounds*, 35 N. W. 77, 79, 67 Mich. 482. See, also, *Davis v. Burgess*, 20 N. W. 540, 542, 54 Mich. 514, 52 Am. Rep. 828.

The term "breach of the peace" is generic, and includes unlawful assemblies, riots, affrays, provoking a fight, and other acts of similar character. The use of grossly indecent, profane, and abusive language toward another person upon the highway, in the presence of others, is a breach of the peace. Any violation of public order or decorum is a breach of the peace. In *Davis v. Burgess*, 54 Mich. 514, 20 N. W. 540, 52 Am. Rep. 828, the court said: "By 'peace,' as used in this connection, is meant the tranquility enjoyed by the citizens of a municipality or community where good order reigns among its members. This is the natural right of all persons in political societies, and any violation of that right is a breach of the peace. Actual personal violence is not an essential element

of the offense. If it were, communities might be kept in a constant state of turmoil, fear, and anticipated danger from the wicked language and conduct of a guilty party, not only destructive of the peace of citizens, but of public morals, without the commission of the offense." Blackstone says, besides the actual breach of the peace, anything that tends to provoke or excite others to break it is an offense of the same denomination. Thus, where parties attempted to go through a gate which blocked a public way and was a nuisance they were guilty of a breach of the peace in provoking a fight while so doing. *State v. White*, 28 Atl. 968, 970, 18 R. I. 473.

A breach of the peace is an offense well known to the common law. It is a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community. *People v. Wallace*, 83 N. Y. Supp. 130, 133, 85 App. Div. 170.

A breach of the peace is a violation of public order; the offense of disturbing the public peace. An act of public indecorum is also a breach of the peace. The term is generic, and includes unlawful assemblies. Games of baseball upon Sunday are breaches of the peace. *Scougale v. Sweet*, 82 N. W. 1061, 1064, 124 Mich. 311 (citing *Ex parte Carroll*, 12 Wkly. Law Bul. 9).

An indictment charging a breach of the public peace by quarreling, sufficiently charges such offense. *State v. Archibald*, 9 Atl. 362, 364, 59 Vt. 548, 59 Am. Rep. 755.

### BREACH OF TRUST.

A breach of trust is a wrong, and a constructive fraud arises upon the said breach of trust. A trustee cannot take advantage of his own wrong by setting up his own breach of trust. *Kerr v. Blodgett* (N. Y.) 16 Abb. Prac. 137, 145.

### BREACH OF WARRANTY.

Marshall on Insurance says that: "A breach of warranty consists either in the falsehood of an affirmative, or in the non-performance of an executory stipulation;" and he adds "that in either case the contract is void ab initio, the warranty being a condition precedent." *Hendricks v. Commercial Ins. Co.* (N. Y.) 8 Johns. 1, 13.

A breach of warranty in insurance is equally fatal whether the thing warranted be material or immaterial, or was or was not intended, or was or was not the fault of insured. *Fitzgerald v. Supreme Council of Catholic Mut. Ben. Ass'n*, 39 N. Y. App. Div. 251, 257, 56 N. Y. Supp. 1005, 1007.

To constitute a breach of covenant of quiet enjoyment and warranty, there must be a disturbance in and deprivation or cessa-

tion of the possession by the prosecution and operation of legal measures. *Stewart v. Drake*, 9 N. J. Law (4 Halst.) 139.

## BREAK.

See "Breaking (In Criminal Law)."

See "Broken."

## BREAK OUT.

As used in 7 & 8 Geo. IV, relating to burglaries, the words "break out" were not satisfied by an indictment for burglary stating in one count that the person "did break to get out," and in another that he "did break and get out." *Rex v. Compton*, 7 Car. & P. 139.

## BREAKAGE.

"Breakage," as used in a bill of lading which exempts the carrier from liability for loss occasioned by breakage, would not exempt the carrier from liability for breakage occasioned by his own gross negligence. *Reno v. Hogan*, 51 Ky. (12 B. Mon.) 63, 64, 54 Am. Dec. 513.

## BREAKER.

The term "breaker," as used in the act relating to mines and mining, means the structure containing the machinery used for the preparation of coal. *P. & L. Dig. Laws Pa.* 1894, vol. 2, col. 8110, § 193; *Commonwealth v. Smith (Pa.)* 4 C. P. Rep. 1, 4. We cannot understand how the structure in which the coal in a washery is prepared can be denied the title "breaker." Whatever coal a washery finds it necessary to break, is broken therein, as well as washed, and it seems but reasonable to conclude that the structure of a washery is included in the expression "any coal breaker or other structure." *Commonwealth v. Brookwood Coal Co.*, 25 Pa. Co. Ct. R. 55, 57.

## BREAKING.

A bill of lading, signed by the shipper of live stock and a railroad company, released the defendant railroad company from damage or loss from "breaking," chafing, weather, fire, or water. Held, that the word "breaking" was applicable only to goods and merchandise, and hence there was no exemption from liability for the breaking of a leg of an animal. *Coupland v. Housatonic R. Co.*, 23 Atl. 870, 871, 61 Conn. 531, 15 L. R. A. 534.

## BREAKING (In Criminal Law).

See "House Breaking."

The word "break," as used in the Penal Code, means and includes (1) breaking or vio-

lently detaching any part, internal or external, of a building; or (2) opening for the purpose of entering therein, by any means whatever, any outer door of a building, or of any apartment or set of apartments therein, separately used or occupied, or any window, shutter, scuttle, or other thing used for covering or closing an opening thereto or therein, or which gives passage from one part thereof to another; or (3) obtaining an entrance into such a building or apartment by any threat or artifice used for that purpose, or by collusion with any person therein; (4) entering such a building or apartment by or through any pipe, chimney, or other opening, or by excavating, digging or breaking through or under the building, or the walls or foundation thereof. *Gen. St. Minn.* 1894, § 6680; *Pen. Code N. Y.* 1903, § 499.

## Actual breaking.

"Actual breaking," as applied to burglary, means the making of an opening or mode of entrance into a building by force. *Minter v. State (Ark.)* 71 S. W. 944, 945.

"Actual breaking," as used in *Pen. Code*, art. 714, providing that an entry into a house for the purpose of committing theft, unless the same is effected by "actual breaking," is not burglary where the same is done by a domestic servant, does not include an entry into a house by opening a door which was closed and bolted but not locked. *Waterhouse v. State*, 2 S. W. 889, 21 Tex. App. 663.

The "breaking" necessary to constitute burglary with intent to commit rape may be actual or constructive, as where the entrance is obtained by fraud, threats, or conspiracy. An actual breaking may be proved by evidence of very slight force, such as lifting the latch of a door, breaking a window, breaking the lock, or other like acts, and also by evidence of escaping from the house by any of these or like means. *State v. Fisher (Del.)* 41 Atl. 208, 211, 1 Pennewill, 303.

To constitute the offense, the breaking may be either actual or constructive; actual where the offender, for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention, breaks a hole in the wall of the house, breaks a door or window, or picks the lock of a door, or opens it with a key, or even by lifting the latch or unloosening any other fastening to doors or windows the owner has provided. *Sims v. State*, 136 Ind. 358, 36 N. E. 278.

## Breaking into other room in hotel.

If a person, being lawfully a guest in a hotel, breaks into other parts of the house, where he has no right to enter, for the purpose of committing a felony, it is burglary, the same as if he had broken in from the outside. *State v. Clark*, 42 Vt. 629, 636.

**Constructive breaking.**

In burglary, "constructive breaking," as distinguished from actual, forcible breaking, may be classed under the following heads: (1) Entries obtained by threats; (2) when, in consequence of violence done or threatened in order to obtain entry, the owner, with a view more effectually to repel it, opens the door and sallies out, and the felon enters; (3) when entrance is obtained by procuring the service of some intermediate person, such as a servant, to remove the fastening; (4) when some process of law is fraudulently resorted to for the purpose of obtaining an entrance; (5) when some trick is resorted to to induce the owner to remove the fastenings and open the door, and the felon enters. *State v. Henry*, 31 N. C. 463, 468; *Clarke v. Commonwealth*, 25 Grat. 908, 912; *Ducher v. State*, 18 Ohio, 308, 317.

To obtain admission to a dwelling house at night with the intent to commit a felony by means of artifice or fraud, or on pretense of business or social intercourse, is a constructive breaking, and will sustain an indictment charging burglary by breaking and entering. *Johnston v. Commonwealth*, 85 Pa. 54, 64, 27 Am. Rep. 622.

"Breaking," as used in definitions of burglary, is any forcible or fraudulent act done for the purpose of obtaining admission to a building which could not otherwise be entered. "Procuring, by craft or by threats and intimidation, a person within a house to open the door, is, in legal contemplation, a breaking." *State v. Moore*, 22 S. W. 1086, 1088, 117 Mo. 395.

Under a statute punishing any person who shall break and enter in the daytime any railroad, freight, or passenger car, with intent to commit murder or robbery, etc., it is held that the term "break" has the same fixed and definite meaning as such word had acquired at common law when applied to dwelling houses. So it is held that obtaining admission to a car by means of artifice or fraud, with intent to commit a felony, is a constructive breaking, and will sustain a prosecution under the statute. In the case under consideration the accused concealed himself in a chest and had himself shipped in an express car, and in that way gained admission to the car, with intent to assault and rob the express messenger while the train was en route. Held, that this was a "breaking" within the meaning of the statute. *Nichols v. State*, 32 N. W. 543, 545, 68 Wis. 416, 60 Am. Rep. 870.

**As destroy completeness of.**

In an act providing that a person who shall willfully break, destroy, or injure the door of any building, shall be punished, etc., the words "break or destroy" mean to destroy the completeness of. *State v. McBeth*, 31 Pac. 145, 49 Kan. 584.

**Entering through chimney.**

The term "breaking," as used in a definition of burglary as being the breaking and entering, etc., does not require an actual breaking through fixed obstructions. An entry at night through a chimney into a log cabin constitutes a sufficient breaking. At ancient common law it was held "that, if a man entered into the dwelling house by an open door in the night and stole goods therein, it was sufficient to constitute burglary. See *Cro. Car.* 65, 285; *Crompt.* 32a; 27 *Assise*, 38. But it soon after became the settled law that an entry by an open door or window, or any hole in the wall or roof of the house, was not a burglarious entry. 1 *Hale's Pl. Cr.* 552; *Kel.* 67-70. Lord Hale says that it was held by *Manwood*, C. B., that, if a thief goes down a chimney to steal, this is a breaking and entering. The reason of this, he says, seems to be that the chimney is closed as much as the nature of the thing will admit. All the elementary writers of any note, from that day down to the present, lay down the law in the same way, and assign the same reason for it." *State v. Willis*, 52 N. C. 190, 191.

**Entering through open door.**

The word "breaking," as used in *Rev. Code*, § 3695, defining burglary as the "breaking in the night or day time into any dwelling house or building, with intent to commit a felony," means an actual breaking, or a constructive one of fraud, threats, or conspiracy; and hence it is held that if a person enters a store through an open door, secretes himself, and the door is locked, then commits a larceny and escapes by opening or breaking out a window, he is not guilty of breaking. *Brown v. State*, 55 Ala. 123, 125, 28 Am. Rep. 693.

*Code* 1833, § 4386, defining burglary to be a "breaking and entering into," etc., does not include an act of one in entering a house with the intent to commit a felony, where the entrance was made through an open door without any breaking, though the party unbolted a door to get out. *White v. State*, 51 Ga. 285, 288.

"Break," as used in an indictment charging that a person did by force, in the nighttime, break and enter a house, imports violence used by such person to obtain entrance in the house, and any violence is sufficient. The charge is not supported by evidence that the house was open—not a door or window closed—and that defendant in his stocking feet entered through the open door without the consent of any one, and without any force whatever being used against the building or any occupant therein to effect the entry. *Melton v. State*, 6 S. W. 303, 304, 24 *Tex. App.* 287.

"Break," as used in reference to burglary, and defined in *Pen. Code*, § 499, as the

opening for the purpose of entering therein by any means whatever any outer door of a building," is established if the proof shows that the accused opened by any means the outer door of the apartment named. Walking in through an open door would not constitute the offense. *People v. Gartland*, 52 N. Y. Supp. 352, 30 App. Div. 534.

#### Force implied.

The term "breaking," as it is used in an indictment for burglary, charging the breaking and entering by defendant, necessarily includes force, and means a forcible breaking. *Mathews v. State*, 86 Tex. 675.

"Break," as used in an indictment charging that the defendant did break and enter a certain house, implied force. *Shotwell v. State*, 43 Ark. 345, 347.

By the term "breaking," as used in article 2360, is meant that the entry must be made with actual force. The slightest force, however, is sufficient to constitute breaking. It may be by lifting the latch of the door that is shut, by raising a window, the entry at a chimney or other unusual place, or the introduction of the hand or any instrument to draw out the property through an aperture made for that purpose. Code (Pasch. Dig.) art. 2363. *Franco v. State*, 42 Tex. 276, 280.

By the term "breaking," in the article defining burglary in the daytime, is meant that the entry must be made with actual force. The slightest force, however, is sufficient to constitute breaking. It may be by lifting the latch of the door that is shut, or by raising a window, the entry at a chimney, or other unusual place, the introduction of the hand or any instrument to draw out the property through an aperture made by the offender for that purpose. Pen. Code Tex. 1895, art. 842.

The illustrations of the term "breaking," in the statute itself, are "the lifting of a latch," "the raising of a window," "the entry at a chimney," "the introduction of a hand or instrument," etc., evincing conclusively that it is used contradistinctive from force by violence. It must have been intended in this definition that, although some force is a necessary element in the constitution of the offense of burglary, yet the burglary committed by breaking is only such force as is sufficient to effect a clandestine entry. It is not such force as would excite alarm and provoke opposition. *State v. Robertson*, 32 Tex. 159, 163.

#### Opening closed door.

Unlatching a door which is only latched is a sufficient breaking to constitute burglary. *People v. Bush*, 3 Parker, Cr. R. 552, 557; *State v. O'Brien*, 46 N. W. 861, 81 Iowa, 93; *State v. Groning*, 5 Pac. 446, 447, 33 Kan. 18; *State v. Moore*, 22 S. W. 1086, 1088, 117

Mo. 395; *People v. Gartland*, 52 N. Y. Supp. 352, 30 App. Div. 534; *State v. Snow* (Del.) 51 Atl. 607, 608, 3 Pen. 259.

Lifting the latch of an outer door, and thereby effecting an entrance, although the door is not otherwise fastened, is a sufficient breaking and entering under an indictment for burglary. To constitute burglary, there must be a breaking,—removing, or putting aside of some material which constitutes a part of the dwelling house, and is relied on as a security against intrusion. But if the entrance be effected through an opening previously there, without forcible enlargement of it, this cannot be a burglarious entrance, unless it is effected through an open chimney. This rule applies to a door or window left open, or any other opening in the house through which the ingress is effected. *Carter v. State*, 68 Ala. 96, 98.

"Breaking," as used in a law forbidding a forcible breaking by a sheriff holding civil process, does not mean a positive breaking, or the removal of some extraordinary fastening, but includes merely lifting the latch and thus opening the outer door. It is enough that the outer door be shut. Merely opening is a "breaking" within the meaning of the law. *Curtis v. Hubbard* (N. Y.) 1 Hill, 336, 338.

In the law of burglary "breaking," is the slightest force, such as the lifting of a latch of a door that is shut, the raising of a window, the entering at a chimney or other unusual place. It is a breaking to lift the latch of the door to an office in the corner of a hardware room made of pickets four feet high, one inch square, and three inches apart, or by climbing over such picketed inclosure. *Anderson v. State*, 17 Tex. App. 305, 310.

The pushing open a door naturally closed is a sufficient breaking to sustain a conviction under a charge of breaking and entering a dwelling house with intent to commit a felony. *May v. State*, 24 South. 498, 40 Fla. 426; *State v. Reid*, 20 Iowa, 413, 418; *State v. Moon*, 64 Pac. 609, 611, 62 Kan. 801.

The word "break," in Code, c. 192, § 12, p. 728, making the breaking and entering of a dwelling house in the daytime a felony, was borrowed from the law in regard to burglary, and is therefore to be understood as it would be when used in a charge of burglary. If, then, in any case, a party shall, by even slight force, remove or displace anything attached to the house as part thereof, and relied on by the occupant for safety of the house, it is housebreaking within the meaning of the statute, if the other constituent parts of the offense exist. In this case, the door through which the entry was made was not fastened by any lock, latch, or bar, nothing of the kind being there, the door fitting closely within the casing, and,

when closed, some degree of force was required to open it. This was its only fastening. The opening of this closed door was held a "breaking" within the statute. *Finch v. Commonwealth*, 14 Grat. 643, 845.

"Breaking," as the term is used in describing an element of burglary, is any unlawful entry to the closed portion of a building for an unlawful purpose. Thus, when a person who had no business in a factory effects an entrance by turning the door knob, thereby withdrawing the bolt used in the daytime to keep the door closed, which was done early in the morning after the door was unlocked, but before it had come into general use for the day by the public, or even by the employes of the establishment, there was a sufficient breaking to establish the offense. *Kent v. State*, 11 S. E. 355, 84 Ga. 438, 20 Am. St. Rep. 376.

Rev. St. c. 155, provides that if any person, with intent to commit a felony, shall at any time break and enter any office, bank, shop, or warehouse, he shall be punished by imprisonment in the state prison. It was doubtless the design of the Legislature to use the words "break and enter," when defining this offense, in the sense in which they are used to define the crime of burglary, and to constitute that offense there must be proof of an actual breaking, or that which is equivalent to it. Proof of an illegal entrance merely, such as would enable the party injured to maintain trespass *quare clausum*, will not be sufficient. Nor will proof of an entrance merely for a purpose ever so felonious and foul, accomplished by any conceivable stratagem, be sufficient if there be no actual breaking. It is immaterial by what kind of felonious breaking entrance is effected. Our statute, in defining this offense, makes no difference respecting the time of breaking and entrance. The same acts will constitute the offense, irrespective of light or darkness. But where a store was lighted up, and the doors were merely latched in the ordinary manner, without any fastenings to exclude others, the clerks being in the store ready to attend on customers, defendant, who lifted the latch and entered the store by the door, with the intention to commit a larceny therein, and did so enter and commit a larceny, secretly, without the knowledge of the attendants, was not guilty of breaking and entering under the statute. *State v. Newbegin*, 25 Me. 500, 503.

#### Opening locked door.

Technically, to open a locked door with the owner's key is a sufficient breaking to constitute burglary, though the key be left within the reach of every comer, and prove a temptation to the dishonest by affording easy opportunity to commit larceny. *Colbert v. State*, 17 S. E. 840, 841, 91 Ga. 705.

#### Opening screen door.

Opening a screen door not fastened, but hung on spring hinges which serve to keep it closed, is a "breaking" within the statute relating to larceny. *State v. Conners*, 64 N. W. 295, 95 Iowa, 485.

#### Opening second door.

To "break," within the meaning of the term as used in the law of burglary, is shown by evidence that defendant gained admission to a house by opening a door from the cellarway, though there was another door opening outwardly before the first door was reached. The fact that there was another door opening outwardly before reaching it did not make it the inner door of a house. Like a storm door, the door was a barrier, and access to the house could not be obtained until the second door was used. *McCourt v. People*, 64 N. Y. 583, 585.

One who enters a railroad depot through an open outer door, and then breaks and enters an inner door, is guilty of a breaking sufficient to constitute a burglary. *State v. Scripture*, 42 N. H. 485, 488.

#### Opening unfastened transom.

An entering into a building by raising a transom window which was attached by hinges above and so arranged that it would fall into the frame by its own weight, and which required some force to open it, constituted a breaking. *Dennis v. People*, 27 Mich. 151, 152.

"Break," as used in a statute providing that to forcibly break and enter any house, etc., with intent to commit a felony, shall constitute a burglary, only requires the degree of force that was implied at common law from the word "break." Force sufficient to open an unfastened transom swinging horizontally over an outer door of a dwelling house is sufficient to constitute forcible breaking. "In England, for more than two hundred years, it has been settled that there can be no burglary without an actual breaking, and in Sir Matthew Hale's time (1 Hale's P. C. 552) these acts amounted to an actual breaking, viz., opening the casement or breaking the glass windows, picking open the lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching a door that is only latched, and to put back the leaf of a window with a dagger. In *Rex v. Haines*, 2 R. & Ry. C. O. 450, it is decided that the pulling down of the sash of a window is a breaking, though it has no fastening and is only kept in its place by the pulley weight. It is equally a breaking although there is an outer shutter which is not put up." *Timmons v. State*, 34 Ohio St. 426, 428, 32 Am. Rep. 376.

#### Opening window.

Raising a window that is closed constitutes a "breaking," within the meaning of



that term as used in reference to a trespass on real estate by breaking and entering. *McUsker v. Mitchell*, 86 Atl. 1123, 1124, 20 R. I. 13; *State v. Moore*, 22 S. W. 1086, 1088, 117 Mo. 395.

A breaking and entering sufficient to constitute burglary is not accomplished by the defendant's effecting an entrance into a building through a window by lifting the sash, which lacked from a fourth of an inch to an inch of being closed. *Commonwealth v. Strupney*, 105 Mass. 588, 7 Am. Rep. 556.

#### **Raising trapdoor.**

Raising a trapdoor merely kept down by its own gravitation constitutes a breaking. *State v. Moore*, 22 S. W. 1086, 1088, 117 Mo. 395.

#### **Removing loose plank in partition.**

Removing a plank in a partition wall of a building, which was loose and which was not fixed to the freehold was not a sufficient breaking to constitute burglary. *Commonwealth v. Trimmer*, 1 Mass. 476, 477.

#### **Removing window netting.**

Where the window of a dwelling house was covered with a netting of double twine nailed to the sides, top, and bottom, the cutting and tearing down the netting and entering the house through the window was a sufficient breaking to constitute burglary. *Commonwealth v. Stephenson*, 25 Mass. (8 Pick.) 354, 355.

### **BREAKING PACKAGES.**

"Breaking packages," as applied to imported goods, means a breaking or destruction of the entirety of the package, consisting of a number of things bound together for convenience in handling and conveyance. *State v. Board of Assessors*, 15 South. 10, 11, 46 La. Ann. 145, 49 Am. St. Rep. 318.

### **BREEDING.**

Animals are imported for "breeding purposes," within the statute allowing them to be admitted free of duty, where the importer in good faith intends them for that purpose, and it does not prevent his otherwise disposing of them if he afterwards finds it necessary or desirable so to do. *United States v. One Hundred and Ninety-Six Mares* (U. S.) 29 Fed. 139.

#### **BREEDING BACK.**

The term, within a contract giving the privilege of "breeding back" again next season if a mare fails to prove with foal, only means to give the right so to do if the animals both live another season. *Price v. Pepper*, 76 Ky. (18 Bush) 42, 43.

### **BRETHREN.**

Testator, in separate clauses of his will, bequeathed to each of his five children, one of whom was a son and four of whom were daughters, certain personality to them and their heirs forever. The legacy to N., one of the daughters, was a female slave. Another clause of the will was as follows: "It is my will that if any one or more of my children, above named, should die without issue, that his or her part or parts, should be divided equally between the surviving brethren." Held, that the word "brethren" meant the survivors of the legatees named, whether daughter or son. *Terry v. Brunson*, 1 Rich. Eq. (S. C.) 78, 87.

### **BREVI ANTICIPANTIA.**

Under the old practice, courts of equity, proceeding in analogy to certain writs of the common law denominated by Coke "brevia anticipantia," or writs of prevention (Co. Litt. 100a), were accustomed to grant relief to a surety, on his application for that purpose, by bill quia timet, in two different ways: (1) By allowing him to proceed against both creditor and debtor, to compel the latter to pay the debt; or (2) the surety might proceed against the creditor alone to compel him to bring his action. Story's Eq. Jur. §§ 327, 638, 849. And our statute (Wag. St. c. 132, p. 1302), which allows notice to be given to the creditor; is no doubt only substitutionary, although it may not be exclusively so, of the ancient chancery practice by which an exoneration of a surety was formerly accomplished. *Peters v. Linenschmidt*, 58 Mo. 464, 466.

### **BREWER.**

Brewers were originally defined as "persons who brewed for sale," but it is now conceded that a person who brews beer, though not for sale, carries on the business of a brewer, although one who distills for his own use merely would not be said to carry on the business of a distillery. *United States v. Wittig* (U. S.) 28 Fed. Cas. 744, 745.

A brewer is defined in Rev. St. § 3244 [U. S. Comp. St. 1901, p. 2096] as "a person who makes fermented liquor, of any name or description, for sale, from malt, wholly or in part, or from any substitute therefor." This clearly comprehends the making of every kind of malted liquor. *United States v. Dooley* (U. S.) 25 Fed. Cas. 890, 891.

### **BREWERY.**

A brewery is a building and its appurtenances especially adapted to the manufacture of beer. *Mugler v. State*, 8 Sup. Ct. 273, 279, 123 U. S. 623, 31 L. Ed. 206; *State v. Weckerling*, 38 La. Ann. 36, 38.

**BRIBE.**

Bribery was an indictable offense at common law, and although, in the early days, it was limited to judicial officers and those engaged in the administration of justice, it was later extended to all public officers. It was variously defined as taking or offering an undue reward, or a reward to influence official action. It is otherwise defined as the giving, offering, or receiving of anything of value, or any valuable services, intended to influence one in the discharge of a legal duty. *People v. Van De Carr*, 84 N. Y. Supp. 461, 463, 87 App. Div. 386.

The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted with a corrupt intent to influence unlawfully the person to whom it is given in his action, vote, or opinion in any public or official capacity. *Pen. Code Ariz.* 1901, § 7, subd. 6; *Pen. Code Cal.* 1903, § 7, subd. 6; *Pen. Code Idaho* 1901, § 4544, subd. 6; *Pen. Code Mont.* 1895, § 7, subd. 6; *People v. Markham*, 30 Pac. 620, 621, 64 Cal. 157, 49 Am. Rep. 700; *People v. Ward*, 42 Pac. 894, 895, 110 Cal. 369.

"Bribe" or "bribery" means any reward, benefit, or advantage, present or future, to the party influenced or intended to be influenced, or to another at his instance, or the promise of such reward, benefit, or advantage. *Ky. St.* 1903, § 1586; *Commonwealth v. Stephenson*, 60 Ky. (3 Metc.) 226, 228; *Commonwealth v. Root*, 96 Ky. 533, 535, 29 S. W. 351; *Commonwealth v. Headley*, 64 S. W. 744, 745, 111 Ky. 815, 23 Ky. Law Rep. 1104, 1105 (quoting *Ky. St.* § 1586, subd. 1); *Cheek v. Commonwealth*, 87 Ky. 42, 44, 7 S. W. 403, 404 (quoting *Gen. St.* § 11, art. 12, c. 33).

"Bribe," as used in the Penal Code, signifies any money, goods, right in action, property, thing of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence unlawfully the person to whom it is given in his action, vote, or opinion in any public or official capacity. *Rev. St. Okl.* 1903, § 2691; *Rev. Codes N. D.* 1899, § 7718; *Pen. Code S. D.* 1903, § 813; *Rev. St. Utah* 1898, § 4053.

By a "bribe," as used in the Penal Code, is meant any gift, emolument, money, or thing of value, testimonial, privilege, appointment, or personal advantage, or the promise of either, bestowed or promised for the purpose of influencing an officer or other person, such as are named in this chapter, in the performance of any duty, public or official, or as an inducement to favor the person offering the same or some other person. *Pen. Code Tex.* 1895, art. 144.

A "bribe" is defined to be a price, reward, gift, or favor, bestowed or promised,

with a view to pervert the judgment or corrupt the conduct of a judge, witness, or other person. To "bribe" means to give a bribe to a person to pervert his judgment or corrupt his action by some gift or promise. Keeping open house for the entertainment of legislators does not constitute the giving of a bribe. *Randall v. Evening News Ass'n*, 97 Mich. 136, 143, 56 N. W. 361.

As used in the consolidation act, declaring that every officer enumerated therein who "shall accept a gift or promise with the agreement or understanding that his vote or action shall be influenced thereby" shall be guilty of a felony, has the same meaning as the phrase "receives or agrees to receive a bribe," as used in *Pen. Code*, § 72, providing that every officer who "receives or agrees to receive a bribe" shall be guilty of a felony. *People v. Jaehne*, 8 N. E. 374, 378, 103 N. Y. 182.

"Bribe," as used in a certificate of acknowledgment of a deed by a married woman that she signed such deed without any "bribe," threat, or compulsion from that of her husband, means undue influence, improper inducement, or allurement by the husband. *Belcher v. Weaver*, 46 Tex. 293, 294, 26 Am. Rep. 267.

"Bribe," as used in a statute making it criminal to "bribe" or offer to "bribe" any sheriff or other peace officer to permit any prisoner to escape, means "any gift, advancement or emolument bestowed for the purpose of inducing such sheriff or other officer to permit any prisoner in his custody to escape." *O'Brien v. State*, 6 Tex. App. 665, 667.

**BRIBERY.**

At common law, "bribery," as defined by Bishop, in 2 Bishop, New Cr. Law, § 85, is: "The voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done." The statute of Missouri (*Rev. St.* 1899, §§ 2084, 2085) has changed the common-law offense of bribery, and has divided the crime into two divisions. Under the statute there are two distinct offenses, one for giving, the other for receiving, a bribe; both are termed "bribery." *State v. Meysenburg*, 71 S. W. 229, 232, 171 Mo. 1.

Bribery is the receiving or offering any undue reward by or to any person whatever whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office and incline him to act contrary to the known rules of honesty and integrity. *Hall v. Marshall*, 80 Ky. 552, 563; *State v. Womack*, 29 Pac. 939, 941, 4 Wash. 19; *State v. Ellis*, 33 N. J. Law (4 Vroom) 102, 103, 97 Am. Dec. 707; *State v. Miles*, 36 Atl. 70, 72, 89 Me. 142. In the more extended sense the offense may be committed by any person in an official

situation who shall corruptly use the power and interest of his place for rewards or promises, and by any person who shall give or offer to take a reward for offices of a public nature. *Opinion of Scott, J., in Walsh v. People*, 65 Ill. 58, 65, 16 Am. Rep. 569; *State v. Davis* (Del.) 45 Atl. 394, 395, 2 Pennewill, 139.

The taking or offering a reward to influence official conduct is a necessary ingredient in bribery. *Watson v. State*, 29 Ark. 299, 301.

"Bribery" means any reward, benefit, or advantage, present or future, to the party influenced or intended to be influenced, or to another at his instance, or the promise of such reward, benefit, or advantage; and at common law was defined as the crime of offering any undue reward, or remuneration to any public officer, or other person intrusted with a public duty, with a view to influence his behavior in the discharge of his duties. *Curran v. Taylor*, 18 S. W. 232, 92 Ky. 537.

"Bribery is the corruptly giving, offering, or promising a thing, gift, or gratuity to any judicial officer with intent to influence his act, decision, or opinion on any matter pending before him in his official capacity. The offense of bribery may be completely committed by the corrupter whether the other party shall afterwards perform his promise or break it. The offense might be completed though it appeared that the person to whom the bribe was offered never intended to be influenced thereby, concealing such intention from the person offering the bribe, but being so far moved as to receive the money." *Commonwealth v. Murray*, 135 Mass. 530, 532.

Bribery is the crime of bestowing some gift, advantage, or emolument on an officer for the purpose of inducing the latter "to do a particular act in violation of his duty, or as an inducement to favor or in some manner to aid the person offering the same, or some other person, in a manner forbidden by law." *Hutchinson v. State*, 36 Tex. 293, 294.

"Bribery may be defined to be the giving (and perhaps offering) to another anything of value, or any valuable services, intending to influence him in the discharge of some legal duty." *Dishon v. Smith*, 10 Iowa, 212, 221.

Within Const. art. 3, § 32, providing that persons may be compelled to testify in any lawful proceeding against one charged with the offense of bribery, but such testimony shall not afterwards be used against the witness except for perjury in giving such testimony, the words "offense of bribery" include all bribery, whether bribery at common law, or under the Constitution itself, or any kind of statutory bribery, and thus includes bribery of delegates to a convention for the nomination of candidates to Congress, bribery

having been used in different statutes in its common-law sense, and also applies to other forms of bribery. *Commonwealth v. Bell*, 22 Atl. 641, 644, 145 Pa. 374.

#### **Act of two persons essential.**

To constitute "bribery," the act of at least two persons is essential, that of him who gives and him who receives. The minds of the two must concur, and it is immaterial whether the giver first makes the advances or gives the money to get some personal advantage to himself. In fact, in most, if not all, of the cases, the very object of the giving of a bribe is to obtain for the giver, or the one for whom he is acting, some supposed advantage or gain for himself. *Newman v. People*, 47 Pac. 278, 280, 23 Colo. 300.

#### **As felony.**

See "Felony."

#### **Inducing school officer to attend meeting.**

The payment or offer of a valuable consideration to a public officer to influence him in the discharge of a legal duty constitutes the offense. So that the giving of a sum of money to a commissioner of the board of education of a school district to influence him to attend a meeting in relation to a selection of books constituted bribery, so as to render the action of the board void. *Honaker v. Board of Education of Pocatalico Dist.*, 24 S. E. 544, 546, 42 W. Va. 170, 32 L. R. A. 413, 57 Am. St. Rep. 847.

#### **Influencing removal of county seat.**

The giving or offering to give facilities for the public convenience of the whole county as an inducement to remove a county seat, or the offering of public advantage for the entire community as an inducement for the members of such community to vote for such removal, does not constitute bribery. *Hall v. Marshall*, 80 Ky. 552, 563.

#### **Influencing vote for senator.**

The term "bribery" includes the act of corruptly offering money to a legislator as an inducement to vote for United States senator. *State v. Davis* (Del.) 45 Atl. 394, 395, 2 Pennewill, 139.

## **BRICK.**

"Brick," as used in an ordinance or resolution of a city council specifying that a pavement should be of "brick," justly and reasonably implies that the brick shall be paving brick of the kind ordinarily used, and hence the specification is sufficient. *Taber v. Grafmiller*, 9 N. E. 721, 722, 109 Ind. 206.

Among builders and mechanics a "brick" is understood to be eight inches in length, four inches in width, and two inches in thick-

ness, and where an ordinance simply describes the material out of which an improvement shall be made as of "brick," "paving brick," or "sewer brick," every one will understand that it means brick of the ordinary dimensions, and of the best quality for that particular structure. *Peters v. City of Chicago*, 61 N. E. 438, 192 Ill. 437.

#### **Fire brick.**

The word "brick," as used in the internal revenue acts (section 75, Act July 1, 1862, and section 94, Act June 30, 1864), does not include a fire brick. *De Casse v. Spader* (U. S.) 7 Fed. Cas. 321.

#### **BRICK BUILDING.**

Where, on account of a settling of one of the walls of a brick building, it was found necessary to replace a portion of it temporarily with wood, and while in that condition it was insured as a "brick building," such description did not amount to a warranty, but merely as identification. The term did not inaccurately describe the building, as it was a brick building in common parlance. *Gerhauser v. North British & Mercantile Ins. Co.*, 7 Nev. 174, 186.

#### **BRICK FACTORY.**

A conveyance of land with all belongings standing thereon, except the "brick factory," means the "brick factory" with the right to occupy the land on which the factory stood, and all appurtenances necessary to the use of the factory. *Allen v. Scott*, 38 Mass. (21 Pick.) 25, 28, 82 Am. Dec. 238.

#### **BRICK HOUSE.**

A devise of "the rents of a brick house" entitles the devisee to rents of not only that part of the lot on which the house stands, but to rents of the entire lot. *Common Council of City of Richmond v. State*, 5 Ind. 334, 337 (cited in *Indianapolis, D. & W. Ry. Co. v. First Nat. Bank*, 33 N. E. 679, 680, 134 Ind. 127).

#### **BRICK IN THE WALL.**

A contract for the erection of a building provided that the contractor should be paid at the rate of \$8 per thousand for "bricks in the wall." Held, that the words "bricks in the wall" was a term having a well-defined meaning, requiring that the bricks should be counted, and, if it was not practicable to ascertain the number by an actual count, they could be ascertained by estimates based on measurements after counting the number of bricks in a cubic yard of the wall; and hence the contractor was not entitled to prove a custom of brick-masons to count 21 brick for every lineal foot of a 13-inch wall, and 14 brick for ev-

ery foot in a nine-inch wall, which did not allow for mortar, and ascertain the number of bricks in the wall by measurement based on such method. *Sweeney v. Thomason*, 77 Tenn. (9 Lea) 359, 42 Am. Rep. 676.

#### **BRICK MASON.**

It is questionable whether the term "brick mason" is sufficiently comprehensive, properly and technically speaking, to embrace brick makers and brick burners. *Robinson v. Mace*, 16 Ark. 97, 102.

#### **BRICK STORE.**

A search warrant authorizing the search of a brick store for intoxicating liquors is to be construed as sufficient to authorize the search of the wooden portion of a building opening into a brick building, and forming one part of a store there kept, which is known in a neighborhood as the "brick store," to distinguish it from a frame store situated in the same neighborhood. *Lowrey v. Gridley*, 80 Conn. 450, 460.

#### **BRICKWORK.**

An agreement to do an amount of brickwork may mean simply to perform the work of laying the brick, or, in addition, to furnish the brick as well as lay them. In construing such a contract, parol evidence is admissible to show that the contractor was to furnish the materials. *Streppone v. Lennon*, 37 N. E. 638, 143 N. Y. 626.

#### **BRIDAL PRESENT.**

Where the vital issue in a case was whether or not a note was given as an inducement to procure marriage, and, if not, for what it was given, a finding by the jury, in response to a special question, that the note was given as a bridal present, meant that the note was not given in consideration of marriage. *Hatchett v. Hatchett*, 67 S. W. 163, 165, 28 Tex. Civ. App. 33.

#### **BRIDGE.**

See "County Bridges"; "Ferry Bridge"; "Private Bridge"; "Public Bridge"; "Suitable Bridge."

All bridge structures, see "All."  
Any bridge, see "Any."

A bridge is a structure of wood, iron, brick, or stone, ordinarily erected over a river, brook, or lake for the more convenient passage of persons and beasts and the transportation of baggage. *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 56, 42 Am. Dec. 716; *Madison County Com'rs v. Brown*, 89 Ind. 48, 52; *Town of Tolland v. Town of Willington*, 26 Conn. 578, 583.

A bridge is a structure over a river, creek, pond, lake, or stream of water flowing in a channel between banks more or less defined, although the channel may be occasionally dry. *Clark County Com'rs v. Brod*, 29 N. E. 430, 431, 3 Ind. App. 585.

The term "bridge" has never "represented any structure or material thing which had not a footway across the stream. Not for the last thousand years has the term 'bridge,' either in England or this country, represented any structure which had not a footway, a horseway, and a wagonway. The footway for man and beast is of the very essence of the bridge. The footway is the bridge, and the bridge is the footway. What must have been the history of civilization upon this subject? A bridge, reduced to its simplest elements, is a plank resting on the natural banks, furnishing a footpath. This footpath is the seminal principle of the bridge. All the rest is but growth and development. Take away the plank and there is nothing of a bridge. The next advance would be, perhaps, a natural rock in the middle of the stream, serving as a rude pier for the ends of the planks to rest upon. Again, take away the planks and there is nothing of the bridge. Adding the artificial pier or the artificial abutment is nothing towards a bridge. Neither are necessary. It is still the pathway that is the bridge. So when, in the progress of skill, they widen the pathway to make it a horseway, and then again widen it so that beasts may draw wagons after them, it is still the pathway that makes the bridge. So when they add handrails and balustrades, it is only to make the bridge, as we commonly say, or the pathway, more secure. And so, in all its stages of development, from the rude plank to Trajan's magnificent arches over the Danube, or to Roebbing's sublime but inverted arch over the boiling chasm of Niagara, or Stevenson's rigid tubes over the wide waters of the St. Lawrence, it is the pathway only that makes the bridge. The pathway, by whatever contrivance supported, whether supported on the natural banks and rock, or the strong towers of Niagara, whatever the kind of bridge, or by whatever name called, it is the pathway that makes the bridge, whether it be a floating or a flying bridge, whether of boats, like that of Xerxes over the Dardanelles, or of pontoons, like that with which a modern general crosses an interposing stream, whether built upon piers or upon arches, whether suspended upon ropes or sustained by its own rigidity, whether built of wood or stone, of cast iron, or wrought iron, whether a chain bridge or wire bridge, whether one arch or many, whether resting on piling or on solid piers, whether covered or not, whether with hand railings or balustrades or not—it is still the pathway that makes the bridge. Nor has any structure which in its development stopped short of this pathway for man

and beast, ever in ancient or in modern times, in any country or in any language having a synonym for the term, been called a 'bridge.' I have been able to find no royal charter, no act of Parliament, from the time the word 'bridge' first fell from the lips of our Anglo-Saxon ancestors until the present moment, no act of the Legislature in our own state, or any of our sister states, from the earliest colonial records, no decision of any court, at any time or in any country whatever, no dictionary, no encyclopedia, no work on mechanical science, no scientific work specially upon bridges, where a structure without a pathway was ever denominated a 'bridge.' The very nature and essence of the thing forbid that there should be a bridge without a pathway. The bridge, for all time and in all countries, has been but the continuation of the ordinary roadway. The only difference between a bridge and the rest of the road is that in the road the pathway rests immediately on the earth, while in the bridge it does not. Whenever the pathway of the ordinary road does not rest immediately on the earth, it is called a 'bridge,' by whatever contrivance supported, whether by water, by piers, by arches, by wires, by tubes, and whether it passes over rivers or gorges, or ravines or valleys, or canals or railroads, and we can just as well have a road without a bottom as a bridge without a footway." *Proprietors of Passaic & Hackensack River Bridges v. Hoboken Land Imp. Co.*, 13 N. J. Eq. (2 Beas.) 503, 511.

The term "bridge" is a comprehensive one, and embraces every structure in the nature of a bridge over any obstruction to the highway, whether a river, ditch, or other passage for water. Though the statute says that a bridge must be not less than 16 feet wide, we are not to understand that the road district is in no case required to construct its bridges more than that width, and when a wider bridge is constructed it must be kept in suitable repair for the whole width. *Rusch v. City of Davenport*, 6 Iowa (6 Clarke) 443, 455.

In the technical meaning of the common law, a "bridge" was a structure for passage over a river. *State v. Inhabitants of Hudson County*, 30 N. J. Law (1 Vroom) 137, 148; *Parrot v. Lawrence* (U. S.) 18 Fed. Cas. 1,234, 1,235.

In this country, generally, "bridges" and highways have not been treated as distinct and separate subjects of legislative provision. Bridges are considered to be portions of the highways which pass over them, unless the import of the term is limited by statute. It means any structure by which a highway is carried over a place. A bridge has therefore been defined to be a building constructed over a river, creek, or other stream, or over a ditch or other place, in order to facilitate the passage over the same. Whitall

r. Board of Chosen Freeholders of Gloucester County, 40 N. J. Law (11 Vroom) 303, 305.

The word "bridge" conveys the idea of a passageway by which travelers and others are enabled to pass safely over streams or other obstructions. A structure of stone which spans the width of a stream, but is wholly inaccessible at either end, whatever may be its architecture, is not a "bridge." *Home Building & Conveyance Co. v. City of Roanoke*, 20 S. E. 895, 897, 91 Va. 52, 27 L. R. A. 551; *Chosen Freeholders of Sussex County v. Strader*, 35 Am. Dec. 530, 532, 18 N. J. Law (3 Har.) 108.

Structures forming parts of railroad beds by which they span streams, chasms, ditches, etc., are "bridges" within the meaning of *McClell. Dig.* p. 358, § 4, punishing the willful and malicious burning of a bridge. *Duncan v. State*, 29 Fla. 439, 453, 10 South. 815.

The word "bridge," as used in certain provisions defining and punishing offenses relating to roads, bridges, etc., includes any state or county bridge owned by a company or person. *Code W. Va. 1899*, p. 355, c. 43, § 44.

The power to bridge a navigable stream includes the right to make repairs. *Kansas City, M. & B. R. Co. v. J. T. Wiygul & Son (Miss.)* 33 South. 965, 61 L. R. A. 578 (citing *Rhea v. Newport N. & M. V. R. Co. [U. S.]* 50 Fed. 16; *Hamilton v. Vicksburg, S. & P. R. Co.*, 7 Sup. Ct. 206, 119 U. S. 280, 30 L. Ed. 393; *Adams v. Ulmer*, 91 Me. 47, 53, 39 Atl. 347).

#### Abutment as part of.

A "bridge" includes not only the structure across a stream, but its abutments also, so finished that travelers and others may safely pass thereon. *Board of Chosen Freeholders of Sussex County v. Strader*, 18 N. J. Law (3 Har.) 108; *Township of Kearney v. Ballantine*, 23 Atl. 821, 822, 54 N. J. Law, 194.

As used in *Rev. St. 1876*, c. 239, providing for the erection of bridges by county commissioners, "bridge" means not only the structure itself and its approaches, but its abutments and bankments, railings, etc. *Driftwood Val. Turnpike Com'rs v. Bartholomew County Com'rs*, 72 Ind. 226, 237.

The term "bridge," as the term is used in connection with the use for which the bridge is erected, includes the abutments thereto. The abutment is so connected with the bridge that "we can no more exclude the abutment from our mind than the flooring or framework of the bridge." *Bardwell v. Town of Jamaica*, 15 Vt. 438, 442.

By the English law the highway 300 feet from each end of a bridge was considered as a part of the bridge for purposes of repair, and in this country the highway

at the end of a bridge may be considered as connected with the bridge. A bridge with its abutments is coextensive with the entire excavation in the highway, and is not to be limited to the exterior line of the stone walls and the plank structure resting on those walls. *Titcomb v. Fitchburg R. Co.*, 94 Mass. (12 Allen) 254, 259.

Where a report directing the erecting of a highway bridge required a wing wall to be built from each end of the west abutment to the bank, and "to be filled up with stone and gravel well compacted," the space included between the wing walls and the bank constituted a part of the bridge. *Powers v. Town of Woodstock*, 38 Vt. 44, 49.

#### Approaches as part of.

The term "bridge" includes not only the structure spanning the chasm over which it is erected, but also includes the approaches by which access to the bridge is obtained, such approaches being as much a part of and appendages to the bridge as the bridge itself. *Commonwealth v. Inhabitants of Deerfield*, 88 Mass. (6 Allen) 449, 455; *Cullen v. New York, N. H. & H. R. Co.*, 33 Atl. 910, 912, 66 Conn. 211; *Rex v. Inhabitants of West Riding of York County*, 7 East, 588, 598; *Everett v. Bailey*, 150 Pa. 152, 153, 24 Atl. 700; *Penn. Tp. v. Perry County*, 78 Pa. (28 P. F. Smith) 457, 459; *Taylor Tp. v. Lawrence County*, 17 Pa. Co. Ct. R. 396, 397; *Francis v. Franklin Tp.*, 36 Atl. 202, 203, 179 Pa. 195; *Albee v. Floyd County*, 46 Iowa, 177, 178; *Miller v. Boone County*, 63 N. W. 352, 95 Iowa, 5; *Moreland v. Mitchell County*, 40 Iowa, 394, 397, 398; *Driftwood Valley Turnpike Co. v. Bartholomew County Com'rs*, 72 Ind. 226, 236; *Shaw v. Saline Tp.*, 71 N. W. 642, 643, 113 Mich. 342; *Tinkham v. Town of Stockbridge*, 24 Atl. 761, 762, 64 Vt. 480.

The approaches to a bridge within reasonable limits—perhaps 300 feet—constitute a part of the bridge. *Rush County Com'rs v. Rushville & V. Gravel Road Co.*, 87 Ind. 502, 505.

The term "bridge" may, under certain circumstances, include the approach thereto, thus imposing on the county the duty of keeping the approach in repair. *Roby v. Appanoose County*, 18 N. W. 711, 713, 63 Iowa, 118.

The approach to a bridge is not a part thereof, as a matter of law. *Nims v. Boone County*, 66 Iowa, 272, 23 N. W. 663.

"Bridge," as used in *Act 1872*, § 1, requiring the cities of New Haven and of East Haven to build and maintain a bridge over the river which formed a boundary between them, includes only the structure, and does not include the embankment necessary for access to the structure; and whether the word "bridge" will include the approaches

to the structure proper depends on the connection in which the word is used, and is more a question of fact than of law. *Phillips v. Town of East Haven*, 44 Conn. 25, 81.

A city charter provided that the common council might from time to time order the building and widening or repair of all bridges crossing railroads in the city in such manner as in their judgment public convenience might require. Held, that the word "bridge" as used in the charter meant merely the bridge proper, to the exclusion of embankments and approaches. *City of New Haven v. New York & N. H. R. Co.*, 39 Conn. 128, 131.

In Act 1862, § 5, providing that any bridge or bridges erected under the provisions of this act shall be lawful structures, and shall be recognized as post routes, etc., "bridge" does not include an existing street or public highway over lands which formed the approaches to the bridge, but is confined to the actual structure. *Kentucky v. Louisville Bridge Co. (U. S.)* 42 Fed. 241, 244.

Pub. Acts 1889, c. 214, p. 129, authorizing the owners of all bridges across a certain river between certain counties to transfer their right, title, and interest in such bridges to the counties, and making it the latter's duty thereupon to take the management of said bridges, refers only to bridge structures, and is exclusive of approaches thereto. The approach of a bridge may sometimes be regarded as a part of the bridge itself, and sometimes as a part of the highway leading to the bridge. The circumstances of each case must control. *New Haven and Fairfield Counties v. Town of Milford*, 80 Atl. 768, 769, 64 Conn. 568.

#### **As building.**

See "Building (In Lien Laws)."

#### **Causeway, embankments, etc., as part of.**

There was a stone wall running from the abutment of a bridge to the bank on each side, and this was filled in with dirt, making an approach to the bridge. The dirt approach was on a level from wall to wall. On each side stringers were laid on the dirt, and a plank walk made on the stringers for the accommodation of passengers. One end of this walk connected with the bridge, and the other with the sidewalk on the street leading to the bridge. Such sidewalk was not a part of the bridge. *Saunders v. Township of Gun Plains*, 76 Mich. 182, 42 N. W. 1088.

An embankment contiguous to a bridge, and necessary to enable teams and wagons to cross the stream over the bridge, is a part of the bridge, and title to the main bridge carries with it title to the abutment or em-

bankment. *Daniels v. Intendant & Wardens of Town of Athens*, 55 Ga. 609, 611.

The word in a statute providing that a town should keep in repair a portion of a "bridge" connecting it with another town means the structure which crosses the stream, and its approaches, without including the causeways, in the absence of any custom, usage, or agreement which fixed the construction to be given to the word. *Inhabitants of Swansey v. Inhabitants of Somerset*, 132 Mass. 312, 314.

"The sale of a bridge, together with the houses and privileges and appurtenances thereunto belonging," passes title to the land on which the bridge rests. *Sparks v. Hess*, 15 Cal. 186 (cited in *Indianapolis, D. & W. Ry. Co. v. First Nat. Bank*, 33 N. E. 679, 680, 134 Ind. 127).

#### **Culvert for surface water.**

See, also, "Culvert."

Bridges are built over streams where they cross the public highway, to facilitate travel and to render it convenient at all times. The object of their erection is to remove either a permanent or temporary obstruction. Some streams are so deep that they cannot be crossed at any time except on a bridge, while others are not impassable except when flooded, but a bridge is indispensable to a free and safe passage over either at all seasons and in all conditions of the stream, so that chosen freeholders having authority to build bridges can construct one over a water course created by surface water. *McKinley v. Chosen Freeholders of Union County*, 29 N. J. Eq. (2 Stew.) 164.

A bridge "denotes a structure of wood, iron, brick, or stone, ordinarily erected over a river, creek, pond, or lake, or over a ravine, railroad, canal, or other obstruction in the highway, so as to make a continuous roadway and afford to travelers a convenient passageway from one bank to the other. A culvert for draining surface water is not a bridge." *Carroll County Com'rs v. Bailey*, 23 N. E. 672, 673, 122 Ind. 46.

Where a statute authorizes a county to levy a tax in aid of bridges, the bridge must not necessarily cross a water course, but a bridge over a dry ravine is within the statute. *State v. Pierce County Sup'rs*, 37 N. W. 231, 232, 71 Wis. 321.

#### **Ferry.**

As ferry, see "Ferry."

A bridge is a permanent and stationary structure extending from one side of a stream, or other obstruction in the highway, to the other. A ferry for the transportation of passengers and goods from one side of the stream to the other cannot be regarded as a

bridge. *Parrot v. Lawrence* (U. S.) 18 Fed. Cas. 1234, 1236.

The word "bridge" and the word "ferry" are equivalent terms, and therefore express power to establish a ferry necessarily implies power to establish a toll bridge. Where the power to establish a toll ferry has been granted in any city, the grant by necessary implication sanctions the power of establishing as a substitute for the toll ferry a toll bridge. *Oliff v. City of Shreveport*, 52 La. Ann. 1203, 27 South. 688.

**As highway or street.**

See "Highway"; "Street."

**As land.**

See "Land."

**Parapet.**

The fact that a structure was without parapet was not decisive of the question whether or not it was a bridge, nor was the fact that it was an arch over water flowing in a channel between banks, though nothing can be a bridge which is not built over such a flow. *Rex v. Whitney*, 3 Adol. & E. 69.

**Part not over water.**

A whole structure, consisting of 29 arches, which had from time immemorial been treated as one bridge, and the whole of it, from beginning to end, immemorably repaired by the county, and 22 out of the 29 arches been actually rebuilt by the county, conclusively show a whole structure to be one "bridge," within the meaning of laws requiring counties to repair public bridges, there being no rule of law prohibiting every part of the structure from being treated as a bridge under which water does not flow at all times. *Regina v. Inhabitants of Derbyshire*, 2 Q. B. 745.

**As public building.**

See "Public Building."

**Railroad bridge.**

The crossing of a river by a railroad track on piers, or what is known as a railroad bridge, is not a "bridge" in the ordinary sense of the term in which it is used in legislation concerning toll roads and bridges. *Lake v. Virginia & T. R. Co.*, 7 Nev. 294, 307; *Bridge Proprietors v. Hoboken Land & Improvement Co.*, 68 U. S. (1 Wall.) 116, 147, 17 L. Ed. 571; *McLeod v. Savannah, A. & G. R. Co.*, 25 Ga. 445, 456.

"Bridge," as used in *McClell. Dig.* p. 358, § 4, making the burning of a bridge a criminal offense, is "a structure usually of wood, stone, brick, or iron, erected over a river or other water course, or over a chasm, railroad, etc., to make a passageway from one bank to the other; anything supported at the ends, which serves to keep some other thing

from resting upon the object spanned, which forms a platform or staging over which something passes or is conveyed. Structures forming parts of railway beds, by which they span chasms, streams, ditches, etc." *Duncan v. State*, 10 South. 815, 817, 29 Fla. 439.

In its widest sense, the word "bridge" applies to any sort of structure extending from one point of support across an open space to another point of support, and of sufficient strength to permit the transit of some material object. In common acceptance the word was primarily applied to structures across streams for the passage of travelers in ordinary modes. Popularly the word "bridge" came to mean a structure whose primary object was the support of persons, animals, and vehicles while crossing a stream or ravine, but the word as now used includes not only highway bridges, but also structures which enter into and form a part of railroads. *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37, 56, 52 Am. Rep. 66.

**As structure.**

Under a statute authorizing the taxation of real estate structures, and stationary personal property of railroads in its own local taxing district, a bridge will be held to come within the term "structures," and not under those of "roadbed" or "main track," the taxable valuation of which was to be distributed throughout the length of the line. *Cowen v. Aldridge* (U. S.) 114 Fed. 44, 50, 51 C. C. A. 670.

**Viaduct.**

A bridge is a pathway erected over a river, canal, road, etc., in order that a passage may be made from one side to the other. It is a structure usually of wood, stone, brick, or iron, erected over a river or other water course, or over a ravine, railroad, etc., to make a continuous roadway from one bank to the other, and hence the term "bridge" may be appropriately applied to viaducts constructed by a railroad company over the streets of a city, and it is within the power of the city to require such viaducts to be built under its power for the construction of bridges. *City of Argentine v. Atchison, T. & S. F. R. Co.*, 41 Pac. 946, 947, 55 Kan. 730, 30 L. R. A. 255.

Originally the term "bridge" applied only to structures erected over such waters as fall within the description "flumen vel cursus aquæ," but modern usage has given it a more enlarged signification, and Worcester defines it as a pathway erected over a river, canal, road, etc., in order that a passage may be made from one side to the other; and it includes a passageway over a railroad. *State v. Inhabitants of Gorham*, 37 Me. 451, 461.



In the statute giving boards of chosen freeholders authority to construct such bridges as may be proper in their discretion, the term "bridge" means any structure constructed over a river, stream, ditch, or other place, in order to facilitate the passage over the same, and is not limited to a structure spanning a water course, and a structure across a cut comes within the definition. *Whitall v. Freeholders of Gloucester County*, 40 N. J. Law, 302, 303, 305.

The construction of a viaduct over a river for a railway, to be used exclusively for its purpose, is not a "bridge" within the provision of a charter giving a corporation the exclusive franchise of maintaining a bridge at a certain point. *Proprietors of Passaic & Hackensack River Bridges v. Hoboken Land & Improvement Co.*, 13 N. J. Eq. (2 Beas.) 81, 91.

It has been authoritatively adjudged that the simple term "bridge" means a viaduct in a road dedicated to common use. *Funk v. St. Paul City Ry. Co.*, 63 N. W. 1099, 1100, 61 Minn. 435, 437, 29 L. R. A. 208, 52 Am. St. Rep. 608.

**As wharf.**

See "Wharf."

#### BRIDGE PIER.

A bridge pier is really a projecting wharf, a permanent structure attached to and firmly connected with the mainland, and loading a vessel from such a place one would naturally suppose was like taking in a cargo from shore. *Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 87, 90.

#### BRIDLE ROAD.

The term "bridle road," as used in the location of a private way made out by the selectmen of a town, has no such definite nor well-settled meaning in the law or by common usage as to authorize the inference that it was intended to be confined to use by horses only, and as equivalent to "horseway," and hence does not exclude the use of the way as a driftway for cattle. *Flagg v. Flagg*, 82 Mass. (16 Gray) 175, 181.

#### BRIEF.

A brief is a detailed statement of a party's case. *Bouv. Law Dict.* Burrill defines it as an abridgment of a plaintiff's or defendant's case, prepared by his attorney for the instruction of counsel on a trial at law. *Gardner v. Stover*, 43 Ind. 356, 357.

A brief is an abbreviated statement of the pleadings, proofs, and affidavits at law, or of the bill, answer, and other pleadings in equity, with a concise narrative of the facts

of the plaintiff's case, or of the defendant's defense, for the instruction of counsel at the trial or hearing. A mere copy of a part of the assignment of errors cannot be dignified with the name of "brief." *Parker v. Hastings*, 12 Ind. 654, 656.

A brief is a mere statement of the points or propositions relied on to reverse or affirm a judgment, and of the matters in the record pertinent to sustain or rebut these points, and a reference to the authorities relied on by the parties, and should not contain either arguments, reasons, conclusions, or inferences. *Haley v. Davidson*, 48 Tex. 615, 618.

A brief should embrace nothing but the propositions, set forth clearly, distinctly, and separately, which are relied on for the reversal of the judgment, and the matters in the record pertinent to the proper determination of each proposition, and a citation of the authorities relied on to maintain the validity or correctness of the propositions thus asserted, and should not include inferences and deductions either from the authorities cited or from matters stated in the record, but such inferences and deductions should be presented to the court by an oral, written, or printed argument. *Shanks v. Carroll*, 50 Tex. 17, 20.

The word "brief" is synonymous in law with "points and authorities," being a condensed statement of the propositions of law which counsel desire to establish, indicating the reasons and authorities which sustain them. *Duncan v. Kohler*, 34 N. W. 594, 595, 37 Minn. 379.

A mere statement of the opinion of counsel is not a brief, and where such a statement is filed by appellant the court is warranted in affirming the judgment without examination of the merits. *Haberlaw v. Lake Shore & M. S. R. Co.*, 73 Ill. App. 261.

A brief cannot be treated as an assignment of errors, for a brief is an abridged statement of the party's case—a summary of the points or questions in issue. In general legal usage a brief is in no sense a pleading. It contains a statement of the facts shown by the record, and the points, authorities, and arguments relied upon to sustain the contention presented for consideration. *Lamy v. Lamy*, 12 Pac. 650, 4 N. M. (Johns.) 43.

#### BRIEF STATEMENT.

A "brief statement" is a substitute for a special plea, and, where it purports to give notice of matter which is a full answer to the plaintiff's declaration, it should contain all the substantial elements of a special plea. Precision and exactness are not necessary, but substance is essential. *Folsom v. Brawn*, 25 N. H. (5 Fost.) 114, 120.

The term "brief statement" conveys the idea of a short notice, without formal or full statements, of the matters relied upon. Such brief statement cannot prevent either party from offering testimony appropriate under the general issue. Nor can the omission of a denial, in a brief statement, of some matter alleged in the statement, control or decide the effect of testimony properly received under it. Such brief statement appears to have been considered as amounting to little more than notice of special matter to be given in evidence under it. *Trask v. Patterson*, 29 Me. 499, 502 (citing *Potter v. Titcomb*, 13 Me. 36).

#### BRIEFLY.

The statute relating to contested elections, and providing that the person wishing to contest an election might give notice in writing to the persons whose election he intends to contest, "stating the cause of such contest briefly," means stating the fact which gives rise to the right to contest, or constituting the ground of such contest. To do this briefly, certainty is required, but not technical precision of averment, and only that degree of certainty in the statement of facts as will serve to notify the adverse party of the particular cause upon which the contest is founded. *Whitney v. Blackburn*, 21 Pac. 874, 876, 17 Or. 564, 11 Am. St. Rep. 857.

Under a statute requiring a recognizance to briefly state the nature of the offense, it is held that a recognizance which gives the name of the offense is a sufficient compliance with the statute. *State v. Birchim*, 9 Nev. 95, 99, 100.

#### BRING.

"Bringing," as used in Rev. St. La. § 1010, authorizing the bringing of a person accused of crime before the district judge, includes an application of the state for a preliminary examination of the accused person, formally made to the judge. *State ex rel. Attorney General v. Brunot*, 28 South. 998, 997, 104 La. 237.

An allegation, in an affidavit for an appeal, that the appeal was not "brought for delay," should be construed as synonymous with the allegation that it was not "intended for delay," as used in the statute requiring the affidavit to allege that it was not intended for delay. *New Brunswick Steamboat & Canal Transp. Co. v. Baldwin*, 14 N. J. Law (2 J. S. Green) 440, 442.

Though a writ is issued or a suit is instituted for some purposes at the time it becomes a perfected process, and though the service of the writ is sometimes the com-

mencement of the suit, the mere making a writ or petition, without summons or citation, and signed by no magistrate or judicial authority, will not constitute the commencement of the suit or the "bringing of the petition or bill." Consequently, where petition for divorce was made and dated prior to the expiration of two years' required residence of the plaintiff, but the summons and order of notice by publication were not signed by the clerk and issued until after the expiration of the two years, the petition or bill could not be said to have been prematurely brought within the meaning of the statute. *Blain v. Blain*, 45 Vt. 533, 543.

#### In reference to actions.

To "bring an action" has a settled customary legal, as well as general, meaning, and refers to the initiation of legal proceedings in a suit. *Hames v. Judd*, 18 Civ. Proc. R. 324, 325, 9 N. Y. Supp. 743.

A suit is "brought" at the time it is commenced. *Rawle v. Phelps* (U. S.) 20 Fed. Cas. 820, 821.

A suit is "brought" when in law it is commenced, and there is no signification in the fact that in the legislation of Congress on the subject of limitations the word "commenced" is sometimes used, and at other times the word "brought." In this connection the two words evidently mean the same thing, and are used interchangeably. *Goldenberg v. Murphy*, 2 Sup. Ct. 388, 389, 108 U. S. 162, 27 L. Ed. 686; *Kaiser v. Illinois Cent. R. Co.* (U. S.) 6 Fed. 1, 4; *United States v. American Lumber Co.* (U. S.) 80 Fed. 309, 315.

"Brought," used in connection with a suit brought, means instituted, commenced. *Berger v. Douglas County Com'rs* (U. S.) 5 Fed. 23, 26.

Act March 3, 1875, § 5, authorizes the removal to the federal Circuit Court of a suit "brought" by a state in its own courts where the suit arises under the Constitution and laws of the United States. Held, that a suit is not "brought" within such section until the defendant has submitted himself to the jurisdiction of the court, and hence, where the case stood on the summons and an alleged service, the complaint, the special appearance of the company for the purposes of its motion to vacate the services, and a petition for removal, there was no suit brought within the meaning of the statute, it not being certain that the defendant was legally within the jurisdiction of the court. *Germania Life Ins. Co. v. Wisconsin*, 7 Sup. Ct. 260, 262, 119 U. S. 473, 30 L. Ed. 461.

The word "brought," as used in a statute relating to actions brought for the support of a pauper, is not inappropriate to designate

an action which had been commenced at any time before the trial, and it does not necessarily designate one commenced after the action or trial was commenced. *Inhabitants of Bangor v. Inhabitants of Brunswick*, 33 Me. 352, 355.

"Brought," when used in the term "action brought" or "writ brought," means "obtained" or "gotten," and signifies the same as "sued out," because the plaintiffs made suit or secta to the King, to the Chancellor, or to the clerk, as in different ages the practice altered and obtained; not a mere blank form as we use, but a writ filled up with the dates, terms, etc., ready for service, like only the writs we now obtain from the clerks, as writs of execution filled up, and hence, when thus obtained, they are properly said to be "sued out." By the procurement of a blank form from the clerk or an attorney, an action is not "brought," such form not being a writ, though by procurement of such a form, suitably filled up and intended to be served, the writ or action may be called "commenced," "sued out," or, in the language of statutes, "brought." *Society for Propagating the Gospel v. Whitcomb*, 2 N. H. 227, 229.

A suit may be "prosecuted" after it has been begun, but the "bringing of a suit" is its initiation. The one phrase applies to the further conduct of a suit, and the other to the beginning of a new suit. *Buecker v. Carr*, 47 Atl. 34, 36, 60 N. J. Eq. 300.

Code Civ. Proc. § 3268, relating to security for costs, provides that defendant may require such security "in an action brought in a court of record." Held, that the word "brought," as used in this section, signifies "begun," or "commenced." The phrase "to bring an action" has a settled customary legal meaning, as well as a general meaning, and refers to the initiation of legal proceedings. The fact that the word "commenced" is used in the same section as applied to the beginning of an action does not conflict with this view, since the two expressions, "brought" and "commenced," mean the same thing. The word "brought" has never been used as synonymous with "removed" in cases of removal of actions from one court to another, and therefore the removal of an action cannot be held to be its commencement within such section. *Hames v. Judd*, 9 N. Y. Supp. 743, 744, note.

The bringing of a suit may be by retaining the attorney for the purpose, either alone or in conjunction with others, or recognizing a retainer made by an assumed agent, or actually engaging to defray the expenses of a nominal plaintiff retaining an attorney in his own name; he alone being liable to the attorney in the first instance. *Whitney v. Cooper* (N. Y.) 1 Hill, 629, 633.

An action is "brought," within the statute authorizing entry of a rule of reference after suit brought, after the defendant makes his appearance, which is not until bail filed. *Hertzog v. Ellis*, 3 Bin. 209, 212.

#### In reference to criminal proceedings.

Criminal proceedings cannot be said to be "brought" until a formal charge is openly made against accused, either by indictment presented or information filed in court, or, at least, by complaint before a magistrate. The mere submission of a bill of indictment to the grand jury and the examination of witnesses do not constitute the bringing of a charge. *Post v. United States*, 16 Sup. Ct. 611, 613, 161 U. S. 583, 40 L. Ed. 816.

#### In reference to certiorari or writ of error.

A writ of certiorari is not "brought," within the meaning of Code 1882, § 2920, providing that such a writ must be brought within three months after judgment, until it is filed in the clerk's office. *Hilt v. Young*, 43 S. E. 76, 77, 116 Ga. 708 (citing *Barrett v. Devine*, 60 Ga. 632).

A writ of error is not "brought," in the legal meaning of the term, until it is filed in the court which rendered the judgment. *Stevens v. Clark* (U. S.) 62 Fed. 321, 324, 10 C. C. A. 379 (citing *Brooks v. Norris*, 52 U. S. [11 How.] 204, 13 L. Ed. 665); *Credit Co. v. Arkansas Cent. Ry. Co.*, 9 Sup. Ct. 107, 123 U. S. 258, 32 L. Ed. 448; *Scarborough v. Pargoud*, 2 Sup. Ct. 877, 878, 108 U. S. 567, 27 L. Ed. 824.

"Brought," as applied to writs of error, means the issuance of the writ by proper authority, and the filing of the same in the proper court, and is used synonymously in the statutes of the United States, in the decisions of the courts, and in the text-books with "sued out." *City of Waxahachie v. Color* (U. S.) 92 Fed. 284, 286, 34 O. C. A. 349.

#### BRING IN.

"Bring in," as used in a statute prohibiting any master of a vessel from bringing in any negro, mulatto, or any other person of color into the country, seems to indicate, and is most commonly employed as indicating, the action of a person on anything, animate or inanimate, which is itself passive. It is true that a vessel coming into port is the vehicle which brings in her crew, but we do not in common language say that the mariners were brought in by a particular person. We rather say that they brought in the vessel, and the words to "bring in" or "import" are particularly applicable to persons not concerned in the navigation of the vessel, so that the statute does not apply to colored seamen employed in navigating such

ship or vessel. *Wilson v. United States* (U. S.) 30 Fed. Cas. 239, 244.

#### As import or enter.

When the subject is persons, "importing" and "bringing in" are synonymous terms. No distinction can be made in the law between the "importation" of persons and "bringing in" of persons. *United States v. Pagliano* (U. S.) 53 Fed. 1001, 1003.

Rev. St. § 2164, Act July 5, 1884, c. 220, § 11, 23 Stat. 117 [U. S. Comp. St. 1901, p. 1310], making it a crime to "bring into the United States" any Chinese person not lawfully entitled to enter, does not refer to persons already within the United States, or to persons who arrive on a vessel from a port or place out of the United States. *United States v. Wilson* (U. S.) 60 Fed. 890, 894.

The revenue laws use the words "to import," "to bring in," "to introduce," as synonymous. Thus the act of August 30, 1842, § 19 (5 Stat. 565), "if any person shall knowingly and willfully with intent to defraud the revenue smuggle or clandestinely introduce into the United States," the act of July 18, 1886, § 4 (14 Stat. 179), "if any person shall fraudulently or knowingly import or bring into the United States," etc.; and there are many others. Under these statutes smuggling or bringing in or introducing goods has been held by both the Circuit and District Courts for a long course of years to be proved by evidence of a secret landing of goods without paying or securing the duties. *United States v. Jordan* (U. S.) 26 Fed. Cas. 661, 662.

"Brought in," as used in a verdict in an action for forfeitures under the customs revenue laws that the goods were "brought in with intent to defraud the United States," is equivalent to an allegation that the acts alleged in the information were done with fraudulent intent, as required to be specially found by 18 Stat. 189, as "brought in" may be fairly construed as having reference to entering or attempting to enter by the means specified. *Origet v. United States*, 8 Sup. Ct. 848, 849, 125 U. S. 240, 31 L. Ed. 743.

#### As present.

"Brought in," as used in a statute giving the orphans' court the power to decree that all creditors of an estate of a deceased person who have not brought in their claims shall be barred from any action thereon against an executor and administrator, except, etc., means not presented in writing, with the formalities and under the oath required by statute to make the bringing in of a claim effectual. *Newbold v. Fenimore*, 21 Atl. 939, 940, 53 N. J. Law (24 Vroom) 307.

#### BRING OUT.

"Bringing out a boat" is a common phrase among boatmen. It is usually applied to the building of a new boat. It may also be understood as applying to a boat newly repaired, or newly brought out when merely laid up for the sea. *Madison County Coal Co. v. The Colona*, 36 Mo. 446, 449.

#### BRING UP.

##### Child.

A will directing that the expenses of educating a legatee and bringing him up to maturity shall be paid out of that part of the testator's estate given to the legatee does not show that the testator intends that the legatee shall only be clothed and fed, "but doubtless intended that his bringing up should include an education according to the inclination and capacities and suited to his situation and circumstances in life." *Condict's Ex'rs v. King*, 13 N. J. Eq. (2 Beasl.) 875, 380.

Within the meaning of a will providing that a legatee should educate and bring up the testator's daughter, the expression "bring up" requires personal, parental care, as well as furnishing subsistence to the daughter. *Merrill v. Emery*, 27 Mass. (10 Pick.) 507.

##### Transcript of record.

A certificate of the clerk of the Supreme Court that the transcript of a record has not been "brought up" within the time fixed is equivalent to a certificate that the transcript has not been filed within that time. *Champomier v. Washington*, 2 La. Ann. 1013.

#### BRINGING MONEY INTO COURT.

"Bringing money into court," says Bouvier, is the act of depositing money in the hands of the public officers of the court for the purpose of satisfying a debt or duty, and, as a clerk of the court is a proper custodian of moneys paid into court, his reception of money under an order to referees to sell certain land as produced by law, and bring the proceeds into court, is done in his official capacity. *Dirks v. Juel*, 80 N. W. 1045, 1046, 59 Neb. 353.

#### BRISK WIND.

The words "brisk wind" include a wind blowing at the rate of 22 miles an hour. *The Snap* (U. S.) 24 Fed. 292, 293.

#### BRISTLINGS.

"Bristlings" are the young of the herring, a family distinct from that to which the

sardines belong. *In re Wieland* (U. S.) 98 Fed. 99, 100.

## BRITISH.

Act March 3, 1813, which provides that it shall be lawful for any person or persons to sink, burn, or destroy any "British armed vessel of war" during the present war, was construed to include vessels which belong to the British navy, and used for hostile purposes, being armed with muskets, pikes, cutlass, etc. *Parlin v. United States*, 1 Ct. Cl. 174, 176.

## BRITISH BRIG.

The description of a vessel in a marine policy as a "British brig" does not imply that the vessel is a British registered vessel, but simply that she is owned by a British subject. *Mackie v. Pleasants*, 2 Bin. 363, 372.

## BRITISH SEAMEN.

The expression "British seamen" in Merchants Shipping Act, § 267, may properly mean one who, whatever his nationality, is serving on board a British ship, for whenever a ship bears a nation's flag it is to be treated as a part of the territory of that nation, a ship being regarded as a kind of a floating island, and, though the ship might float into the territory of another nation, that would not prevent the country whose flag she bore from legislating in regard to the conduct of sailors on board her, so as to give the courts of such country jurisdiction of crimes committed on board the ship, though within the jurisdiction of a foreign port; and therefore, though a defendant charged with crime be an American citizen, yet, where he embarks by his own consent on board a British ship as a part of the crew, he must be considered as being within British jurisdiction. *Ross v. McIntyre*, 11 Sup. Ct. 897, 904, 905, 140 U. S. 453, 35 L. Ed. 581.

## BRITISH WEIGHT.

The words "British weight," in a charter party, if it appears from the evidence to have two meanings, one referring to gross weight and the other net weight, creates a latent ambiguity, and parol evidence is admissible to show the meaning of the term in commercial usage. *Bulow v. Goddard* (S. C.) 1 Nott & McC. 45, 51, 9 Am. Dec. 663.

## BROAD-TIRED WAGON.

"Broad-tired wagon," as used in St. 1889 (Acts 1889, p. 378; Burns' Ann. St. 1894, § 2047; Horner's Ann. St. 1897, § 6600), making it an offense to haul over turnpikes and gravel roads in specified weather loads of more than 2,500 pounds in a "broad-tired

wagon," is not a technical phrase having a peculiar and appropriate meaning in law, but is to be taken in its plain, or ordinary and usual, sense, which means a wagon having wheels with tires which are broad. If tires of particular widths be compared, it is easy to say which is comparatively narrow and which is comparatively broad, but without any prescribed standard it is impossible to say, as a matter of law, that a tire two inches wide is certainly either a narrow tire or a broad tire. The meanings of the separate words in the phrase "narrow-tired wagon" is plain, but the word "broad" describes not certain, but uncertain, comparative widths, and, no standard of comparison being provided by the law, it renders the phrase in which it occurs uncertain and indefinite. A particular tire may be broad or narrow according to the width of another tire or other tires of different widths with which for the occasion it is being compared. *Cook v. State*, 59 N. E. 489, 491, 26 Ind. App. 278.

## BROKEN.

See "Break."

Where, on a trial of a prosecution for burglary, the court charged "if the brick walls of the building were in the nighttime broken and any entry made into the walls so broken," the language should be construed as meaning "if the walls were broken through, and the entry made into the walls so broken." *Commonwealth v. Glover*, 111 Mass. 395, 403.

## BROKEN DOWN.

The term "broken down in his loins," when used in reference to a horse, means that the horse is so feeble in the rear part of his back that his usefulness and value are greatly impaired. In such case he can neither carry nor draw such burdens as sound horses ordinarily do, and the fact that he is in such a condition is a breach of a warranty of soundness. *State v. Sherrill*, 95 N. C. 663, 665.

## BROKEN GRANITE.

The words "broken granite," as used in a specification for public improvements, would include only small pieces or fragments, and the meaning intended is also to be gathered from the context. These small pieces or fragments of granite are to be used in the making of concrete, and the making and use of concrete for pavements have become so common that the public generally are familiar with them, and the apparent meaning of an ordinance providing that the broken granite shall pass through rings of a certain size is that such broken pieces shall not be larger than a certain size. *Gage v. City of Chicago*, 66 N. E. 374, 376, 201 Ill. 93.

## BROKER.

See "Bill and Note Broker"; "Commercial Agent or Broker"; "Exchange Broker"; "Insurance Broker"; "Investment Broker"; "Local Commercial Broker"; "Merchandise Broker"; "Note Broker"; "Pawnbroker"; "Pine Land Broker"; "Produce Broker"; "Real Estate Broker"; "Ship Brokers"; "Stockbroker."

As acting in fiduciary capacity, see "Fiduciary Capacity or Character."

As agent, see "Agent."

A broker is an agent employed to make bargains and contracts between other persons in matters of trade and commerce or navigation, for a compensation commonly called "brokerage." Story on Agency; Higgins v. Morre, 34 N. Y. 417, 418; Wyckoff v. Bissell, 48 N. Y. Supp. 1018, 1019, 24 App. Div. 66; White v. Brownell (N. Y.) 3 Abb. Prac. (N. S.) 318, 326; Condict v. Cowdrey, 5 N. Y. Supp. 187, 188, 57 N. Y. Super. Ct. (25 Jones & S.) 66; State v. Duncan, 84 Tenn. (16 Lea) 75, 78; Spears v. Loague, 46 Tenn. (6 Cold.) 420, 422; Parker v. Walker, 8 S. W. 391, 392, 86 Tenn. (2 Pickle) 566; Hedden v. Shepherd, 29 N. J. Law (5 Dutch.) 334, 340; Milliken v. Woodward, 45 Atl. 796, 798, 64 N. J. Law, 444; Stout v. Humphrey, 55 Atl. 281, 282, 69 N. J. Law, 436; Henderson v. State, 50 Ind. 234, 339; Haas v. Ruston, 42 N. E. 298, 301, 14 Ind. App. 8, 56 Am. St. Rep. 288; City of Portland v. O'Neill, 1 Or. 218, 219; Baker v. State, 12 N. W. 12, 17, 54 Wis. 368; Edgerton v. Michels, 26 N. W. 748, 750, 66 Wis. 124; United States v. Simons (U. S.) 27 Fed. Cas. 1080, 1081; Northrup v. Shook (U. S.) 18 Fed. Cas. 375, 379; Richmond v. Blake, 10 Sup. Ct. 204, 205, 132 U. S. 592, 33 L. Ed. 481; Warren v. Shook, 91 U. S. 704, 710, 23 L. Ed. 421; Braun v. City of Chicago, 110 Ill. 186, 194; Saladin v. Mitchell, 45 Ill. 79, 83; Douthart v. Congdon, 64 N. E. 348, 197 Ill. 349, 90 Am. St. Rep. 167; Clark v. Cumming, 77 Ga. 64, 67, 4 Am. St. Rep. 72; Graham v. Duckwall, 71 Ky. (8 Bush) 12, 16; Adkins v. City of Richmond, 34 S. E. 967, 968, 98 Va. 91, 47 L. R. A. 583, 81 Am. St. Rep. 705; Hamberger v. Marcus, 27 Atl. 681, 682, 157 Pa. 133, 87 Am. St. Rep. 719; City of Little Rock v. Barton, 33 Ark. 486, 444; Hinckley v. Arey, 27 Me. (14 Shep.) 362, 364; Pott v. Turner, 6 Bing. 702, 706. He is a mere negotiator between other parties, and never acts in his own name, but in the name of those who employ him. Henderson v. State, 50 Ind. 234, 239; Hedden v. Shepherd, 29 N. J. Law (5 Dutch.) 334, 340; Saladin v. Mitchell, 45 Ill. 79, 83; Parker v. Walker, 8 S. W. 391, 392, 86 Tenn. (1 Pickle) 566; Haas v. Rushton, 42 N. E. 298, 301, 14 Ind. App. 8, 56 Am. St. Rep. 288; Southack v. Lane, 52 N. Y. Supp. 687, 688, 23 Misc. Rep. 515. He must exercise such customary skill as is requisite to

effectuate the business which he has in hand. Milliken v. Woodward, 45 Atl. 796, 798, 64 N. J. Law, 444. The duty of a broker consists in bringing the minds of the vendor and vendee to an agreement. He must produce a purchaser ready and willing to enter into a contract on the employer's terms. Condict v. Cowdrey, 5 N. Y. Supp. 187, 188, 57 N. Y. Super. Ct. (25 Jones & S.) 66. He is a person whose business it is to bring the buyer and seller together. He may or may not be concerned in negotiating the bargain, and he therefore becomes entitled to his compensation when he procures for his principal a party with whom the principal is satisfied, and who actually contracts for the purchase or sale of the property at a price acceptable to the owner. Keys v. Johnson, 68 Pa. (18 P. F. Smith) 42.

Lord Chief Baron Comy, N. S., of the Court of Exchequer, in his Digest of the Laws of England, defines "brokers" to be persons employed among merchants to make contracts between them and fix the exchange for payment of wares sold or bought. See Comy's Dig. 78. Burrill, in his Law Dictionary, describes a "broker" as one who makes a bargain for another, and receives a commission for so doing. An agent employed among merchants and others to make contracts between them in matters of trade. Tindale, C. J., Ring, 702, 706. An agent employed among merchants and others to make contracts between them for a commission, commonly called "brokerage." A broker is not generally authorized to act or contract in his own name, nor is he intrusted with the possession of what he is employed to sell, or empowered to take possession of what he is employed to purchase, but he acts merely as a middleman or negotiator between the parties, and in those respects he is distinguished from a "factor." The earliest definition of this term "broker" confined the employment of brokers to dealings between merchant and merchant. Thus, by the statute, 1, § 1, c. 21, "brokers" are described to be persons employed by merchants English, and merchant strangers, in contriving, making, and concluding bargains and contracts between them concerning their wares and merchandise and moneys to be taken up by exchange between such merchants and merchant tradesmen. Russell on Fact. These definitions, however appropriate at a period when merchandise and exchange brokers appear to have constituted the only classes of this description of agents, have been properly regarded by modern writers as too limited to include the various classes of brokers recognized at the present day. Bouvier says that brokers are those who are engaged for others in the negotiations of contracts relative to property, with the custody of which they have no concern. Webster defines a "broker" as: "(1) One who transacts business for another; an agent. (2) An agent

employed to effect bargains and contracts, as a middleman or negotiator, between other persons for a compensation commonly called 'brokerage.' He takes no possession, as broker, of the subject-matter of the negotiation. He generally contracts in the name of those who employ him, and not in his own." *City of Little Rock v. Barton*, 33 Ark. 436, 437, 444.

A "broker" is defined as follows: "Every person, firm, etc., excepting such as hold a license as a banker, whose business it is as a broker to negotiate purchases or sales of stock, exchange, etc., or other securities." Act 1864, § 79, subd. 9, 13 Stat. 223, amended by Act March 3, 1865, 13 Stat. 469. *United States v. Fisk* (U. S.) 25 Fed. Cas. 1089, 1090.

The words "bank," "banker," "broker," "stockjobber," when used in the revenue act, shall be construed to include whoever has money employed in the business of dealing in coin, notes, or bills of exchange, or in the business of dealing in or buying or selling any kinds of bills of exchange, checks, drafts, bank notes, promissory notes, bonds, or other writing obligatory of stock of any kind or description whatsoever, or receiving money on deposit. *Hurd's Rev. St. Ill.* 1901, p. 1493, c. 120, § 292, subd. 3.

#### As agent of both parties.

Any party buying or selling coupon bonds shall be deemed a "broker" within the meaning of the license laws of this state. *Code Va.* 1887, § 402.

A broker is primarily the agent of the person who first employs him. *Illingworth v. De Mott*, 45 Atl. 272, 279, 59 N. J. Eq. 8.

Every person, firm, or company whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank notes, promissory notes, or other securities for themselves or others, shall be regarded as a "broker" within the meaning of the war revenue act of 1898. *U. S. Comp. St.* 1901, p. 2287.

It is only when making sales and purchases in his business, his trade, his profession, his means of getting his living, or of making his fortune, that he becomes a "broker" within the meaning of the statute requiring brokers to pay certain duties on sales made by them; nor is it believed that a sale, by one doing a banking business, of a security received by him for repayment of a legitimate loan, would make him a broker. This would not be deemed an act of brokerage, either under the statute or on general principles of law. *Warren v. Shook*, 91 U. S. 704, 710, 23 L. Ed. 421.

One who does not make bargains for others, but buys and sells on his own account, or with his own funds, or on the account and with the funds of his principals,

is not a broker. The city charter of Portland, which authorizes the mayor and common council to license, tax, and regulate brokers, does not embrace the power to regulate or license the sale of bills of exchange, when the business is transacted by persons on their own account and with their own funds. *City of Portland v. O'Neill*, 1 Or. 218, 219.

A broker is one who is engaged for others in the negotiation of contracts relative to property with the custody of which they have no concern. It is essential that a broker act for some other party, and a person transacting business for himself cannot be a broker. *Gast v. Buckley* (Ky.) 64 S. W. 632, 633.

Brokers are of many kinds, the most important being enumerated as follows: Exchange brokers, insurance brokers, note brokers, real estate brokers, ship brokers, stock-brokers, and merchandise brokers. *Ayres v. Thomas*, 47 Pac. 1013, 116 Cal. 140.

The business of a broker is to serve as a connecting link between the party who is to be insured and the party who is to do the insuring—to bring about "the meeting of their minds" which is necessary to the consummation of the contract. In the discharge of his business he is the representative of both parties to a certain extent. Domat thus defines his functions: "The engagement of a broker is like that of a proxy, a factor, or other agent, but with this difference: that, the broker being employed by persons who have opposite interests to manage, he is, as it were, agent of both to negotiate the commerce and affair in which he concerns himself. Thus his engagement is twofold, and consists in being faithful to all the parties in the execution of what every one of them intrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner as to put those who employ him in a condition to treat together personally." 1 Pom. (Strahan's Translation) bk. 1 tit. 17, § 1. Story says this statement of the functions of a broker is "a full and exact description according to the sense of our law." Story, (9th Ed.) p. 31, note 3. *Hooper v. People of State of California*, 15 Sup. Ct. 207, 211, 155 U. S. 648, 39 L. Ed. 297.

A broker is, strictly, a middleman or intermediate negotiator between the parties. He is primarily deemed merely the agent of the parties by whom he is employed, and he becomes the agent of the other party only when the bargain or contract is definitely settled as to its terms between the principal. As a general proposition, the same individual cannot be agent for both parties, but persons having undertaken certain duties of a particular character, are treated as agents of both parties; such are brokers. *Hinckley v. Arey*, 27 Me. (14 Shep.) 362, 364.

The broker or intermediary is he who is employed to negotiate a matter between two parties, and who for that reason is considered as the mandatory of both. *Civ. Code La. 1900, art. 3016.*

#### **Auctioneer distinguished.**

A broker is a person who makes a private bargain between other persons, but not a public one. He is described as a person who makes bargains between merchant and merchant. He also both buys and sells. A broker is essentially different from an auctioneer, who only sells. *Wilkes v. Ellis, 2 H. Bl. 555.*

#### **Authority.**

A broker "is a special agent, and derives his power and authority to bind his principal from the instructions given him by his principal. When definite instructions are given by the principal to the broker to sell goods for him at a certain specified price for a certain time and day only, this will not authorize the broker to contract and sell the same kind of goods at a different and subsequent time for the same price. His power is limited by and ceases with his instructions, and this is so even though it had been usual, in the course of dealings between the broker and his principal, for the broker to continue to sell at the price quoted last by the principal." *Clark v. Cumming, 77 Ga. 64, 67, 4 Am. St. Rep. 72.*

The authorities denominate a "broker" as a middleman, the go-between to perfect an understanding between the contracting parties, and he is not necessarily the agent of either party. When employed by a party to do a particular thing, he is primarily that party's agent, and ordinarily the party with whom he deals must take notice of the authority given him by his principal. *Jackson v. Butler, 51 S. W. 1095, 1096, 21 Tex. Civ. App. 379.*

In *Morris v. Ruddy, 20 N. J. Eq. (5 C. E. Green) 236*, it is said that brokers are persons employed to effect sales. Their general business is only to bring the parties together. But with regard to merchandise it is held that they have the power to bind the principal by their signature to written memorandums of sale, known as "bought and sold notes," in sales within the statute of frauds. *Keim v. Lindley (N. J.) 30 Atl. 1063, 1070.*

#### **Banker distinguished.**

See "Banker."

#### **Clerk distinguished.**

A broker is one who is employed to negotiate a matter between two parties, and who for that reason is the mandatory of both. *Rev. Civ. Code, art. 3016.* The leading and

essential difference between a "clerk" and a "broker" is that the former hires his services exclusively to one person, while the latter is employed to make bargains and contracts between other persons in matters of trade, commerce, and navigation. For the services of the former there is a fixed stated salary, while for those of the latter a compensation commonly styled "brokerage" is allowed. Thus, under an agreement that a person shall sell all the sugar and molasses consigned to a third person and no other, and shall receive for his services a stated salary, such person was a clerk, and not a broker. *Tete v. Lanaux, 14 South. 241, 243, 45 La. Ann. 1343.*

#### **Commission merchant distinguished.**

A commission merchant is one who buys or sells goods or merchandise, consigned or delivered to him by his principal, for a compensation, commonly called "commission." He differs from a broker in that he may buy or sell in his own name, and very frequently does, without disclosing the name of his principal; while the broker has no right to buy or sell except in the name of his principal. The commission merchant is intrusted with the management, control, or disposition of the goods to be bought or sold, and he has a special property in them, and a lien upon them for his share, advance, or commission. The broker is he who negotiates the purchase or sale for the principal. He has no control of the property. *Edwards v. Hoefflinghoff (U. S.) 38 Fed. 635, 641.*

#### **Factor distinguished.**

A broker is an agent of his employer, and differs from a factor in that he does not ordinarily have the possession of the property which he is employed to sell, and his contracts are always made in the name of his employer. *DeLafield v. Smith, 78 N. W. 170, 173, 101 Wis. 664, 70 Am. St. Rep. 938.*

A broker differs from a factor in some very important particulars, as he is not intrusted with the possession, management, control, and disposal of the goods to be bought or sold, and consequently has no special property therein, as has a factor. *Graham v. Duckwall, 71 Ky. (8 Bush) 12, 16; Price v. Wisconsin Marine Fire Ins. Co., 43 Wis. 267, 269, 276, 277; Slack v. Tucker, 90 U. S. (23 Wall.) 321, 23 L. Ed. 143; American Sugar Refining Co. v. McGhee, 21 S. E. 383, 386, 96 Ga. 27; Graham v. Duckwall, 71 Ky. (8 Bush.) 12; Butler v. Dorman, 68 Mo. 298, 300, 30 Am. Rep. 795.*

A factor is one who sells the property of others when he has such property in his possession, while a broker negotiates contracts relative to property, and makes sales of the same, when he has no custody of the property. *Braun v. City of Chicago, 110 Ill. 186, 194.*



A broker is one who negotiates contracts relative to property, and makes sales of the same, when he has no custody of the property; while a factor sells the property of others when he has such property in his possession. *Braun v. City of Chicago*, 110 Ill. 186, 194; *American Sugar Refining Co. v. McGhee*, 21 S. E. 383, 386, 96 Ga. 27.

Mr. Justice Bradley in *Slack v. Tucker*, 90 U. S. (23 Wall.) 821, 330, 23 L. Ed. 143, says the difference between a factor or commission merchant and a broker is stated by all the books to be this: A factor may buy and sell in his own name, and he has the goods in his possession, where a broker, as such, cannot ordinarily buy or sell in his own name, and has no possession of the goods sold. Thus in *Story, Ag. § 28*, it is said the true definition of a "broker" seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade; that he is strictly, therefore, a middleman or intermediate negotiator between the parties. The authority of a merchandise broker, under his general powers as such, is quite limited, and he has no authority to rescind a contract of sale received from the purchaser of goods the bill of lading indorsed by him and thus obtain possession of the goods from the carrier, nor does he have power to direct to whom the goods shall be delivered. *American Sugar Refining Co. v. McGhee*, 21 S. E. 383, 386, 96 Ga. 27.

#### Insurance agent.

The term "broker," as used in General Incorporation Act, art. 5, § 1, par. 91, authorizing municipal corporations organized under the act to license brokers, does not include insurance agents representing corporations, and hence the statute does not authorize the licensing of such agents. "The term 'broker' or 'insurance broker' is generally understood to mean a person who owes no duty or allegiance to any particular corporation," while an insurance agent representing a corporation owes such duty and allegiance to the corporation so represented. *McKinney v. City of Alton*, 41 Ill. App. 508, 512.

#### Pawnbroker.

A pawnbroker is a "broker" within § Geo. II, c. 30, § 89. *Rawlinson v. Pearson*, 5 Barn. & Adol. 124.

The word "broker" is derived from the Anglo-Saxon word signifying to use, and primarily means an agent. It means in law a middleman or negotiator between other persons for a compensation, called "brokerage," who takes no possession of the subject-matter of negotiations, and usually contracts in the name of those employing him, and not in his own name; and sometimes it means in ordinary speech a dealer in money, notes, bills of exchange, etc., but will not in-

clude a pawnbroker. *Schauf v. City of Charlotte*, 24 S. E. 526, 527, 118 N. C. 733.

#### Possession of goods.

A broker is an intermediate agent negotiating between buyer and seller, and as broker he is not entitled to the possession of the property which is the subject of sale or purchase, nor does he receive or pay the price unless he is authorized so to do. *Morgan v. Jaudon*, 40 How. Prac. 366, 378; *City of Little Rock v. Barton*, 33 Ark. 436, 437, 444; *Gast v. Buckley*, 64 S. W. 632, 633; *Northrup v. Shook* (U. S.) 18 Fed. Cas. 375, 379; *Braun v. City of Chicago*, 110 Ill. 186, 194.

When a broker is employed to buy or sell goods he is not intrusted with the custody or possession of them, and is not authorized to buy or sell them in his own name. He is a middleman, and for some purpose is treated as agent for both parties. When he is employed to buy and sell goods it is customary for him to give the buyer a note of the sale called a "solid note," and to the seller a like note called a "bought note," in his own name as agent of each party, whereby they are respectively bound if he has not exceeded his authority. *Saladin v. Mitchell*, 45 Ill. 79, 83.

A broker is not authorized to buy or sell property in his own name, but in the name of his principal. He is not intrusted with the custody or possession of the property bought or sold, and consequently has no special lien thereon. *Edgerton v. Michels*, 26 N. W. 748, 750, 66 Wis. 124.

#### Stockbroker.

By Ordinances of Chicago, § 214, a "broker" is one who, for commission or other compensation, is engaged in selling or negotiating the sale of goods, wares, merchandise, produce, or grain belonging to others, and thus includes brokers who deal in stocks, bonds, and securities, sometimes known as "stockbrokers." *Banta v. City of Chicago*, 50 N. E. 233, 237, 172 Ill. 204, 40 L. R. A. 611.

The earlier authorities defined "broker" as one employed by merchants English and merchants stranger in contriving and concluding bargains and contracts between them concerning their wares and merchandise and the moneys to be taken up by exchange between such merchants and traders. *Com. Dig. "Merchant," "C."* Gradually, however, the word came to be employed as embracing those dealing with the affairs of others than merchants domestic and merchants foreign, and eventually to include the handling of indebtedness and capital stock of corporations. This later became known as "stock brokerage." Gradually, also, the rule that a broker could not buy or sell in his own name became subject to exceptions. *Edw.*

Brok. & F. 1870, § 109, says: "A broker is at liberty to buy in his own name, if such be the custom among brokers." Mr. Story, in his work on Agency (section 109), says: "There are exceptions by the usages of trade to the rule that a broker cannot make a contract in his own name." Russ. Fact. p. 52, says: "Brokers may contract in their own name if the usual course of dealing warrants them to do so." The same authors also recognize exceptions to the rule that a broker could pay the purchase price of goods bought or receive the price of those sold. A stockbroker is defined as a broker "who, for a commission, attends to the purchase and sale of stocks or shares, and of government or other security, in behalf and for the account of clients." His functions are recognized as broader than those of the ordinary broker, since he is intrusted with the possession of the property concerning which he acts, and may even take and transfer them without the name of his principal appearing in the transaction. Under this statement of the law a definition of a "broker" in an ordinance as one who, for a commission or other compensation, is engaged in selling or negotiating the sale of goods, wares and merchandise, produce or grain, belonging to others, includes stockbrokers, though they have possession of the goods which they sell and buy, and though the transactions are completed in their own name, those for whom they were really acting not appearing at all. *Banta v. City of Chicago*, 50 N. E. 233, 235, 172 Ill. 204, 40 L. R. A. 611.

## BROKERAGE.

See "Marriage Brokerage."

"Brokerage" is the name used to designate compensation for brokers' services. *Graham v. Duckwall*, 71 Ky. (8 Bush) 12, 16; *City of Little Rock v. Barton*, 33 Ark. 436, 437, 444; *Tete v. Lanau*, 14 South. 241, 243, 45 La. Ann. 1343; *Stratford v. City Council of Montgomery*, 110 Ala. 619, 20 South. 127, 128; *Adkins v. City of Richmond*, 84 S. E. 967, 968, 98 Va. 91, 47 L. R. A. 583, 81 Am. St. Rep. 705; *Schau v. City of Charlotte*, 24 S. E. 526, 527, 118 N. C. 733; *Saladin v. Mitchell*, 45 Ill. 79, 83; *Murray v. Doud*, 47 N. E. 717, 718, 167 Ill. 363, 59 Am. St. Rep. 297; *United States v. Fisk* (U. S.) 25 Fed. Cas. 1089, 1090.

The word "brokerage," in a request for an instruction that if defendant agreed to pay plaintiff brokerage, and that such promise was made after all services rendered had been performed, plaintiff is not entitled to recover, was used in its ordinary and common acceptance as equivalent to "compensation for services rendered," and not in the strict legal definition of the term. *Myers v. Dean*, 32 N. Y. Supp. 237, 238, 11 Misc. Rep. 368.

Where a contract entitled plaintiff to recover only in case he had earned "broker's commissions," he could not recover by merely proving that he procured and submitted to defendant a list of properties for sale, which included the property which was finally exchanged by defendant for the property which he had employed the broker to sell. *Wyckoff v. Bissell*, 43 N. Y. Supp. 1018, 1019, 24 App. Div. 66.

Where the owner of property employs a broker to find a purchaser, and agrees to compensate him therefor, the consideration is known as "brokerage commission." The very essence of a brokerage commission is success. It is dependent upon the securing of a satisfactory purchaser and the consummation of the deal, and, no matter how much time may be devoted to finding a customer, or how little, the element of success alone will determine whether he is entitled to compensation. The promise to pay if a customer is found to purchase at a stated price is not the ordinary contract of employment, but it is generally in the nature of an offer to pay a commission if a person is produced who buys at a price named. This offer may be withdrawn at any time, provided the work done has not brought the person within the terms of the offer, and where the broker has been unsuccessful he is not entitled to recover on a quantum meruit for work done. In *Dowling v. Morrill*, 43 N. E. 295, 165 Mass. 491, it was held that where a broker has done work, but another broker closed the trade, he could not recover on a quantum meruit for work done, but that a commission was earned if his work was in fact the efficient and predominating cause of the sale. Where a broker is discharged before producing a purchaser at the terms authorized, he has not completed his contract, and is not entitled to commission. *Cadigan v. Crabtree*, 61 N. E. 87, 38, 179 Mass. 474, 55 L. R. A. 77, 88 Am. St. Rep. 397.

## BROMO.

The word "bromo," as used in the name of bromo-quinine claimed as a trade-mark for a medicinal preparation, is one of description, and not a coined word, and was used for the purpose of inducing the belief that bromine was a leading constituent in its compound. The Standard Dictionary states that the word "bromo" is derived from bromine, and is a combined word, used mostly in names of chemical compounds in which bromine is a principal element. *Paris Medicine Co. v. W. H. Hill Co.* (U. S.) 102 Fed. 148, 152, 42 C. C. A. 227.

## BROMO-CAFFEINE.

"As applied to a preparation composed of bromide of potassium and other ingredients, the term is descriptive of the general

composition and characteristics of the article to which it is attached, so that a trade-mark cannot be acquired in such a name." *Keasbey v. Brooklyn Chemical Works*, 21 N. Y. Supp. 696, 67 Hun, 648.

## BROOK.

The word "brook," when used in a deed to describe the boundary of land, will, in the absence of evidence that the parties did not use the word according to its ordinary signification, be construed to mean the main brook, although the brook has a main and auxiliary channel; and this is true, even though the boundary is thus made to include an island in the stream. *Pike v. Hood*, 27 Atl. 189, 67 N. H. 171.

## BROTHER.

See, also, "Sister."

A statute providing that if any person shall die intestate, having title to any estate or inheritance, and shall leave no children or their legal representatives, such estate shall pass to the "brothers and sisters" of the intestate, means the whole stock or class of brothers and sisters, so that a brother or sister born at any period subsequent to the death of the intestate is entitled to share equally with those then in being. "The term imports all the brothers and sisters, and cannot be limited to those living at any particular period." *Springer v. Fortune* (Ohio) 2 Cln. R. 52, 53.

### Brother of the half blood.

Webster defines the word "brother" to mean "a male person who has the same father and mother with another person, or who has one of them." The term "brothers and sisters" held to include brothers and sisters of the half blood, in a statute relating to descent of property. *Anderson v. Bell*, 140 Ind. 375, 379, 39 N. E. 735, 736, 29 L. R. A. 541.

A brother is one who has the same father and mother with another, or has only one of them, and so includes a brother of the half blood. *State v. Gulton*, 24 So. 784, 785, 51 La. Ann. 155.

Whenever the term is used without limitation, "brothers" of the half blood are included. *Lynch v. Lynch*, 64 Pac. 284, 285, 132 Cal. 214 (citing *Gardner v. Collins* [U. S.] 9 Fed. Cas. 1162; *Id.*, 27 U. S. [2 Pet.] 58, 7 L. Ed. 347; *Pearson v. Grice*, 6 La. Ann. 282; *Sheffield v. Lovering*, 12 Mass. 490; *Rowley v. Stray*, 32 Mich. 70; *Clark v. Sprague* [Ind.] 5 Blackf. 412; *Clay v. Cousins*, 17 Ky. [1 T. B. Mon.] 75; *Marlow v. King*, 17 Tex. 177).

It cannot be legally assumed that the term "brother" necessarily and at all times

and under all circumstances comprehends a half-brother, and the question with reference to its inclusion or exclusion of the half-brother is properly left to the jury in each particular case. *Spitz v. Mutual Ben. Life Ass'n*, 25 N. Y. Supp. 469, 473, 5 Misc. Rep. 245.

Under a statute providing that, in case a decedent shall leave no wife or descendants, father or mother, then his estate shall be equally divided among his brothers and sisters or their descendants, the term "brothers and sisters" includes those of the half blood. A brother of the half blood is a brother, as well as a brother of the whole blood. *Anderson v. Bell*, 140 Ind. 375, 379, 39 N. E. 735, 736, 29 L. R. A. 541.

Act 1835 (Swan's St. p. 286, § 1), declaring that if any person shall die intestate, etc., and there shall be no children or other legal representatives, the estate shall pass to the brothers and sisters of the intestate, includes not only brothers and sisters of the intestate, but half brothers and sisters of the ancestor, which also are to be preferred to the brothers and sisters of the intestate of the half blood, not of the blood of the ancestor from whom the estate came. *Cliver v. Sanders*, 8 Ohio St. 501, 504.

The term "brothers and sisters" as used in laws providing that, on the death of a decedent without children or father, his estate should descend to his mother, brothers, and sisters, includes brothers and sisters of the half blood. *Doe v. Abernathy* (Ind.) 7 Blackf. 442, 449.

Act 1797 provides that in all cases in which persons shall die intestate leaving neither wife nor children, but leaving a father or mother and brothers and sisters, the estate shall be equally divided among the father, or, if he be dead, the mother, and such brothers and sisters as may be living at the time of the death of such intestate, means brothers of the whole blood, and not brothers of the half blood. "Brother" is defined by *Johnson* as one born of the same father and mother. *Lawson v. Perdriault* (S. C.) 1 McCord, 456, 457.

The term "brother," as used in the statute punishing intercourse between brother and sister as incest, includes a brother of the half blood, as well as a brother of the full blood. *State v. Wyman*, 8 Atl. 900, 59 Vt. 527, 59 Am. Rep. 753.

### Illegitimate.

A will describing a beneficiary to whom property was left as "my brother T." meant the person commonly called by that name and known as the brother of the testator, though he was not the testator's brother, but was the illegitimate child of the testator's mother before her marriage with his father. *Dane v. Walker*, 109 Mass. 179, 180.

In Rev. Code, §§ 4367, 4368, declaring that the marriage of a brother and his sister shall be punishable as incest, the terms "brother" and "sister" mean offspring of the same parent, whether legitimate or not, and therefore the fact that the marriage was consummated between a brother and sister, both or one of whom was illegitimate, was no defense to a prosecution under the statute. *State v. Schaunhurst*, 34 Iowa, 541, 549.

#### Stepbrother.

1 Rev. St. p. 752, § 6, provides that the inheritance shall descend to the mother in fee, in case the intestate leaves no descendant, father, brother, or sister, or descendant of a brother or sister. Section 15 provides that, in case an inheritance comes to an intestate by descent, devise, or gift of one of his ancestors, all those not the blood of such ancestor shall be excluded from such inheritance. Held, that the term "brother," as used in section 6, when construed in connection with section 15, did not include a stepbrother, but only a brother of the whole blood. *Wheeler v. Clutterbuck*, 52 N. Y. 67, 71.

#### BROTHER-IN-LAW.

The relationship between persons who have married sisters is not that of brother-in-law, which is defined by the Century and Webster's Dictionary as "the brother of one's husband or wife; also, one's sister's husband." *Farmers' Loan & Trust Co. v. Iowa Water Co.* (U. S.) 80 Fed. 467, 469.

#### BROUGHT.

See, also, "Bring."

The use of "brought," in Act 1857, which provides that all proceedings brought to obtain the forfeiture of any liquor license under the twelfth and thirteenth sections of the act for the suppression of intemperance, shall be held to be proceedings in rem, and not criminal proceedings, implies past time, and includes prosecutions then pending, as well as those thereafter to be brought. *Hine v. Belden*, 27 Conn. 384, 391.

In Rev. St. c. 32, §§ 29, 30, providing that an action may be maintained by one town against another to recover for the expenses incurred for the support of a pauper whose legal settlement is established in such town, and that a recovery in such action shall bar the town against which it shall be had from disputing the settlement of such pauper with the town thus recovering in any future action brought for the support of such pauper, the term "future action" is not necessarily confined to an action commenced after the action was commenced in which the judgment was rendered; but where two actions are pending at the same time, and after the first one is tried, pending an application for

a new trial, the other one is tried, and final judgment rendered therein in favor of the defendant on the retrial of the first action, such judgment is a bar to a recovery in the first action. The word "brought," as used in such statute, is not inappropriate to designate an action which had been commenced at any time before the trial, and it does not necessarily designate one commenced after the action on trial was commenced. *Inhabitants of Bangor v. Inhabitants of Brunswick*, 33 Me. 352, 355.

As used in Act Cong. March 3, 1887, c. 373, § 3, 24 Stat. 553, relative to the removal of cases from state to federal courts, and requiring a party entitled to remove a suit from a state court to the circuit court of the United States to file a petition in such suit in such state court at the time the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration, etc., means the state court in which suit is pending at the time the petition for the removal is filed. *American Finance Co. v. Bostwick*, 23 N. E. 656, 659, 151 Mass. 19.

Code Civ. Proc. § 1243, provides that all proceedings in regard to eminent domain shall be brought in the superior court of the county in which the property is situated. Held, that the words "to be brought" mean something more than that the proceeding must be commenced in such superior court, since there is strong reason why such proceedings should be had in the county where the land sought to be condemned is situated. The compensation for the land sought to be taken is to be determined on testimony, and the witnesses most competent to speak on that subject are usually found in the county referred to; and hence such proceedings shall be conducted in such county in their entirety. *California S. R. Co. v. Southern Pac. R. Co.*, 4 Pac. 344, 345, 65 Cal. 394.

#### BROWN GREASE.

"Brown grease," as used in Customs Act 1897, par. 279, is equivalent to what is known commercially as "wool grease." Wool fat is the natural grease contained in sheep's wool. In the course of preparing the raw wool for spinning, this grease is removed by means of dilute soap solutions or by extraction with volatile solvents. The suds from wool scouring are collected in large tanks, and, by acidulating with mineral acids, brown grease is obtained. *United States v. Leonard* (U. S.) 108 Fed. 42, 43, 47 C. C. A. 181.

#### BRUISE.

"Bruised" is more definite than "hurt," but does not indicate necessarily or generally

more than a temporary contusion, which may be on any part of the person, and light or severe, but seldom more than temporary in effect. *Shaddock v. Alpine Plank Road Co.*, 44 N. W. 158, 159, 79 Mich. 7.

A bruise is a hurt with something blunt and heavy, and in judicial decisions it is synonymous with the word "wound." *State v. Owen*, 5 N. C. 452, 455, 4 Am. Dec. 571.

## BUCKET SHOP.

As a game, see "Game."

"A bucket shop is a place where wagers are made on the fluctuations of the market prices of grain and other commodities." *Bryant v. Western Union Tel. Co.* (U. S.) 17 Fed. 825, 828; *Fortenbury v. State*, 1 S. W. 58, 59, 47 Ark. 188.

A bucket shop is a place where wheat, corn, pork, other provisions, and grain are bought and sold on margins. *Lancaster v. McKinley* (Ind.) 67 N. E. 947, 948.

The term "bucket shop," in Rev. St. 1889, § 3834, prohibiting the keeping of bucket shops, was defined in section 3835 to be a place, other than a duly incorporated merchants' exchange, wherein are published, from information received as the same occur, the fluctuating prices of stocks, bonds, petroleum, cotton, or grains, in trades made or offered to be made on regular and lawful boards of exchange, and wherein the person carrying on the bucket shop, either as principal or agent, pretends to buy or sell, or goes through the form of buying and selling, then and there, to any person or persons any one of said commodities at a certain price fixed by or according to the aforesaid prices posted or published, but wherein neither party actually buys or sells the same. *Connor v. Black*, 24 S. W. 184, 187, 119 Mo. 126.

A bucket shop is a place where grain, provisions, etc., are posted on blackboards as they come in on the ticker. The shop buys or sells indifferently, and always at the price appearing for the time being on the blackboard. The shop does not notify the customer of the fluctuations of the market, but he looks out for that on the blackboard. It is understood between the customer and the shop that there is no actual deal in grain, that there is none to be delivered, and that the difference in future prices is simply dealt in. In other words, the customer bets the shop that on a certain day in the future, or in a certain month in the future, wheat will be worth so much, and if in the time agreed the wheat is worth that much the customer wins, less the commission; if it is not worth that much, the shop wins. *Smith*

*v. Western Union Tel. Co.*, 2 S. W. 483, 484, 84 Ky. 664.

Pool selling does not constitute a lottery or a policy or bucket shop, within the meaning of a municipal ordinance prohibiting the keeping of such establishments. *People v. Reilly*, 50 Mich. 384, 15 N. W. 520, 45 Am. Rep. 47.

A bucket shop is a place wherein are posted or published, from information received as the same occur, the fluctuating prices of stocks, bonds, petroleum, cotton, grain, provisions, or other commodities, or of any one or more of the same, in trades made or offered to be made on boards of exchange, or by any person, firm, or organization, and wherein the person carrying on the bucket shop, either as principal or agent, pretends to buy or sell, or goes through the form of buying and selling, then and there, to any other person or persons, any one of said commodities at a certain price fixed by or according to the aforesaid price posted or published, but wherein neither party actually buys such commodities, and neither party actually sells the same. *Rev. St. Mo. 1899, § 2222.*

The term "bucket shop" shall apply to all and every of the places mentioned in an act for the suppression of bucket shops, etc., and shall include, not only the place of the making, or permission to make, or offer to make wagering contracts, but also the place wherein is carried on the system of purchasing or selling of stocks, bonds, or securities, whether the contract is to be performed within or without this state, when the payment therefor is by certified check, or any other device given or made by or for the purchaser to the seller, and the delivery is by and for the seller to the purchaser, and such seller, or party acting for him, does not in good faith receive the cash upon such certified check or method of payment as is done in the regular course of legitimate business, or any such purchaser or party acting for him does not in like manner receive such stock, bonds, or other securities. *Bates' Ann. St. Ohio 1904, § 6934a-4*

## BUCKWHEAT LAND.

A term used in Michigan to describe poor land or land in a deserted section of the country, which is in a wild and uncultivated state, and on which buckwheat is usually grown as the first crop. *Stubly v. Beachboard*, 36 N. W. 192, 196, 68 Mich. 401.

## BUFFALO.

As defined by Webster, the buffalo is a species of wild ox, a species of the genus "bos" or "bubalus," originally from India,

but now found in most of the warmer countries of the Eastern continent. While, perhaps, a buffalo is from the same genus as domestic cows and cattle, they are not the same kind of an animal, and hence could not be included within the meaning of the word "cattle," as it is used in Rev. St. 1845, p. 364, declaring that any person who shall maliciously kill or wound any cattle of another shall be punished, etc. *State v. Crenshaw*, 22 Mo. 457, 458.

## BUFFERS.

The term "buffers" is used to designate timbers placed across the ends of cars, beyond which the drawheads slightly project. In coupling cars, the drawheads yield to the impact of the two cars, and the buffers of the cars coming together arrest the force of the blow. Cars constructed with buffers are considered to make the act of coupling cars more dangerous. *Louisville & N. R. Co. v. Boland*, 11 South. 667, 96 Ala. 626, 18 L. R. A. 260.

## BUGGERY.

"Buggery" is synonymous with "crime against nature." It includes both sodomy and bestiality, and is any unnatural connection between one man and another man, or between a person and a beast of the opposite sex. *Ausman v. Beal*, 10 Ind. 355, 356.

Act June 11, 1879, § 1 (P. L. 148), declares that "the terms 'sodomy' and 'buggery,' as and where used in the laws of this commonwealth, shall be understood to be a carnal copulation by human beings with each other against nature *res veneria* in ano or with a beast." *Commonwealth v. J—*, 21 Pa. Co. Ct. R. 625, 626.

## BUGGY.

As carriage, see "Carriage."

As tool, see "Tools—Tools of Trade."

As wagon, see "Wagon."

## BUILD.

See "Hereafter Built."

See, also, "Construct—Construction"; "Erect—Erection."

The word "build" is derived from the word "bold," meaning a dwelling. *Rouse v. Catskill & N. Y. Steamboat Co.*, 13 N. Y. Supp. 126, 127, 35 N. Y. St. Rep. 491 (citing *Truesdell v. Gray*, 79 Mass. [13 Gray] 311).

In a certificate of the Governor of a state that he had made a careful examination of a military road since its completion, and

that the same was built in all respects as required by recited acts of Congress, the word "built" was equivalent to the word "constructed," as used in such acts, and was, therefore, a sufficient compliance with the act requiring a certificate from the Governor that the road had been fully constructed. *United States v. The Dalles Military Road Co.* (U. S.) 51 Fed. 629, 636, 2 C. C. A. 419.

A franchise to build and maintain a flouring mill "imports the right to build a dam to obtain power to run the mill." *Glinrich v. Patrons' Mill Co.*, 21 Kan. 61, 64.

### Form and plans included.

A grant to a city council of general power to build a market implies a determination upon the form, dimensions, and fashion of the edifice, and the city council may employ a person of professional skill to furnish plans, drawings, specifications, and estimates. *Peterson v. City of New York*, 17 N. Y. 449, 453.

### As acquire or obtain.

As used in the title of an act relating to the organization of associations for the purpose of raising funds to be loaned among their members for building homesteads and other purposes (Gen. St. 1873, c. 11), the word "build" will be held to have been employed in the sense of obtain, secure, or acquire, as well as the ordinary meaning of build, so that provisions of the act authorizing the purchase of lots or houses are not void, as not being included in the title. *Nebraska Loan & Building Ass'n v. Perkins*, 85 N. W. 67, 69, 61 Neb. 254.

### As furnish machinery.

Whatever is supplied to a vessel for the purpose of making it what it was intended to be and to enable it to enter upon the kind of business or navigation intended is a part of the building of the vessel, thus including machinery. *The Paradox* (U. S.) 61 Fed. 800, 861.

### As location of railroad.

In a subscription to the capital stock of a railroad company, provided the road is built inside of a certain distance north of a certain township, the word "built" means the permanent location of the road in the place designated, though the road was never completed. What the parties must have meant to provide for was the place of the road, and not its condition of completeness or incompleteness. Strictly speaking, to build a road is to complete it. When a subscription book speaks of a road to be built in one place in preference to another, it must be supposed and held that it was the location of the road, and not its structure, that was intended to be specified, which means less

than a finished road. *Warner v. Callender*, 20 Ohio St. 190, 197.

#### **As maintain.**

To build or construct a railroad is one thing; to maintain the structure after it is erected or built is another; and neither authorizes the relocation of the road after completion on the first location, within a statute authorizing the construction and maintenance of a railroad. The word "maintenance" has reference to the powers to be exercised after completion. *Moorhead v. Little Miami R. Co.*, 17 Ohio, 340, 353.

A statute authorizing certain persons to make a canal and take toll thereon, on the condition, among others, that they would "build suitable and convenient bridges" where the canal should cross the highways, meant not only that such persons should construct the bridges, but that they should maintain them in repair. *Franklin County Com'rs v. White Water Valley Canal Co.*, 2 Ind. 162, 163.

A grant to a railroad company in its charter of the power of "laying, building, and making" a road includes the power of maintaining and sustaining it, which has reference to keeping it in repair, supplying it with machinery, and such like acts, but does not extend to projects for extending its business by schemes and enterprises not contemplated and expressed in clear, unambiguous terms. *Central R. Co. v. Collins*, 40 Ga. 582, 624.

#### **As pave street.**

In Rev. St. § 1592, empowering the board of aldermen in cities of the fourth class to tax abutting property for grading, macadamizing, building, guttering, and repairing streets, the word "building" includes paving. When defining the word "build," the International Dictionary does so thus: "To erect or construct, as a fabric or edifice of any kind; to form by uniting materials into a regular structure; to fabricate; to make; to raise." When used with reference to streets, the word "build" may well be regarded as a synonym of the word "make," or of the word "pave." *Morse v. City of West Port*, 19 S. W. 831, 832, 110 Mo. 502.

#### **As repair.**

"Build," as used in Pub. St. c. 34, § 5, providing that towns may appropriate money for building bridges, means to construct anew, and repairing is not building within the statute. *State v. White*, 18 Atl. 179, 16 R. I. 591.

"Built," as used in Olympia City Charter, § 3, subd. 25, requiring, as a preliminary to the building of the sidewalks and assessing and levying taxes therefor, that a petition by the majority of the property owners or a

vote of two-thirds of the common council in favor be had, means "constructed" or "erected," and is therefore not synonymous with "repairs" or "repaired," and hence the city was not relieved from its obligation to repair by failure to procure a vote under the charter. *Hutchinson v. City of Olympia*, 5 Pac. 606, 608, 2 Wash. T. 814.

#### **BUILT UPON.**

St. 55 Geo. III, c. 25, § 3, authorizing commissioners "to view and inspect any street square, or other public passage or place within the limits," etc., "which now is or hereafter may be built upon or in building," does not apply to bridges built by a canal company, the roadways over which were used as public highways, and formed the sole connection at the particular spot between the streets on either side of the bridges, and which bridges were built of brick and had brick parapet walls from four to five feet high on the outer side of each footway. *Arnell v. Regents Canal Co.*, 14 C. B. 564, 576.

#### **BUILDER.**

The terms "artisans, builders, and mechanics," in Gould's Dig. c. 112, § 1, giving a mechanic's lien to all artisans, builders, and mechanics of every description who shall perform any work and labor on any building, edifice, or tenement, does not include one selling lumber to be used in the construction of a dwelling house. *Duncan v. Bateman*, 23 Ark. 327, 79 Am. Dec. 109.

Architects and builders are well known as persons engaged, as a business, in planning, constructing, remodeling, and adapting to particular uses buildings and other structures. *Turner v. Haar*, 21 S. W. 737, 738, 114 Mo. 835.

A builder is one who builds, one whose occupation it is to build, an architect, a shipwright, a mason, etc. *Savannah & C. R. Co. v. Callahan*, 40 Ga. 506, 511.

#### **Of vessel.**

See "Ship Carpenter or Builder."

Act N. Y. April 24, 1862, c. 482, giving the builder of a vessel a lien thereon, is limited to and means the person having charge of the actual construction of the whole vessel, and hence cannot include a person hired by a subcontractor to do a part of the work he had contracted to do thereon. *Calkin v. United States*, 8 Ct. Cl. 297, 306.

One engaged in repairing and putting new machinery into a steam canal boat is a builder, within the meaning of Laws 1862, c. 482, providing for the collection of demands against ships and vessels for materials furnished to the builder of the same. *King v. Greenway*, 71 N. Y. 413.

**BUILDING.**

See "Building (In Criminal Law)"; "Building (In Insurance)"; "Building (In Lien Laws)"; "Building (In Revenue Laws)."

See "Boat Building"; "Brick Building"; "Farm Building"; "Frame Building"; "Inhabited Building"; "New Building"; "Outbuilding"; "Public Building"; "Wooden Building."

All buildings, see "All."

Other buildings, see "Other."

As included in term land, see "Land."

As personal property, see "Personal Property."

As tool, see "Tools—Tools of Trade."

A building is defined to be a structure in the nature of a house built where it is to stand; as commonly understood, a house for business, residence, or public use, or for shelter of animals or storage of goods, and very generally, though not always, the idea of a habitation for the permanent use of man, or an erection connected with his permanent use, is implied in the word "building." A building is a part of the land. One would not call a tent a building. In its broadest sense it can mean only an erection intended for the use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use, constituting an edifice, such as a house, a store, a church, or a shed. *Rouse v. Catskill & N. Y. Steamboat Co.*, 18 N. Y. Supp. 126, 127, 35 N. Y. St. Rep. 491 (citing *Truesdell v. Gray*, 79 Mass. [13 Gray] 311).

Buildings, structures, and improvements, within the meaning of Code Civ. Proc. § 2134, providing that the interest in the land, building, structure, or other improvement in a leasehold interest shall be subject to lien, although the lease is forfeited, is to be construed to mean such buildings, structures, and improvements put upon the premises by the lessee as can be removed. *Stenberg v. Liennemann*, 52 Pac. 84, 85, 20 Mont. 457, 63 Am. St. Rep. 636.

Where a lease provided that if the lessee should tear down and remove the buildings not standing on the premises, and erect in place thereof a good and substantial building, such building should be valued and paid for at the termination of the lease, where the main building on the premises was not torn down or removed, but the front of the first story and basement was taken out, and iron columns and doors inserted, and stairs and partitions were torn down, and the floors lowered and relaid, and the rear wall of each of the stores was removed, and a flat roof put on, and two stories were made out of the attic story, there was no building erected, within the terms of the lease, for the price of which the landlord would be liable. *Smith v. Cooley* (N. Y.) 5 Daly. 401, 402.

**Apartment, room, or tenement.**

Rooms in a factory were let to separate tenants, the rents differing according to the size of the room, and the entry to which was either by common staircase leading from the entrance to the factory, or by separate outside staircase, or by doors opening into the yard. Each tenant had his own spinning machine, which was worked by a steam engine belonging to the landlord; it being a part of each contract that the landlord should supply steam power and also the exclusive use of his room and the key to the door thereof. Held, that the occupier of each room was the exclusive occupier of a "building," within St. 2 Wm. IV, c. 45, § 27, conferring the right of voting in the cities and boroughs upon the occupier of any house, warehouse, counting house, shop, or "other building." *Pownall v. Dawson*, 11 C. B. 9.

"Building," as used in St. 2 Wm. IV, c. 45, § 27, includes apartments in a house which were rented; the tenant having a key of the outer door and free and uncontrolled access thereto at all times, though the landlord occupied a portion of the premises, but did not reside therein. *Toms v. Luckett*, 5 Man., Gr. & S. 24, 85.

The word "building," as used in a town by-law requiring the tenant of a building to remove the snow from in front of the premises, is broad enough to include a "tenement." *Town of Easthampton v. Hill*, 88 N. E. 502, 162 Mass. 302.

**Completion indicated.**

In a contract by which plaintiff agreed to win stones for the purpose of building certain cottages, the term "building" could not be taken to include the completion of a building by plastering and tile pointing, and parol evidence could not be given to explain the sense in which the word was used. *Charlton v. Gibson*, 1 C. & K. 541, 542.

**Fence.**

When used in a covenant not to erect a building within a certain distance from a boundary line, may be held to include a fence, on a showing that the purpose and object of the covenant was to prevent the shutting off of light and air, and that a fence would have the same effect in this respect as a structure technically known as a "building." *Wright v. Evans*, 2 Abb. Prac. (N. S.) 308.

As used in a grant giving the grantee the right of cutting and hewing timber for building, includes the right to cut timber for making fences, and in common parlance the word "building" would have been understood as including the making of fences. *Livingston v. Ten Broeck*, 16 Johns. 14, 22, 8 Am. Dec. 287.



**Flume.**

See "Flume."

**Hustings.**

Hustings erected to take the poll at a contested election for members to serve in Parliament are not a building, within St. 57 Geo. III, c. 19, § 38, so that no action lies against the hundred for the destruction of such property by a tumultuous assembly. *Allen v. Ayre*, 3 Dow. & R. 96.

**Jail cell.**

1 Gen. St. 1889, par. 1633, providing that boards of county commissioners (who have power to purchase sites for, build, and keep in repair county buildings, levy taxes therefor, and care for the county property) shall not build any permanent county buildings without submitting the question to a vote of the electors of the county, does not include one or two cells in a jail building. A cell is but a very small room, and it can hardly be contended that the manufacture and erection of a room in a building, whether small or large, would be forbidden by an inhibition to construct a permanent building. *Pauly Jail-Bldg. & Mfg. Co. v. Kearney County Com'rs* (U. S.) 68 Fed. 171, 173, 15 C. C. A. 351.

**Land occupied included.**

"A lease of the wooden building south of the brick dwelling house" of the lessor does not pass as parcel of the wooden building or appurtenant thereto any title in an outbuilding, yard, and passageway within a curtilage or inclosure adjoining the wooden building, but not distinct from the brick house; but any right of way or other easement necessary to the enjoyment of the demised premises passes as appurtenant thereto, although not expressly mentioned in the lease. *Oliver v. Dickinson*, 100 Mass. 114, 117.

The land upon which the walls of a stone or brick building rest, or, indeed, of any other kind of a building, which in law is considered as annexed to the soil, and which is not clearly severed therefrom by the terms of the deed itself, must be considered as part of the building, and a sale of the building, therefore, would carry the title to the land upon which it stands. *Wade v. Odle*, 54 S. W. 786, 788, 21 Tex. Civ. App. 656.

A lease of a building, where the landlord owns the real estate under the eaves thereof, embraces such land. *Sherman v. Williams*, 113 Mass. 481, 484, 18 Am. Rep. 522.

**As main building.**

Where a subscription for the building of a church was according to its terms to be paid "when the building is inclosed," such

phrase meant when the main building was inclosed; and hence, when such part of the building was inclosed, the subscription was payable, notwithstanding that some towers on the building had not been inclosed. *Snell v. Methodist Episcopal Church*, 58 Ill. 290, 293.

**Mill flume.**

In 1 Rev. St. p. 514, § 57, providing that no public road shall be laid through any buildings, or any fixtures or erections for the purpose of trade or manufacture, without the consent of the owner, buildings cannot be construed to include the channel by which water is conducted from a creek to a saw-mill, within any natural or fair meaning of the term. *People v. Kingman*, 24 N. Y. 559, 562.

**Monument.**

A monument is not a building, within the meaning of the condition of a deed to a city conveying a square, and providing that no part of it shall be made use of for erecting any sort of a building thereon. A monument may take the shape of a memorial hall or other building, but that is not the general sense of the word, and will not be presumed. A statue upon a pedestal, even though the latter be large, is not a building within the proper meaning of the term. *Appeal of State Soc. of Cincinnati*, 26 Atl. 647, 651, 154 Pa. 621, 20 L. R. A. 323.

The term "building" does not include a monument 100 feet in height on a platform 120 feet long and erected in a city park. *Parsons v. Van Wyck*, 67 N. Y. Supp. 1054, 1058, 56 App. Div. 329.

Act April 19, 1895 (P. L. 38), requiring county commissioners, in the erection of a courthouse, jail, or other "building," to let the work to the lowest bidder, cannot be construed to include a monument to be erected in memory of soldiers and sailors. A monument may take the shape of a memorial hall or other building, but that is not the general use of the word and will not be presumed. A statue on a pedestal, even though the latter be large, is not a building, within the proper meaning of the term. *Van Baman v. Gallagher*, 37 Atl. 832, 834, 182 Pa. 277.

**Porch or steps.**

As used in a deed, providing that "all buildings" upon the lots conveyed should be erected not less than 15 feet back from the fence line, means all substantial parts of all buildings. While merely incidental encroachments on this space by steps or eaves or ornamental projections might not amount to violations of the agreement, a porch extending the whole width of the house, as a substantial and integral part of it, is clearly so. *Ogontz Land & Improve-*

ment Co. v. Johnson, 81 Atl. 1008, 1009, 168 Pa. 178.

Approaches and steps are not a part of a building, so that a contract to furnish "all the dimension stone that may be required" in the "construction of a building" does not include stone used in the approaches or steps leading up to the building. *United States v. Mueller*, 5 Sup. Ct. 380, 382, 113 U. S. 153, 28 L. Ed. 946.

#### **Stable, shed, or other outbuilding.**

A stable, with a hay loft over, built of brick, annexed to which, but of a lower elevation, was another brick building, to which again was annexed an irregular wooden building divided into three compartments, the whole of which was in the exclusive occupation of one person, and used by him for the purpose of his business of a wheelwright, there being no internal communication, constitutes a building, within St. Wm. IV, c. 45, § 27. *Pownall v. Dawson*, 11 C. B. 9.

As used in St. 2 Wm. IV, c. 45, § 27, "building" includes a cow barn or stable. *Whitmore v. Bedford*, 5 Man. & G. 9, 16.

"Building," as used in St. 2 Wm. IV, c. 45, § 27, should be construed to include a shed closed on two sides, having a roof, and used for the purposes connected with the occupation of a wharf and also used by another as a place of deposit for goods. It is a thing ejusdem generis with those particularly enumerated. *Watson v. Cotton*, 57 Eng. C. L. 50, 53.

A cow stable, wagon shed, and chicken house are buildings, within the statute providing that no public highway shall be laid out through any building or fixture without the consent of the owner. *Smart v. Hart*, 75 Wis. 471, 44 N. W. 514.

#### **Steamboat.**

"The word 'building' is derived from the Anglo Saxon 'bold,' meaning a dwelling. Building is defined to be a structure in the nature of a house, built where it is to stand. As commonly understood, it means a house for residence, business, or public use, or for the shelter of animals or storage of goods, and very generally, though not always, the idea of a habitation for the permanent use of man, or an erection connected with its permanent use, is implied by the word. It is defined by Bouvier as 'an edifice erected by art and fixed on the soil, composed of different pieces of stone, brick, marble, wood, or other substance, designed for permanent use in the position in which it is so fixed.' A building is a part of the land. In its broadest sense it can only mean an erection intended for use and occupation as a habitation, or for some purpose of trade, manufacture, ornament, or use, constituting a fabric or edifice, such as a house, a store, a church, a shed. A tent is not a building,

neither is a vault for the interment of the dead, although above ground; and a steamboat is not a building, within the meaning of Laws N. Y. 1873, c. 646, making any person owning, renting, or permitting the occupation of any building, wherein intoxicating liquors are sold, liable for damages" etc. *Rouse v. Catskill & N. Y. Steamboat Co.*, 18 N. Y. Supp. 126, 127, 59 Hun, 80.

#### **Structure resting on timbers or posts.**

In St. 18 & 19 Vict. c. 122, art. 1, providing that every building shall be inclosed with walls constructed with brick, stone, or other hard and incombustible substance, and the foundations shall rest on solid ground or upon other solid substructure, the word "building" should be construed to include a structure of wood of considerable size (16 by 18 feet), and intended to be permanently used as a shop, though not laid into the ground, but merely laid upon timbers upon the surface. *Stevens v. Gourley*, 97 Eng. C. L. 99, 109.

"Building," as used in a deed of land providing that the grantees should not erect on the land any house or other "building" nearer the line of a certain street than a certain number of feet, should be construed to include a structure raised on posts, with a roof supported by pillars. *Evans v. Mary A. Riddle Co.* (N. J.) 43 Atl. 894, 895.

#### **Tent.**

A tent about 10 by 12 feet in size used by a lot owner to live in with his family, but not to sleep in, it being fitted up with a cook stove and other furniture, and occupied temporarily, is a building, within a deed of the lot prohibiting the erection thereon of any buildings other than dwellings, such dwellings to cost not less than a certain sum; the tent being of less value than that sum. The ordinary meaning of the word "building" is said by Mr. Justice Morton, in *Nowell v. Boston Academy of Notre Dame*, 130 Mass. 209, to be a structure or edifice inclosing a place within its walls and usually covered with a roof. *Blakemore v. Stanley* (Mass.) 33 N. E. 689, 690.

#### **Two distinct buildings.**

"Building," as used in St. 2 Wm. IV, c. 45, § 27, cannot apply to two distinct buildings, in order to make the occupant a voter. *Dewhurst v. Feilden*, 7 Man. & G. 182, 186.

#### **Wall.**

A deed conveyed certain premises, subject to the restriction that no building erected on the land should be less than two stories in height, exclusive of the basement and attic, etc. Held, that "building" should be construed to mean a structure or edifice inclosing a space within its walls and usually covered with a roof, such as a house, a church, a shop, a barn, or a shed, and does not include

a wall six feet in height, to be used as a fence or wall. *Nowell v. Boston Academy of Notre Dame*, 130 Mass. 209, 210.

Local Paving Act 55 Geo. III, c. 25, § 8, requiring commissioners to inspect "any street, square, or other public passage or place which now is or hereafter may be built upon or in building," does not apply to a bridge which forms part of a public highway, other streets communicating with each end of the bridge, and which was built of brick over a canal and had brick walls from four to five feet high on either side; the walls not constituting a building. *Arnell v. Regent's Canal Co.*, 25 Eng. Law & Eq. 351, 354.

#### **Wholly or partially destroyed building.**

A building is defined as an edifice for any use, as a house for residence, business, or public use, so that, where a building has been destroyed by fire, except the four walls, no "building" exists, within the meaning of a lease. *Corbett v. Spring Garden Ins. Co.*, 58 N. Y. Supp. 148, 153, 40 App. Div. 628.

#### **BUILDING (In Criminal Law).**

Any house, edifice, structure, vessel, or other erection, capable of affording shelter for human beings or appurtenant to or connected with an erection so adapted, is a building, within the meaning of the chapter in the Penal Code defining and punishing arson. Rev. St. Utah, 1898, § 4327; Pen. Code N. Y. 1903, § 493; Pen. Code Idaho, 1901, § 4923; Rev. Codes N. D. 1899, § 7383; Pen. Code S. D. 1903, § 543; Pen. Code Cal. 1903, § 448.

The term "building," as used in the Penal Code, includes a railway car, vessel, booth, tent, shop, or other erection or inclosure. Gen. St. Minn. 1894, § 6685. The term "building," as used in the chapter of the Penal Code defining and punishing burglary, includes a railway car, vessel, booth, tent, shop, or other erection or inclosure. Pen. Code N. Y. 1903, § 504.

"Building," as used in that part of the Penal Code defining and punishing arson, includes any bridge, edifice, vessel, structure, house, or other erection, with walls or roof, in whole or in part. Rev. St. Okl. 1903, § 2411.

A statute declaring that every person who shall willfully and maliciously set fire to certain designated classes of buildings, or to any "building" or room occupied as a shop or office for professional business, shall be deemed guilty of arson, means a building used for one of the purposes designated by the words which follow it. An indictment merely charging the burning of a building is insufficient, as it should allege the purpose for which the building was occupied. *State v. O'Connell*, 26 Ind. 206, 267.

The term "building," in a statute defining burglary as the unlawful entry of any office, shop, store, etc., or any other building in which goods, merchandise, or valuable goods are kept for use, safety, or deposit, with intent to commit a felony, is qualified by the clause relevant to the keeping of valuable goods in such building, and therefore, in a prosecution for breaking into any building other than enumerated buildings, it must be shown that valuable goods were kept therein; but it is not necessary to make the showing in a prosecution for breaking or entering any of the enumerated buildings. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

In construing Pen. Code 1895, art. 843, defining the term "house," as used in the law of burglary, to be any "building" or structure erected for public or private use, the court say that the word "building" means a fabric built or constructed; a structure; an edifice as commonly understood: a house for a residence, business, or public use, or for shelter of animals or storage of goods. *Fayro v. State*, 46 S. W. 932, 39 Tex. Cr. R. 452, 73 Am. St. Rep. 950.

The term "building," within the meaning of the statute making it criminal to burn any building whatsoever, includes a building owned by the person setting it on fire, but in the possession of another who has a qualified ownership therein. *Erskine v. Commonwealth (Va.)* 8 Grat. 624, 627.

#### **Addition or improvements.**

As the word "building" is used in a city ordinance forbidding the erection of wooden buildings on a certain street, or between that street and the sea, it includes an addition or change to a building already erected, which so changes the plan, structure, dimensions, and general appearance of the building already erected that, according to common understanding of men, it would be called a new building or a rebuilding. *DeHone v. Long Branch Com'rs*, 25 Atl. 274, 275, 55 N. J. Law (26 Vroom) 108.

#### **Apartment, room, or tenement.**

Pen. Code, art. 709, defining a house to be any building or structure erected for public or private use, of whatever material it may be constructed, should be construed to include an office, apartment, or room, in one corner of a hardware room, made of pickets about four feet high, one inch square, and three inches apart, on top of which there was a plank, in which the account books, money, etc., of a lumber company were kept, and where the business of such company was transacted by their agent or clerk; it being a place partitioned off and used separately from any other portion of a hardware house for a particular purpose. Webster defines a building to be "a fabric or edifice constructed; a thing built; as a house, church, etc." Mr. Bouvier defines a build-

ing to be "an edifice erected by art, and fixed upon or over the soil, composed of brick, stone, marble, wood, or other proper substance connected together and designed for use in the position it is so fixed." *Anderson v. State*, 17 Tex. App. 305, 310.

St. 1855, c. 405, prohibited the keeping of any building for the illegal sale or illegal keeping of intoxicating liquors. An indictment under such statute charged the keeping of a certain building. Held, that the word "building," as thus used, meant the entire structure wherein the liquors were alleged to have been kept, as distinguished from a tenement or various tenements in the building, and thus, where the proof showed that defendant did not occupy the whole building, but sold liquors in a single room therein, there was a fatal variance. *Commonwealth v. McCaughey*, 75 Mass. (9 Gray) 296, 297.

An indictment charged that defendant was the owner of a certain tenement and building, being the first tenement and building on a certain side of a street, and that he let the said tenement and building to a person who used the same for the illegal sale of intoxicating liquors. Held that the words "tenement" and "building" were used as synonymous with each other. *Commonwealth v. Bossidy* 112 Mass. 277, 278.

#### Cemetery vault.

A stone vault in a cemetery, used for the interment of dead bodies, although wholly above ground, is not a building, within Pen. Code, § 498, defining the crime of burglary in the third degree as the breaking into a building. *People v. Richards*, 15 N. E. 371, 372, 108 N. Y. 137, 2 Am. St. Rep. 373.

#### Chicken house.

The phrase "other building," as used in Gen. St. 1901, § 2059, providing that every person who shall be convicted of breaking and entering in the nighttime any shop, store, booth, tent, warehouse, or other building, shall be adjudged guilty of burglary in the second degree, includes a frame chicken house having doors and a board roof. *State v. Poole*, 70 Pac. 637, 638, 65 Kan. 713.

#### Cornerrib.

A cornerrib is a building, within the provisions of a statute punishing larceny from a building. *State v. Gibson*, 66 N. W. 742, 743, 97 Iowa, 416; *Brown v. State*, 52 Ala. 845, 847.

A crib in which corn and fodder are kept is undoubtedly such a structure as comes within the provisions of a statute punishing the burning of a house or building. *Brown v. State*, 52 Ala. 845, 847.

An indictment merely charging the breaking and entering of a cornerrib, and not

a building called a cornerrib, is insufficient. "We have been unable to find this word 'cornerrib' in Worcester's Dictionary, and it is not necessarily a building, ship, or vessel. 'Corn' is defined to be a cereal grain, and the word is correctly used in this country in place of Indian corn or maize. 'Crib' has various definitions, as the manger of a stable, a bin, a frame for a child's bed, a small habitation, and is used in the latter sense by Shakespeare. Nowhere else do we find it used in the sense of a building." *Wood v. State*, 18 Fla. 967, 969.

A building is a structure made for use or convenience, and designed for the habitation of men or animals, or the sheltering of property, and hence includes a cornerrib, so that larceny from a cornerrib is larceny from a building, within the meaning of Code, § 3894. *State v. Gibson*, 66 N. W. 742, 743, 97 Iowa, 416. CONTRA, see *Wood v. State*, 18 Fla. 967, 969.

#### Depot.

"Webster defines 'depot' to be a place of deposit for storing goods, a warehouse, a storehouse. Worcester defines it as a place where any kind of goods is deposited, a storehouse, a warehouse." A railroad depot is a building, within the meaning of Rev. St. § 3526, defining burglary in the second degree to be the breaking and entry of any depot, store, tent, warehouse, or other building, with intent to steal therein. *State v. Edwards*, 19 S. W. 91, 92, 109 Mo. 315.

Under a statute defining burglary to be the breaking and entering of any shop, store, booth, tent, warehouse, or other building, an indictment alleging that the defendant did break and enter the depot of a certain railway company was sustained, as the depot was either a warehouse or other building. *Bigham v. State*, 31 Tex. Cr. R. 244, 250, 20 S. W. 577 (citing *State v. Edwards*, 109 Mo. 315, 19 S. W. 91).

#### As dwelling house.

Under Rev. St. 668, § 16, declaring that no building shall be deemed a dwelling house, within the meaning of the provision relating to burglary, unless the same be adjoined to, immediately connected with, and a part of, a dwelling house, "a structure must of itself be a building, so as to stand and subsist, separate and independent from the other structure, which is the dwelling house of the owner." *Quinn v. People*, 71 N. Y. 561, 570, 27 Am. Rep. 87.

A defendant cannot be convicted on an indictment charging him with burning a building, under a statute providing penalties therefor, when the building burned is a dwelling house, and such crime is covered by other sections of the statute. *State v. Atkinson*, 58 N. W. 1084, 1035, 88 Wis. 1.

**Inclosed park.**

Webster defines a building to be: "A fabric or edifice constructed for use or convenience, as a house, a church, a shop. This is the universal meaning of the word." And it is so used in Gen. St. tit. 52, § 4, prohibiting the keeping open on Sunday of a shop, house, store, saloon, or other building in which it is reputed that spirituous and intoxicating liquors, ale, and lager beer are exposed for sale; and hence the term does not include an inclosed park, in which such liquors are sold. *State v. Barr*, 89 Conn. 40, 44.

**Engine room.**

Cr. Code, § 38, provides that whoever shall enter any dwelling house, kitchen, office, shop, storehouse, etc., or other building, shall be guilty of burglary. Held, that the term "other building," as so used, meant an erection separate from other buildings, and hence an engine room, which was apart from a mill and attached to the mill, was not within the term as so used. *Kincaid v. People*, 28 N. E. 1060, 1061, 139 Ill. 218.

**House synonymous.**

"House" and "building" are synonymous terms, and hence an indictment for burning a "building" is not at variance with an information in extradition proceedings charging defendant with the burning of a two-story brick house. *State v. Spiegel*, 83 N. W. 722, 724, 111 Iowa, 701.

The words "building or house," in an indictment charging that defendant burned a "building or house," are evidently used as terms of synonymous import, and intended to designate one and the same building, and therefore there is no uncertainty as to the location, by using the conjunctive "or," which will invalidate the indictment. *State v. Moore*, 61 Mo. 276, 278.

The word "house" in its ordinary meaning is understood to mean a building, and therefore its use in an indictment charging defendant with burning a certain flour, grist, and corn mill house is sufficient to show the burning of the building. *Jordan v. State*, 41 N. E. 817, 818, 142 Ind. 422.

While the word "house" is used in a broader and more comprehensive sense than "dwelling house," it has a narrower and more restricted meaning than the word "building." *State v. Garity*, 46 N. H. 61, 62.

**Incomplete structure.**

"A 'building' is a fabric or edifice constructed for use," within the meaning of that word in 2 Rev. St. p. 667, § 4, making it a felony to burn any "building" erected for the manufacture of cotton or woollen goods, and does not include the frame of a factory,

not completely constructed and ready for use. *McGary v. People*, 45 N. Y. 153, 161.

A structure is a building, within a statute punishing arson, while it is yet incomplete and unfinished, and the word does not necessarily import that the structure is so far advanced as to be in every respect perfect for the purpose for which it is designed eventually to be used. *Commonwealth v. Squire*, 42 Mass. (1 Metc.) 258, 259.

"Webster defines the word 'building' as a fabric or edifice constructed, a thing built. Worcester defines it a structure or edifice constructed for use or convenience, as a house, church, shop. In *La Crosse & M. R. Co. v. Vanderpool*, 11 Wis. 121, 78 Am. Dec. 691, Mr. Justice Paine says the well-understood meaning of the word is a structure which has a capacity to contain, and is designed for, the habitation of man or animals, or the sheltering of property." As used in Rev. St. § 4409, making it burglary to break and enter in the nighttime any office, shop, or other building not adjoining or occupied with any dwelling house, it will be construed to include a structure in the process of erection, which is so far completed that it may be temporarily or permanently used for the shelter of man or beast. *Clark v. State*, 33 N. W. 436, 438, 69 Wis. 203, 2 Am. St. Rep. 732.

A building is a fabric or edifice constructed for use. A building intended for a house not completed is not a house, within a statute authorizing the recovery of satisfaction for burning a house. "To erect," when used in connection with a house, or church, or factory, is "to build," and neither can be said to be erected until they are built, completed. *McGary v. People* (N. Y.) 1 Cow. Cr. R. 338, 343.

A structure in course of erection, intended for a dwelling, but unfit for the purpose for which it is ultimately designed, but so far complete as to be used temporarily or permanently for the shelter or occupation of man or beast, or the storage of tools or other personal property for safe-keeping, is a "building," within the meaning of section 4409, defining and punishing burglary. *Clark v. State*, 33 N. W. 436, 438, 69 Wis. 203, 2 Am. St. Rep. 732.

**Planing mill.**

A planing mill, as ordinarily used, is a building, and therefore an indictment charging the breaking and entering of a planing mill sufficiently charges the breaking and entering of a "building." *State v. Haney*, 81 N. W. 151, 110 Iowa, 26.

**Saloon.**

The words "other building," as used in Gen. St. p. 330, providing that every person who shall be convicted of breaking and en-

tering in the nighttime any shop, store, booth, tent, warehouse or other building, etc., shall be adjudged guilty of burglary, includes a saloon building. *State v. Comstock*, 20 Kan. 650, 651.

**Stable, shed, or other outbuilding.**

"Building," as used in a statute defining burglary to be the breaking into a building, etc., includes a stable. *Orrell v. People*, 94 Ill. 456, 457, 34 Am. Rep. 241; *Gillock v. People*, 49 N. E. 712, 713, 171 Ill. 307.

**Uninhabited building.**

"Building," as used in Pen. Code, § 179, providing for the punishment of any one stealing property in a dwelling house, store, shop, warehouse, or any other "building," means an edifice for any use, that which is built as a dwelling house, barn, etc., and includes a stationary structure eight feet tall, covered with shingles and inclosed with wire, erected for the purpose of the safe-keeping of birds and fowls. *Williams v. State* (Ga.) 32 S. E. 129, 105 Ga. 814, 70 Am. St. Rep. 82 (quoting Standard Dict.).

The word building, in a statute declaring that the offense of burglary may be committed in any dwelling house or in any other house or "building," is to be construed to mean a building, without regard to its inhabitancy. *State v. Dan*, 4 Pac. 336, 18 Nev. 345.

A "building," as the term is used in the statute defining arson, includes any house, edifice, vessel, or other protection capable of affording shelter for human beings. It is not necessary that such building should have been intended for or have been used as a habitation, but it is sufficient if it be capable of affording shelter for human beings. *People v. Fisher*, 51 Cal. 319, 320.

**Wholly or partially destroyed building.**

When a building has been torn down, it ceases to be a "building or structure," within the meaning of Pen. Code, art. 652, defining a "house" which can be the subject of arson as any "building or structure," etc. It has lost the arrangement of its parts—its form, make, and construction. *Mulligan v. State*, 7 S. W. 664, 25 Tex. Cr. App. 199, 8 Am. St. Rep. 435.

**BUILDING (In Insurance).**

Where an insurance policy covers a brick building, and from defect of construction it falls and the materials take fire, they are not a building within the terms of the policy. *Nave v. Home Mut. Ins. Co.*, 37 Mo. 430, 431, 90 Am. Dec. 394.

**Brick den heater.**

A "building," within the meaning of a fire policy thereon, includes a brick den heat-

er. *Adams v. Greenwich Ins. Co.* (N. Y.) 9 Hun, 45, 49.

**Cellar or foundation wall.**

The word "building" necessarily embraces the foundation on which it rests; and the cellar, if there be one, under the edifice, is also included in the term "house" or "building." If there be a cellar, the word "building" includes it, unaffected by the height above the foundation. *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389, 394.

The word "building," as used in a fire policy insuring a building, includes the cellar wall. *Ervin v. New York Cent. Ins. Co.* (N. Y.) 3 Thomp. & C. 213, 215.

**Scow.**

Whether or not a building, within the meaning of a fire policy includes a scow, is a question of fact, and evidence is proper to show that similar scows were treated as buildings in the sense of the policy. *Enos v. Sun Ins. Co.*, 8 Pac. 379, 67 Cal. 621.

**Stable, shed, or outbuilding.**

A hog pen and hen house, from 3½ to 6 feet high, covered with boards, with a partition of boards between them, are not "buildings," within the meaning of an application for insurance, which represents that there are no buildings not disclosed within a certain distance. *White v. Mutual Fire Assur. Co.*, 74 Mass. (8 Gray) 566, 567.

**Wholly or partially destroyed building.**

A clause in a policy of insurance against fire that, if the building shall fall except by fire, the insurance shall immediately cease, refers to the falling of the whole building, and would not include a case where only a small part of the building had fallen, more than three-quarters of which remained standing. *Breuner v. Liverpool & London & Globe Ins. Co.*, 51 Cal. 101, 107, 21 Am. Rep. 703.

Where the roof and interior woodwork of a building are destroyed by fire, leaving the walls standing, though somewhat damaged, it is a question for the jury as to whether such structure constituted a building. *Corbett v. Spring Garden Ins. Co.*, 32 N. Y. Supp. 1059, 1062, 85 Hun, 250.

**BUILDING (In Lien Laws).**

The words "building or other improvement," as used in the chapter relating to liens, shall be held to include and apply to any wharf, bridge, ditch, flume, tunnel, fence, machinery, aqueduct to create hydraulic power, or for mining or other purposes, and all other structures and superstructures, whenever the same can be made applicable thereto. *B. & C. Comp. Or.* 1901, § 5652.

St. N. C. March 28, 1870, giving a lien to mechanics and laborers for labor performed on any "building, lot, farm, and any kind of property not herein enumerated," does not give a lien on the roadway, bridges, or other property of a railroad. *Buncombe County Com'rs v. Tommey*, 5 Sup. Ct. 626, 629, 115 U. S. 122, 29 L. Ed. 308.

The term "building," in the mechanic's lien statute, authorizing liens on buildings, includes a building used for a railroad depot; there being no rule of public policy which will preclude the enforcement of a lien against the railroad company on the ground that it is a public servant. *Hill v. La Crosse & M. R. Co.*, 11 Wis. 214, 224.

An act authorizing a lien in favor of mechanics for work performed toward the erection, construction, or finishing of a building, does not authorize a lien for the flagging of sidewalks, yards, and areas of buildings in the process of erection. *Knaube v. Kerchner*, 39 Ind. 217, 218 (citing *McDermott v. Palmer* [N. Y.] 2 E. D. Smith, 675).

#### Addition or improvement.

Civ. Code, § 2802, provides that every person, firm, or corporation that gives out to contract "the building or construction of any house, store, mill, railroad, or other structure of like nature, shall retain 25 per cent. of the contract price thereof, until the contractor shall submit to such person, firm, or corporation an affidavit that all debts incurred in building or constructing such house, store, mill, railroad, or other structure of like nature, have been paid." Section 2802 makes any firm or corporation who shall pay over to a contractor said 25 per cent. without requiring the affidavit liable to that extent of the contract price to any materialman or laborer for material furnished or work for said contractor "in building or constructing said house, store, mill, railroad, or other structure of like nature." Held, that the word "building" has a double significance, and may be employed to express the idea of original construction, or it may serve the purpose of expressing the idea of reconstruction or the building of an annex to an edifice already constructed, which would form so considerable a part of the building originally added to as to constitute a new building, and in that event it would amount to a "building" within the meaning of the term. *Willis v. Boyd*, 29 S. E. 707, 103 Ga. 130.

Under the mechanic's lien law, giving a lien on every building erected, but not for adding to or altering old buildings, a building whose structure "is so completely changed that in common parlance it may be properly called a new building or rebuilding" will be included. *Armstrong v. Ware*, 20 Pa. (8 Harris) 519, 520.

In Code, § 3019, giving a lien for labor or materials furnished for any "building or improvement" on land, or for repairing the same, the terms "building" and "improvement" are not necessarily synonymous, and have a different signification from "repairs," though "repairs" may be an improvement. The term "building" refers to an independent erection on the land. An improvement may be an independent structure or addition, and it may be an addition to or mere betterment of a building or improvement already made. *Wimberly v. Mayberry*, 10 South. 157, 158, 94 Ala. 240, 14 L. R. A. 305.

#### Block of houses.

The word "building," as used in every mechanic's lien law, is strictly applicable to a block which, though composed of separate houses, is put up as a whole; but it cannot be predicated of separate blocks in different streets, which could in no aspect be viewed as entire. *Chambers v. Yarnall*, 15 Pa. (3 Harris) 265, 267.

As used in Hill's Ann. Laws, § 3669, giving a lien to every mechanic or other person performing labor or furnishing material to be used in the construction of any "building," though used in the singular, should be construed as including the plural number also, so that a person who, under an entire contract, has furnished material used indiscriminately in the erection of several houses on contiguous lots belonging to the same owner may include all the buildings and lots in one notice of lien, and need not file a separate notice for each building and lot. *Willamette Steam Mills Lumbering & Mfg. Co. v. Shea*, 82 Pac. 759, 24 Or. 40.

#### Bridge.

The words "build" and "building," as a verb and participle, are commonly used as applicable to the erection of numerous structures, which are not to be included among houses or other structures erected as habitation for either men or animals, or for sheltering property. Thus, we speak of building bridges, sidewalks, embankments, etc. But, as used in statutes, giving mechanics' liens on "buildings," the word refers to structures in the nature of houses only, and fences and bridges are not included. *La Crosse & M. R. Co. v. Vanderpool*, 11 Wis. 119, 121, 78 Am. Dec. 691.

The word "building" in laws giving laborers and materialmen a lien on any building on which they performed labor or to which they furnished materials, should be strictly construed to mean a house or similar structure, and hence does not embrace a bridge. *Pike County Com'rs v. Norrington*, 32 Ind. 190, 196; *Burt v. Washington*, 3 Cal. 246.

**Cellar or foundation wall.**

"Building," as used in a statute providing for a mechanic's lien upon a building and the land upon which it stands, includes the substructure as well as the superstructure; there being no distinction between substructure and superstructure in the meaning of the statute, but it is all superstructure. The foundation walls of the building, though lowered in the earth, are just as much a part of the building as its upper story or roof is, and even a more essential part. The foundation wall of a mill, which constitutes part of the milldam, is still a part of the building constituting the mill. *Baker v. Waldron*, 42 Atl. 225, 228. 92 Me. 17, 69 Am. St. Rep. 483.

**Church.**

"Building" is defined by Webster to be an edifice erected for use or convenience, such as a house or church; and, as used in Act June 16, 1836, authorizing a mechanic's lien on any "building," etc., the term includes a church. *Presbyterian Church v. Allison*, 10 Pa. (10 Barr) 413, 416.

Hill's Ann. Laws § 3669, providing for mechanic's liens for material furnished in the construction of any building, will be held to include a church. *Harrisburg Lumber Co. v. Washburn*, 44 Pac. 390, 391, 29 Or. 150 (citing Phillips on Mechanic's Liens, [3d Ed.] § 171; *Presbyterian Church v. Allison*, 10 Pa. [10 Barr] 413).

**Coke oven.**

A coke oven, which is an erection of stone about six feet high, arched over at the top, with a hole in the crown for the exit of gases and introduction of coal, and a door in front for the discharge of coke, is not a building, within Act Pa. June 16, 1836, § 1, and amendatory acts, providing that every building shall be subject to a lien for all debts contracted for work done or materials furnished for or about the erection or construction of the same. In *Truesdell v. Gay*, 79 Mass. (13 Gray) 311, the court says: "Taken in its broadest sense, the word 'building' can mean only an erection intended for use and occupation as a habitation, or for some purpose of trade, manufacture, ornament, or use, constituting a fabric or edifice, such as a house, a store, a church, a shed." A coke oven is not intended as a habitation or for shelter; neither is it capable of occupation and use for the purpose of trade, etc., in the sense of the above definition. It is no more a building than is any other oven erected on land, for the purpose of baking bread or drying any substance. *Central Trust Co. v. Cameron Iron & Coal Co. (U. S.)* 47 Fed. 136.

**Curbing, grading, or paving.**

A statute giving a lien for labor and materials furnished for the building, altering, repairing, or ornamenting of any house or

other building, or appurtenance thereto, does not give a lien on a lot for curbing, grading, and paving the street in front of the same. *Smith v. Kennedy*, 89 Ill. 485, 486.

**Ditch.**

As used in Act 1855, giving a mechanic's lien on "buildings, wharves, and other superstructures," the quoted phrase cannot be construed to include a ditch used in connection with waterworks. *Ellison v. Jackson Water Co.*, 12 Cal. 542, 553; *Horn v. Jones*, 28 Cal. 194, 203.

**Fence.**

St. 1851, c. 343, § 1, authorizing a lien for labor performed in erecting, altering, or repairing any "building," does not include every species of erection on land, such as fences, gates, and other like structures, but applies only to an erection intended for use and occupation as a habitation for some purpose of trade, manufacture, ornament, or use, constituting a fabric or edifice, such as a house, a store, a church, or a shed. *Truesdell v. Gay*, 79 Mass. (13 Gray) 311, 312.

A fence is not a building, within the mechanic's lien law. *Bailey v. Hull*, 11 Wis. 289, 290, 78 Am. Dec. 706.

**Floating dock or wharf.**

A floating dock is not a "building or a fixture," within the meaning of those words as used in a mechanic's lien law. *Coddington v. Hudson County Dry Dock & Wet Dock Co.*, 31 N. J. Law (2 Vroom) 477, 487.

Floating wharves, for receiving, storing, and forwarding merchandise, are "buildings," within the mechanic's lien law. *Olmsted v. McNail (Ind.)* 7 Blackf. 387, 389.

**Incomplete building.**

Rev. St. 1888, § 5293, giving mechanics a lien on any "building" to the extent of the labor done and materials furnished therefor, is not to be construed to mean necessarily a completed building; but the mechanic is entitled to a lien, though the owner suspends building operations and fails to complete the structure. *Scott v. Goldinghorst*, 24 N. E. 333, 334, 123 Ind. 268.

**Lightning rods.**

The term "building," in a statute giving a mechanic's lien to every mechanic or to the person who shall do any labor upon, or furnish any material, machinery, or fixtures for, any building, erection, or improvement upon land, includes lightning rods. *Harris v. Schultz*, 21 N. W. 22, 64 Iowa, 539.

Furnishing materials and labor in placing a lightning rod on a house is not furnishing materials and labor in "building, altering, repairing, or ornamenting" a house, in the sense those terms are used in the



mechanic's lien law. *Drew v. Mason*, 81 Ill. 498, 499, 25 Am. Rep. 288.

#### **Lime kiln.**

The word "building" means a fabric or edifice, such as a house, church, or the like, and does not include a lime kiln, built of stone and brick; in other words, a roofless stack 19 feet square at its base. A base built of solid masonry is a permanent structure, yet no one would call it a building. The stack intended for a furnace is a permanent structure, yet, considered singly and alone, without reference to any building attached to it, it is simply a stack, not a building, within the meaning of the mechanic's lien law. It is only a building when connected with a casting house or foundry, in connection with it and constituting part of an entire erection. *Cowdrick v. Morris*, 9 Pa. Co. Ct. R. 312, 314.

#### **Machinery.**

A statute giving a mechanic's lien for materials furnished and services rendered in the construction of any building construed not to include a placing of machinery for manufacturing paper in a building erected as a paper mill. *Rose v. Persee & Brooks Paper Works*, 29 Conn. 256, 268.

In statutes giving a mechanic's lien to any one who shall build or repair, in whole or in part, a house, fixtures, or improvements, or shall furnish materials in such building or repairing, does not include the furnishing of machinery to be used in a building for manufacturing purposes. *East Tennessee Iron Mfg. Co. v. Bynum*, 35 Tenn. (3 Sneed) 268, 269, 64 Am. Dec. 56.

"Building" includes burr millstones, furnished like any other part of the machinery, rendering them subject to a mechanic's lien. *Wademan v. Thorp* (Pa.) 5 Watts, 115, 118.

#### **Oil refinery.**

"Buildings," as used in Act June 16, 1836, giving laborers and materialmen and contractors a lien on the buildings on which the labor and material was employed, means buildings sufficiently substantial to entitle them to the character of buildings, though the act does not designate the character. A boiler house, filter house, barrel house, tank house, pump house, tool house, etc., the whole forming a plant known as an "oil refinery," though of extremely simple character, yet if permanent and suited to their purpose, are "buildings," within the meaning of the act. *Short v. Miller*, 14 Atl. 374, 120 Pa. 470.

#### **Oil tank.**

The term "building," in the mechanic's lien statute, does not include oil tanks, although they may be included within the broad meaning of the word, because they are

something erected or constructed on land. *Seiders & Co. International Boiler Works v. Lewis*, 21 Pa. Co. Ct. R. 80.

#### **Portable steam engine.**

Gen. Laws, c. 139, § 11, providing that any person performing labor or furnishing materials for erecting, altering, or repairing a house or building, or appurtenances, should have a lien thereon, cannot be construed to include a portable steam engine. *Thompson Mfg. Co. v. Smith*, 29 Atl. 405, 406, 67 N. H. 409, 68 Am. St. Rep. 679.

#### **Railroad.**

A railroad is not a building or structure, within the meaning of the South Carolina mechanic's lien law, and is not subject to such liens. *Greenwood, A. & W. Ry. v. Strang* (U. S.) 77 Fed. 498, 499.

#### **Sidewalk.**

A statute giving a lien in favor of mechanics for work performed toward the erection, construction, or finishing of buildings, cannot be construed to include flagging the sidewalks, yards, and approaches of buildings which are being erected. *McDermott v. Palmer*, 8 N. Y. (4 Seld.) 353, 356.

2 Gav. & H. St. p. 298, § 697, giving mechanics and all persons performing labor or furnishing materials for the "construction or repair of any building" a lien on the same, etc., does not include the making of a pavement in front of a lot. *Knaube v. Kerchner*, 39 Ind. 217, 218.

#### **Swing or seat in hall.**

Code, §§ 1183, 1192, authorizing a mechanic's lien on buildings or structures, etc., does not cover swings or seats in a dancing hall. *Lothian v. Wood*, 55 Cal. 159, 163.

#### **Wall.**

A wall built around three sides of an iron furnace, and at the distance of a few feet from it, in order to protect it from the possible sliding down of earth from a hill, at the foot of which it stands, is not a building, within the meaning of St. 1851, c. 343, giving a mechanic's lien for labor performed in erecting, altering or repairing any building. The word "building" cannot be held to include every species of erection on land, such as fences, gates, or other like structures. Taken in its broadest sense, it can mean only an erection intended for use and occupation as a habitation, or for some purpose of trade, manufacture, ornament or use, constituting a fabric or edifice, such as a house, a store, a church, a shed. *Truedell v. Gay*, 79 Mass. (13 Gray) 311, 312.

#### **BUILDING (In Revenue Laws).**

According to Webster a building is "that which is built; a fabric or edifice construct-

ed, as a house, a church, etc." This definition was adopted in construing the word as used in mechanic's lien law in *Coddington v. Hudson County Dry Dock & Wet Dock Co.*, 31 N. J. Law (2 Vroom) 477; and neither a tent nor a frame tenement used for a kitchen and laundry, without any accommodations for sleeping or for the care and shelter of the objects of a charity, are buildings within a statute exempting such buildings from taxation. *Children's Seashore House for Invalid Children v. Atlantic City*, 53 Atl. 399, 401, 68 N. J. Law, 385, 59 L. R. A. 947.

Everything that is necessary to perfect a manufacturing establishment and fit it for the uses designed is a part of it, and falls within the term "building" under the general revenue laws. *Patterson v. Delaware County*, 70 Pa. (20 P. F. Smith) 381, 384.

#### Land occupied included.

"Building," as used in Const. 1876, exempting from taxation any building used exclusively for school purposes, includes both the structure and the land on which it stands. *Cassiano v. Ursuline Academy*, 64 Tex. 678, 676.

Within the meaning of the statute which makes it the duty of the auditor to transfer for taxation in the name of the owner lands, town lots, and parts thereof, which have been conveyed, a building, whenever it is a permanent improvement, is "land," for the purpose of taxation, and the words "part thereof" may apply to the improvement, as well as to the lot on which it stands, and may consist of a part of the building by metes and bounds, or definite description of a separate part, or of an individual aliquot part of the whole, provided the conveyance in terms conveys the ownership in the estate which is liable to be assessed; and it is immaterial whether the building be divided by such conveyance by vertical lines or horizontal lines. On a conveyance of the second story of a building, it is the duty of the auditor to transfer such part of the building to the new owner. *Cincinnati College v. Yeatmen*, 30 Ohio St. 276, 282.

#### Wholly or partially destroyed building.

In St. 1894, c. 391, § 1, providing that no building for the storage of petroleum shall be erected without license, the term "building" does not apply to a case where a building worth \$3,000 was burned down, and the value of the remaining material for use in a new building was \$1,450, but the owner was entitled to rebuild without a license; the word "building" often being held to include partly destroyed or unfinished structures. *City of Somerville v. Walker*, 47 N. E. 127, 168 Mass. 388.

### BUILDING AND LOAN ASSOCIATION.

See "National Building and Loan Association"; "Permanent Association."

A building association is a species of partnership for dealing in money. Appeal of *Criswell*, 100 Pa. 488, 490 (approving *Becket v. Uniontown Building & Loan Ass'n*, 88 Pa. 211, 216).

A building and loan association is an organization created for the purpose of accumulating a fund by the monthly subscriptions and savings of its members to assist them in building or purchasing for themselves dwellings or real estate by loan to them of the requisite money from the funds of the society upon good security. *McCauley v. Workingman's Bldg. & Sav. Ass'n*, 37 S. W. 212, 213, 97 Tenn. (13 Pickle) 421, 35 L. R. A. 244, 56 Am. St. Rep. 813; *Rhodes v. Missouri Savings & Loan Co.*, 50 N. E. 998, 1000, 173 Ill. 621, 42 L. R. A. 93.

A building and loan association is "a private corporation, erected for such a period of time as may be permitted by the laws under which it is incorporated, for the accumulation, from fixed periodical contributions of its shareholders and the profits upon their investment, of a fund to be applied from time to time in accommodating such shareholders with loans or advancements, for the purpose, primarily, of acquiring the free possession of real estate, and constructing dwellings, under terms and regulations sanctioned by experience and prescribed by legislation and the charter and by-laws of the association, upon principles of strict mutuality and equality of benefits and obligations, with the effect of gradually extinguishing the liability incurred from such loans and advancements simultaneously with the prescribed continuance of the shareholder's periodical contributions upon the stock held by him in the association; the said periodical contributions being so calculated as to amount, in the aggregate, at compound interest, to the par value of all the shares, as agreed upon at the formation of the society and fixed by its charter, within the period allowed for the anticipated duration of the society, or the continuance of the contributions, after deduction of all the necessary expenses of the business." *Endlich, Bldg. Ass'ns*, § 39. The societies in this country were first organized under the plan evolved in England. Lord Chancellor Cranworth, describing their operations in that country under the provisions of Act 6 & 7, Wm. IV, c. 32, §§ 1, 3-5, says: "Members subscribe monthly sums, which are cumulated till the fund is sufficient to give a stipulated sum to each member, and then the whole is divided among them. In the society now in question, the sum to be raised for each member is £100. If this were all, it would be a very simple transaction, mere accumulation, and

the only question would be how to invest the sums subscribed to the greatest advantage. But this is not all. One main object is to enable members to obtain their £100 by anticipation on their allowing a large discount. For this purpose, when a sufficient fund is in the hands of a treasurer, the members who desire to get their shares in advance bid by a sort of auction the sum which they are ready to allow as a discount, and the highest bidder obtains the discount. Thus, if at the end of a year a sum of £500 is in the hands of the treasurer arising from the monthly subscriptions, and the holder of 10 shares is willing to allow a discount of 50 per cent. (no one offering more), the £500 is or may be advanced to him, being £50 in satisfaction of each of his 10 shares. For this accommodation he is bound to pay monthly till a fund is raised sufficient to give £100 per share to all the other members, not only the original monthly subscription, but also a further monthly sum, called 'redemption money.' Washington Nat. Building, Loan & Investment Ass'n v. Stanley, 63 Pac. 489, 492, 38 Or. 319, 84 Am. St. Rep. 793 (citing Fleming v. Self, 3 De Gex, M. & G. 997, 1012).

A building and loan association is a "private corporation for gain, erected for such time, limited or unlimited, as may be permitted by the laws under which it is incorporated, for the accumulation, from fixed periodical contributions of its shareholders, in payment of the stock subscribed by them, the penalties for their nonpayment, and the profits upon their investment, of a fund to be applied from time to time in accommodating such shareholders with loans or advancements, primarily for the purpose of acquiring the free possession of real estate, or constructing dwellings, or both, under terms and regulations prescribed by legislation, or reasonably and lawfully ordained by charter and by-laws of the association, upon principles of strict mutuality and equality of benefits and obligations, with the effect of extinguishing the liability incurred for such loans and advancements simultaneously with the termination of the shareholder's periodical contributions upon the stock held by him in the association; the object of the latter being completed when the fund raised is sufficient to distribute to each member the par value of all shares subscribed by him and held without loans, and to extinguish all loans held by shareholders." Albany Mut. Bldg. Ass'n v. City of Laramie (Wyo.) 65 Pac. 1011, 1013.

A building and loan association is a private corporation, designed for the accumulation by the members of their money by periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for the same purposes, the borrowing members paying interest and premiums as a preference in secur-

ing loans over other members, and continuing their fixed periodical payments in addition, all of which payments, together with the nonborrower's payments, including fines for failure to pay such fixed installments thereafter or for such continued failure of such payments fees for transferring stock, membership fees required upon the entrance of a member into the society, and such other revenues go into the common fund until such time as that the installment, payments, and profits aggregate the face value of all the shares in the association, when the assets, after the payment of expenses and losses, are prorated among all members, which in legal effect cancels the borrower's debts and gives the nonborrower the amount of his stock. Cook v. Equitable Building & Loan Ass'n, 30 S. E. 911, 914, 104 Ga. 814; Albany Mut. Bldg. Ass'n v. City of Laramie (Wyo.) 65 Pac. 1011, 1013; Washington Nat. Building, Loan & Investment Ass'n v. Stanley, 63 Pac. 489, 492, 38 Or. 319, 58 L. R. A. 816, 84 Am. St. Rep. 793; Fleming v. Self, 3 De Gex, M. & G. 997, 1012.

Endlich on Building Associations, at section 517, described incorporated building associations as incorporated partnerships. In Towle v. American Building, Loan & Investment Soc. (U. S.) 61 Fed. 446, it is said: "These associations are essentially corporate partnerships. They have no function except to gather together from small stated contributions sums large enough to justify loans. Their officers are the agents of every stockholder. They have no debtors, no creditors, except the stockholders, and whether a stockholder is a creditor or debtor depends on whether he has exercised his privilege of borrowing money from the common fund." In Security Savings & Loan Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753, our Supreme Court adopted the foregoing view, that the relation existing between the members of a building association is that of a quasi partnership. Union Mut. Building & Loan Ass'n v. Alchele, 61 N. E. 11, 12, 28 Ind. App. 69.

"It is true, so far as I know, that unincorporated building societies have not existed in this country to any great extent, except in Massachusetts and Pennsylvania, because of the facility with which acts of incorporation of such societies and of companies generally can be procured in this country; but it is far otherwise in England. There these unincorporated building societies existed and flourished for many years before there was any law proposed which permitted them to become incorporated. Such a building club is mentioned as having existed in Birmingham as early as 1795, but nothing is really known about its operations. As early as 1809 one is certainly known to have existed in Greenwich. About 1815 the Earl of Selkirk, from purely benevolent motives, started these building societies in Scotland. They were merely private and unin-

corporated associations, and were eminently successful, because of the beneficial influence which they exerted on the industrial classes." *Pfeister v. Wheeling Bldg. Ass'n*, 19 W. Va. 676, 693.

Mutuality is the essential principle of a building association. Its business is confined to its own members; its object being to raise a fund to loan among themselves, or such as may desire to avail themselves of the privilege. This is done by the payment at stated times of small sums in the way of dues, interest on loans, and premiums for loans. Each shareholder, whether a borrower or nonborrower, participates alike in the earnings of the association, and alike assists in bearing the burden of losses sustained. It has what is called a "capital stock." This is only true in a modified sense. Unlike other corporations for profit, a share in a building association has at its inception only a nominal value. Its value is expected to increase by the lapse of time and the success of the association. *Eversmann v. Schmitt*, 41 N. E. 139, 141, 53 Ohio St. 174, 29 L. R. A. 184, 53 Am. St. Rep. 632.

The name "building and loan association," as used in the act relating to building, loan, and savings associations, includes all corporations, societies, organizations, or associations doing a saving and loan or investment business on the building society plan, whether mutual or otherwise, and whether issuing certificates of stock which mature at a fixed time in advance or not. *Gen. St. Minn. 1894, § 2876; Pub. St. N. H. 1901, p. 558, c. 166, § 2; Ballinger's Ann. Codes & St. Wash. 1897, § 4416.*

A "building and loan association," as used in the chapter relating to building and loan associations, is a corporation for the purpose of raising money to be loaned among its members. Associations organized under the laws of this state shall be known in this act as "domestic associations," and those organized under the laws of another state or territory, as "foreign associations." *Bates' Ann. St. Ohio 1904, § 3836-1.*

The name "building and loan association," as used in an act for the regulation and inspection of building and loan associations, includes all corporations, societies, organizations, or associations doing business in this state under a building and loan charter or engaging in a building and loan business. *Shannon's Code Tenn. 1896, § 2159.*

The name "building and loan association," as used in the chapter relating to mutual building and loan associations, shall include all societies, organizations, or associations doing a saving and loan or investment business on the building association plan, whether mutual or otherwise, and whether issuing certificates of stock or bonds, or any other evidence of indebtedness, whether the

time of maturity be fixed or not. *Rev. St. Wis. 1899, §§ 2014-2022.*

#### **As a corporate partnership.**

In *Towle v. American Building, Loan & Investment Soc. (U. S.)* 61 Fed. 446, it is said that building associations "are essentially corporate partnerships. They have no function, except to gather together from small stated contributions sums large enough to justify loans. Their officers are the agents of every stockholder. They have no debtors, no creditors, and whether a stockholder is a debtor or creditor depends on whether he has exercised his privilege of borrowing money from the common fund." This doctrine was adopted in *Security Savings & Loan Ass'n v. Elbert*, 153 Ind. 198, 54 N. E. 753, that the relation between the members and the association was that of a quasi partnership, whose members share in the profits and losses. The shares are matured by payment of dues and accumulation of property, and can only reach par value when the payment of dues and accumulation of property have reached the actual value of \$100 per share. A stockholder withdrawing can only withdraw what he has actually paid on each share, and not the par value of such share. *Union Mut. Building & Loan Ass'n v. Aichele*, 61 N. E. 11, 12, 28 Ind. App. 69.

#### **As a savings institution.**

A building association cannot, without a manifest abuse of the term, be denominated a "savings institution," and is not included within the exceptions of Act June 7, 1879, exempting from certain taxes "foreign insurance companies, banks, and savings institutions." *Bourguignon Bldg. Ass'n v. Commonwealth*, 98 Pa. 54, 64.

#### **BUILDING AND LOAN STOCK.**

"Building and loan stock" is stock held by those who make stated payments to the association in return for money borrowed by them from the association, and by such borrowers invested in the building or buying of homes. *Deniston v. Terry*, 41 N. E. 143, 144, 141 Ind. 677.

#### **BUILDING CONTRACT.**

"A contract," says Mr. Lloyd, in his work on the Law of Building and Buildings, § 1, "is an agreement between two or more persons for a valuable consideration to do or not to do some particular thing, and, when the undertaking refers to constructing, erecting, or repairing an edifice or other work or structure, it may be called a building contract." *Utah Lumber Co. v. James*, 71 Pac. 986, 987, 25 Utah, 434 (citing *City of Lake View v. MacRitchie*, 134 Ill. 203, 25 N. E. 663).

The term "building contracts" is properly used to designate contracts for work or materials in erecting and building, etc., for which work and materials the contractor is entitled to a mechanic's lien. *Carey-Lombard Lumber Co. v. Jones*, 58 N. E. 347, 349, 187 Ill. 203.

#### **BUILDING FOR PUBLIC WORSHIP.**

See, also, "Public Worship."

A statute exempting from taxation every building for public worship and the several lots whereon such buildings are situated does not include a cemetery and the keeper's house, and a chapel erected thereon for religious service at interments. *Trinity Church v. City of New York*, 10 How. Prac. 138.

The term "building for public worship," in a statute exempting a building for public worship, was construed not to include a church building, not used for religious purposes, and owned by a private person and situated on property owned by him. *Black v. City of Brooklyn*, 4 N. Y. Supp. 78, 51 Hun, 581.

#### **BUILDING FOR RELIGIOUS WORSHIP.**

See "Religious Worship."

#### **BUILDING GROUND.**

"Building ground," as used in a conveyance to plaintiff, by which the land was described as bounded by building ground belonging to another grantee of the same grantor, was a loose and general expression, which might be satisfied as well by the power of erecting a building, which would leave the plaintiff's lights altogether undisturbed, or partially obstructed only, or altogether blocked up; but, on its appearing that there had been on the building ground in question for a long period of time, and only recently demolished, a building which extended only to the height of the first floor of the plaintiff's house, this gave the limit and extent intended by the terms in the description. *Swansborough v. Coventry*, 9 Bing. 305, 310.

#### **BUILDING LIEN.**

See "Building (In Lien Laws)."

A building or mechanic's lien is purely statutory. Its character, operation, and extent must be ascertained by the terms of the statute creating and defining it. A mechanic's lien in favor of a principal contractor grows out of the contractual relations between the owner of the property improved or his authorized agent and such principal contractor, and the right authority is based upon contract for the purpose of securing

debts due thereunder. *Rust-Owen Lumber Co. v. Holt*, 82 N. W. 112, 113, 60 Neb. 80, 83 Am. St. Rep. 512.

#### **BUILDING MATERIALS.**

Lumber, being timber sawed or split for use in building and material essential for building any kind of a house ordinarily used for business or by families, is included in the term "building material." *Ward v. Kadel*, 38 Ark. 174, 180.

A city ordinance prohibiting any person from placing any materials for building in any street will not be construed to apply to dirt excavated for the foundation of a building and which is not to be used in the construction thereof. *Hundhausen v. Bond*, 36 Wis. 29, 36.

A fire insurance policy on the lumber and building materials contained in a shipyard should be construed to cover timbers not united to the keel or structure thereon of a contemplated bark, though they are intended and completely prepared to be used in its framework, are lying in the yard in the proper place to be conveniently applied to that use, and are valueless for any other vessel. They are materials until they actually become a part of the structure of the ship. *Hood v. Manhattan Fire Ins. Co.*, 11 N. Y. (1 Kern.) 532, 540.

#### **BUILDING PURPOSES.**

A tax for heating and repairing purposes is a tax for school, and not for building purposes. The latter words refer to the building of schoolhouses only, within the meaning of 3 Starr & C. Ann. St. p. 1194, limiting taxes levied in any one year to a certain per cent. for school purposes and a certain per cent. for building purposes. *Chicago & A. R. Co. v. People*, 45 N. E. 122, 123, 103 Ill. 616.

Where, in 3 Starr & C. Ann. St. p. 3706, par. 202, providing that the levy of school taxes shall not exceed a certain per cent. for educational purposes and a certain per cent. for building purposes, the words "building purposes" are special, and apply solely to the building of schoolhouses and matters incident thereto, while the words "for educational purposes" are general, and apply to all matters for which a board of directors may levy school taxes. *O'Day v. People*, 49 N. E. 504, 505, 171 Ill. 293.

#### **BUILT AND IN OPERATION.**

An agreement under which a tax was voted to aid in the construction of a railroad stipulated that it should be built and in operation on or about a certain date. This did not impose an obligation on the company to complete the road by the time nam-

ed, but only that it should be "built and in operation"—so far completed that it was capable of use. *Muscatine Western R. Co. v. Horton*, 38 Iowa, 33, 43.

### BUILT UP.

"Built up," as used in Act April 20, 1899 (P. L. 66), declaring it unlawful thereafter to establish or maintain any additional hospital in the built up portion of cities, should be construed in its ordinary and popular sense, and not as contradistinguished to rural and agricultural property. *Commonwealth v. Pittsburg Charity Hospital*, 47 Atl. 980, 982, 198 Pa. 270.

### BULK.

See "In Bulk"; "Open Bulk."

"Bulk" is said to be that which is neither counted, weighed, nor measured. A sale by the bulk is the sale of a quantity such as it is, without measuring, counting, or weighing. *Civ. Code La. 1900*, art. 3556, subd. 6.

As the term "bulk" is used in speaking of sales by sample, it indicates the entire quantity to be sold, which is supposed to be presented in quality by the sample, which is the basis of the sale. *Reynolds v. Palmer* (U. S.) 21 Fed. 433.

Where a testator made certain specific bequests to persons, and then provided that the bulk of his estate should be disposed of in a certain manner, the bulk of his estate referred to is testator's residuary estate, both real and personal. *Cole v. Proctor* (Tenn.) 54 S. W. 674, 676.

### BULL—BULLOCK.

As a beef, see "Beef."

As cattle, see "Cattle."

A bull is an uncastrated male of the cattle species. *State v. Royster*, 65 N. C. 539.

Act 1869, making it unlawful for the owner of domestic animals of the "species bull" to allow them to run at large, applies to bulls of all kinds and descriptions, without reference to size, age, or quality; but it does not embrace cows, helpers, or steers. *Oil v. Rowley*, 69 Ill. 469, 472.

A bull is a male of the bovine genus of animals, and is not included in the term "cow," so that one indicted for stealing a cow could not be convicted of stealing a bull. *State v. McMinn*, 34 Ark. 160, 162.

"Bullock stealing," as used in St. 7 Geo. IV, c. 64, § 28, relating to allowances of rewards for the discovery of offenders, includes all cases of actual stealing of ani-

mals of that particular description, as ox, cow, helper, etc. *Rex v. Gillbrass*, 7 Car. & P. 444.

Bulls and cows are not covered by a mortgage which undertakes to include one and two year old steers. *Wyman v. Herard*, 59 Pac. 1009, 1024, 9 Okl. 35.

### BULLION.

See "Base Bullion"; "Crude Bullion."

Bullion is defined to be uncoined gold or silver in mass. Properly the precious metals are called "bullion" when smelted, and not perfectly refined, or when refined, but in bars or ingots, or in any form uncoined or in plate. *Hope Min. Co. v. Kennon*, 3 Mont. 35, 44.

The term "bullion," in Rev. St. § 2897, providing that upon an indictment for the theft of money it shall be sufficient to maintain the charge if it be proved that any bullion, money, notes, etc., were fraudulently embezzled, means uncoined gold and silver in the mass. *Thalheim v. State*, 20 South. 938, 948, 38 Fla. 169.

Where a contract for services provides that they should be paid for at a certain rate per month in gold bullion, the word "bullion" imports money, for which suit could be maintained without demand. It was argued that bullion was a specific article, it being merchandise; and the court said: "In the same sense coin may be regarded as merchandise; for it is not its coinage which makes it the standard by which other commodities are measured, but its intrinsic value in the markets of the world as a precious metal. The precious metals are adopted as the general medium of exchange, because they have in themselves an intrinsic value, being used for many purposes, are produced in nearly equal quantities at nearly equal cost, are portable and comparatively indestructible, and they have this value, coined or uncoined; for the stamp which government impresses upon the coin is simply a guaranty of its weight and fineness. 'Bullion,' when the word is used in a financial sense, for it has other meanings (*Nare's Glossary*, Ed. of 1872; *Wedgwood's Eng. Etymology*), imports uncoined gold and silver, either smelted, refined, or in the condition in which it is used for coining, and has from the earliest period been associated with or employed as a term denoting money. It is derived from the French word 'billion,' which Savary, in his *Dictionnaire Universel de Commerce*, defines as a term for money; \* \* \* and one of the earliest English authorities upon those words that are derived from the French, *Cotgrave*, in his *French and English Dictionary* of 1632, defines 'bullion' as 'money; monnoye de billion.' Bayley, more than a century afterwards, defines it in his

English Dictionary of 1763 as 'money having no stamp upon it'; and our own contemporary authority, Webster, says: 'The word is often used to denote gold and silver, coined and uncoined, when reckoned by weight and in mass, including especially foreign or uncurrent coin.' \* \* \* Locke, in his paper on Raising the Value of Money, so employs the word in this passage: 'Foreign coin hath no value here for its stamp, and our coin is bullion in foreign countries.' In France 'bullion' is used not only for coin, and for the material before it is coined, but also for the mint or place where the precious metals are sent to be coined (*Bescherelle Dictionnaire Universel de la Langue Francaise*); and 'bullion' was formerly used in this sense in England." *Counsel v. Vulture Min. Co. of Arizona*, 5 Daly, 74, 77 (citing *Wedgw. Dict. Eng. Etymology*, p. 112; 2 St. 27 Edw. III, c. 14; St. 4 Hen. IV, c. 10).

## BUNCO.

Evidence that defendant, learning that the prosecuting witness had \$4,000 deposited in his wife's name, gained his confidence and took him to a lottery shop, where, after being induced by defendant to try his luck, he was allowed to draw a prize of \$4,000, but was told, when he demanded it, that he must first draw an equal amount of money; that defendant went with him to get the money, and after his wife, in whose name it was deposited, had drawn it, returned with them to the lottery shop at the time agreed on, where they found another man in charge, who said that the man in charge when the prize was drawn had gone to get the money; that this new man, and also defendant, told the wife that she must give the money to her husband and go out of the shop, as women are not allowed in it; and that witness and his wife, suspecting a trick, went away—makes it plain to a certainty that the defendant was doing his best to defraud the witness of his money by playing a confidence game, and its name is "bunco," as defined by the dictionaries. *People v. Mason*, 45 Pac. 182, 183, 113 Cal. 76.

## BUNCO STEERER.

Any person or persons who shall, by means of any scheme, trick, device, practice, or deception, entice or induce, or attempt to entice or induce, any person into any gambling house, club rooms, variety show, lottery office, beer hall, or any other place, for the purpose and with intent to procure or obtain, or to attempt to procure or obtain, from such person any money or other valuable thing by means of any game or games, lottery, or gift enterprise of any kind, or by means of any fraudulent pretense, scheme, trick, device, or deception, shall be deemed a bunco steerer. *Mills' Ann. St. Colo.* 1891, § 1398.

## BURDEN.

The word "burden," in a deed to a lot by a city, which provides that the holders shall be subject to all such assessments and burdens as might be imposed on other lot holders of the city, is sufficiently comprehensive to include municipal taxes. "Taken altogether, the language adopted is clearly broad enough to embrace every burden then existing or which might thereafter be lawfully imposed upon other landowners in the city." *Wells v. City of Savannah*, 21 Sup. Ct. 697, 701, 181 U. S. 531, 45 L. Ed. 986; *Id.*, 32 S. C. 669, 670, 107 Ga. 1.

### Of vessel.

A statute enacted that, after a ferry should be established, no other ferry should be set up and used by any person, and, if any person other than those operating the ferry established by the statute should use any boat or vessel of the burden of four tons or upward, they should forfeit a certificate. Held, that the word "burden" did not register admeasurement, but the carrying capacity. *North & S. S. Ferry Co. v. Baker*, 2 Wel., Hurl. & G. 136, 147.

## BURDEN OF PROOF.

The fundamental rule as to burden of proof, as given by Stephen, *Ev. (Am. Ed.)* 175, is that, whenever the existence of any fact is necessary in order that a party may make out his case or establish a defense, the burden is on such party to show the existence of such facts; that whoever desires any court to give a judgment as to any legal right or liability, dependent on the existence or nonexistence of facts, which he asserts or denies to exist, he must prove that those facts do or do not exist in order to be entitled to the relief. *Willett v. Rich*, 142 Mass. 356, 357, 7 N. E. 776, 56 Am. Rep. 684.

The term "burden of proof" means that the burden is coextensive with the legal proposition sought to be proven, and it applies to every fact which is essential to or necessarily involved in the proposition. It does not apply to facts relied on in defense to establish an independent proposition, however inconsistent such proposition may be with that on which the plaintiff's case depends. If the defendant furnish proof on an independent proposition which is inconsistent with that on which the plaintiff's case rests, the burden is on the plaintiff not to disprove those particular facts, nor the proposition which they tend to establish, but to maintain the proposition on which his own case rests, notwithstanding the defendant's testimony, and on the whole evidence in the case. *Wilder v. Cowles*, 100 Mass. 487, 490.

The burden of proof is often spoken of as an equivalent to the duty of introducing

evidence to meet or overcome a prima facie case, and, where the court is asked to instruct the jury that by the proof of certain facts the burden was cast on defendant, complainant in fact seeks to have the court tell the jury that such facts constitute a prima facie case for complainant. *Michael v. Marshall*, 66 N. E. 273, 275, 201 Ill. 70.

The strict meaning of the term "onus probandi" is that, if the party who has the burden of proof does not offer any evidence in the cause, the issues must be found against him. *Davis v. Rogers* (Del.) 1 Houst. 44, 95; *Evans v. Arnold*, 52 Ga. 169, 180; *Roberts v. Crawford*, 54 N. H. 532, 534 (citing *Kendall v. Brownson*, 47 N. H. 186, 197); *Baldwin v. Parker*, 99 Mass. 79, 87, 98 Am. Dec. 697.

"By the onus probandi is meant the obligation imposed upon a party who alleges the existence of a fact or thing necessary in the prosecution or defense of an action to establish it by proof. It may be proved by the production of evidence in the usual way, or the law under certain circumstances in certain cases may presume its existence without proof." *People v. McCann*, 16 N. Y. 58, 66, 69 Am. Dec. 642; *Id.*, 15 How. Prac. 503, 514.

The rule of burden of proof cannot be made to depend upon the order of proof, or upon the particular mode in which the evidence is introduced. *Commonwealth v. McKie*, 67 Mass. (1 Gray) 61, 64, 61 Am. Dec. 410. The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and is not changed in any aspect of the cause, except by legal presumption; the latter shifts from side to side in the progress of the trial, according to the nature and strength of the proof offered in support or denial of a main fact to be established. *Kendall v. Brownson*, 47 N. H. 186, 200.

The term "burden of proof" is used in different senses. Sometimes it is used to signify the burden of meeting a prima facie case, and sometimes the burden of producing a preponderance of evidence. The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony. The other remains with the party on whom it is cast by the pleadings; that is, with the party who has the affirmative of the issue. All that is meant, however, by the phrase "shifting of the burden of proof," is that the party having the burden has produced sufficient evidence to establish a prima facie case, and that there is a necessity of evidence to answer the same or it will prevail. The burden, however, of maintaining the affirmative of the issue involved in the action, is on the party alleging the fact which constitutes the issue, and this burden remains where it is placed according to the

pleadings throughout the trial. *Jones v. Prospect Mountain Tunnel Co.*, 31 Pac. 642, 644, 21 Nev. 339. "If, upon the making of a prima facie case, the burden shifts to the other side, then it would follow that, when the prima facie case is overthrown, the burden shifts back again. To say that the burden thus shifts is to say that it is constantly shifting from the stronger to the weaker side, as the testimony may make one side or the other stronger." *Carver v. Carver*, 97 Ind. 497, 511.

Where a party during the progress of a trial gives evidence sufficient to establish his allegation prima facie, it is sometimes said that the burden of proof is shifted. What is meant by this, however, is only that there is a necessity of evidence to answer the prima facie case, or it will prevail. The burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial. *Heinemann v. Heard*, 62 N. Y. 448, 455.

The "burden of proof" means the burden of establishing a case, and the well-settled law is that such burden remains unchangeably throughout the entire case exactly where the pleadings originally placed it. The burden of proof, in the sense of the "burden of the evidence," may shift constantly, as the evidence is introduced by one side or the other—as one scale preponderates over its fellow; but, when all the evidence is in, it is legally necessary to action by the tribunal that the final balance be one way. This necessity does not at any time shift, but remains constantly throughout the trial on one of the parties alone, to wit, on him who had the affirmative. This is the burden of establishing—the burden of proof. *Feurt v. Ambrose*, 34 Mo. App. 360, 366.

An accepted definition of "burden of proof," propounded by our own court of highest authority, is: "The obligation imposed on the party who alleges the existence of the fact or thing necessary in the prosecution or defense of an action to establish it by proof." *Siefke v. Siefke*, 3 Misc. Rep. 81, 84, 22 N. Y. Supp. 546 (citing *People v. McCann*, 16 N. Y. 58, 66, 69 Am. Dec. 642).

The phrase "burden of proof" is employed and has been used from time immemorial by every judge to indicate how the carriage of a case passes from one side to the other. By it is meant, when it is said that the defendant has the burden of proof, either his evidence to a refutation of the plaintiff's version, or to the establishment of facts which would avoid liability or explain the case as made by the plaintiff. It is thus used in relation to cases of accidents which speak for themselves as indicating the negligence of



defendant. Where it is said that, on proof of an accident, the plaintiff had established a prima facie case when he rested, and the burden was then on defendant. *Kay v. Metropolitan St. R. Co.*, 51 N. Y. Supp. 724, 727, 29 App. Div. 466.

As a general proposition, the burden of proof in respect to the different parts of a case may be determined by reference to the pleadings, the plaintiff being bound to prove, if denied, what he has affirmed in his answer; but, beyond the reply, with which, under the Code, pleading stops, the question must be determined by the nature of the evidence and its relation to the case, the burden of rebutting being on the defendant, of surrebutting on the plaintiff, and in actions of replevin, ejectment, or the like, wherein the pleadings do or may end with the complaint and an answer in denial, the burden of the evidence is upon the party who, if special pleading were required, would be bound to allege the particular matter sought to be proven. *Fay v. Burditt*, 81 Ind. 433, 443, 42 Am. Rep. 142.

Strictly speaking, the "burden of proof," as these words are understood in the criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end, and applies to every element necessary to constitute the crime. Where the defense is insanity, the vital question, from the time a plea of not guilty is entered until the return of the verdict, is whether, on all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that specified by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of sanity, the accused is entitled to an acquittal. *Davis v. United States*, 16 Sup. Ct. 353, 358, 160 U. S. 469, 40 L. Ed. 499.

In an action for personal injuries, the court charged that "the burden rests upon the plaintiff, even though the city was negligent. If he could have seen the defect which was here alleged, had he looked, and he did not look, he cannot recover in this action." It was contended that the use of the word "burden" was erroneous; but it was held that, while the word was perhaps not happily chosen, it was not inaccurate. The plaintiff was bound to make out a case clear of contributory negligence, and this may be properly described as a burden, though a negative one. *Heiss v. City of Lancaster*, 52 Atl. 201, 203 Pa. 260.

The "burden of proof," as used in an instruction that the burden of proof is on the defendant in proving the defense of alibi, does not imply that the defendant must prove his defense by such evidence as will satisfy

a jury that his defense is true, but only that, after the prosecution has made out its case, it devolves upon the accused to introduce evidence, if he has any, to prove his alibi, if he relies upon such a defense. *Wilburn v. Territory*, 62 Pac. 968, 970, 10 N. M. 402.

The term "burden of proof" is, after all, and no matter how important it has become through unanimous adoption and use, a mere form and figure of speech. In re Appeal of Barber, 27 Atl. 973, 977, 63 Conn. 393, 22 L. R. A. 90.

#### **Burden of evidence distinguished.**

There is a manifest distinction between the "burden of evidence" and the "burden of proof." How far the burden of evidence may bear upon a party to litigation is usually more for the jury to determine as a matter of fact than for the ruling of the court as matter of law. Generally the burden of proof upon any affirmative proposition necessary to be established as the foundation of a suit does not shift from plaintiff to defendant, while the burden of evidence, or of the weight or preponderance of evidence, or the burden of explanation, may shift from one side to the other, according to the testimony. *Buswell v. Fuller*, 36 Atl. 1059 1060, 89 Me. 600.

#### **Preponderance of evidence.**

The burden of proof is that obligation resting on a plaintiff in a suit at law to establish to the satisfaction of the jury or court, by a preponderance of the evidence, reasonably satisfying the minds of the jury or court, by convincing proof of witnesses, that the defendant, whom the plaintiff has brought into court, is responsible for the loss or damage alleged to have been suffered by plaintiff. *Gage v. Louisville, N. O. & T. Ry. Co.*, 14 S. W. 73, 74, 88 Tenn. (4 Pickle) 724.

It is the well-settled rule that the burden of proof, which is charged upon the person who asserts the fact, requires that the jury shall be satisfied from the whole case that the fact is proved, and if, from the whole case, the jury are not satisfied that the fact is established, the asserting party fails in bearing the burden. An instruction that if the jury should find the theory of the plaintiff more acceptable, more probable, and more consistent than the theory advanced by the defendants, the rule requiring plaintiff to establish his case by the burden of proof has been satisfied, is erroneous. "It might well be that one theory of a case was more acceptable, more probable, and more consistent than the other, and yet be unsupported by a preponderance of evidence, or so far supported by the evidence as to entitle the party to recover, or it might well be that one theory of a case was more acceptable, probable, and consistent than another, and yet neither be sufficiently supported to warrant a finding

that either theory was proven." *Rommeney v. City of New York*, 63 N. Y. Supp. 186, 189, 49 App. Div. 64.

Where a party avers a thing, which is denied by his opponent, the party who avers the fact to exist must take upon himself the trouble or burden of proving it; and, when the burden of proof is upon a party, he is bound to establish the fact which he alleges, and which the other party denies, by a preponderance of the evidence. *Parker v. Hull*, 37 N. W. 351, 352, 71 Wis. 868, 5 Am. St. Rep. 224.

The term "burden of proof" may be used to indicate the burden which rests on every party to a cause presenting a claim for relief, or pleading in avoidance, of going forward, if he be met by a traverse, and establishing what is well defined by an authoritative writer on the law of evidence as "the total proposition or series of propositions which constitute his disputed case" (*Thayer, Prelim. Treatise Ev.* 380). It may also be used to denote a duty cast by law upon one party to meet and rebut the effect of some piece of evidence introduced by the other by proof of what may suffice to overbear it in the mind of the trier. *Baxter v. Camp*, 41 Atl. 803, 805, 71 Conn. 245, 42 L. R. A. 514, 71 Am. St. Rep. 169.

#### Weight of evidence distinguished.

"The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause. The latter shifts from side to side in the progress of the trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established." *Scott v. Wood*, 22 Pac. 871, 872, 81 Cal. 398; *Central Bridge Corp. v. Butler*, 68 Mass. (2 Gray) 130, 132.

"Burden of proof should not be confounded with weight of evidence, since the former is a rule of law, while the latter is one of fact. The one belongs to the court; the other, to the jury. Whether the burden of proof as to a certain fact is on the plaintiff or defendant, the court will determine on the settled rules of judicial evidence, one of which is that the burden of maintaining any issue of fact rests on him who, from the nature and character of the fact, has or might have peculiar evidence thereon." *Little Pittsburg Con. Min. Co. v. Little Chief Min. Co.*, 17 Pac. 760, 765, 11 Colo. 223, 7 Am. St. Rep. 228.

The term "burden of proof" is properly applied only to a party affirming some fact essential to the support of his case, and with regard to the necessary allegations to support such case the burden never shifts during the trial. The term "burden of proof" is

often confounded with weight of evidence, which may shift from one side to the other as facts and presumptions appear from the testimony and are overcome by other evidence or presumptions. *Pease v. Cole*, 22 Atl. 681, 686, 53 Conn. 53, 55 Am. Rep. 53.

## BUREAU.

See "Head of Bureau."

A bureau is an article of household furniture used for domestic purposes, and generally belongs to the ladies' department of the household government, and the ordinary use of a stand of bureaus is not for the purpose of holding and securing such things as a life insurance policy, though they may often be used for that purpose; hence the gift of the bureau would not carry with it the insurance policy. *Newman v. Boat*, 29 S. E. 848, 849, 122 N. C. 524.

## BUREAU OF CONSCRIPTION.

The bureau of conscription was a branch of the war department of the Confederate states. *In re Strawbridge*, 39 Ala. 367, 375

## BURGEE.

A "burgee" is defined by lexicographers to be "a distinguishing flag or pennant." *The Stephen Hart* (U. S.) 22 Fed. Cas. 1253, 1269.

## BURGERALLY.

A jury trying a defendant for burglary returned a verdict finding accused guilty of "Burgerally and theft." Held, that the words quoted in the verdict described no offense, as there was no such word as "Burgerally," nor was it idem sonans with "burglary." The verdict, therefore, was unintelligible and void. *Haney v. State*, 2 Tex. App. 504, 505.

## BURGESS.

The word "burgess," as used in a charter providing that the mayor was to be annually elected by the burgesses of the borough, did not mean only capital burgesses, but applied to all. *Rex v. Goldsmith*, 4 Barn. & Adol. 835.

## BURGLAR.

"A burglar is by the common law a felon that in the nighttime breaketh and entereth into a mansion house of another, of intent to kill some reasonable creature, or to commit some felony within the same, whether his felonious intent be executed or not" (*Coke*). *Wilson v. State*, 34 Ohio St. 199, 200; *State v. McDaniel*, 60 N. C. 245, 248; *People v. McCloskey* (N. Y.) 5 Parker, Cr. R. 57, 60;

*Armour v. State*, 22 Tenn. (3 Humph.) 379, 385; *Wilson v. State*, 34 Ohio St. 199, 200 (citing 1 Hale, P. C. 556); *Robinson v. State*, 53 Md. 151, 153, 36 Am. Rep. 399.

A burglar is one who breaks into a house with intent to commit a crime, even though but little force be used in the breaking. *O'Connor v. Press Pub. Co.*, 70 N. Y. Supp. 367, 368, 34 Misc. Rep. 564.

### BURGLARIOUSLY.

The word "burglariously" is understood in the modern professional language as necessarily implying that the act characterized by the term was done in the night. Yet it is said in Jacob's Law Dictionary, under the title "Burglary," that originally the term signified only the robbery of a dwelling house, without any reference to the time when it was committed. *Lewis v. State*, 16 Conn. 32, 34.

Under Code Cr. Proc. art. 422, defining "burglary" as entering a house by force, threats, or fraud, at night, or, in like manner, by entering a house during the day and remaining concealed therein until night, with intent in either cause of committing felony or the crime of theft, the offense can be charged in an indictment without using the word "burglariously," and such word is not a term of art, in charging burglary, for which there is no substitute. *Reed v. State*, 14 Tex. App. 662, 665.

### BURGLARIZE.

"Burglarize" is defined by standard English dictionaries to mean to "commit burglary upon," and is therefore the exact equivalent in meaning of the words "committed burglary," as used in the statute, and is sufficient in an indictment for conspiracy to burglarize. *State v. Slutz*, 30 South. 298, 300, 106 La. 182.

### BURGLARY.

See "Burgerally"; "Burgurly."

See, also, "Breaking (In Criminal Law)."

Burglary is a combination of the Saxon term "burg," a house, and "laron," theft, and originally signified no more than the robbery of a dwelling, but is now defined to be breaking and entering the house of another in the nighttime with intent to commit a felony, whether the felony be actually committed or not. At common law the ownership of the house was essential to the offense. It was required that it should be the house of another. Under most statutes this is not so, and the character of the building broken and entered is all that is required, with such a description of the building as enables the state to identify it by the evidence for the prosecution. *Anderson v. State*, 48 Ala. 665, 666, 17 Am. Rep. 36.

At common law, burglary consisted of two kinds: (1) Simple burglary, which was committed the minute a breaking of the dwelling house was accomplished, with the intent, etc.; (2) a burglary complicated and mixed with another felony, such as burglary and larceny, committed at the same time. Cases of a burglarious entry with intent to steal, and the consummation of that intent by actual theft, are so connected as to practically amount to one crime, both of which may be charged in the same count of an indictment, except where prohibited by statute. *State v. Smith*, 52 N. W. 320, 321, 2 N. D. 515.

Burglary is the breaking and entering into the house of another with intent to commit a felony. *Benson v. McMahon*, 3 Sup. Ct. 1240, 1242, 127 U. S. 457, 32 L. Ed. 234; *People v. St. Clair*, 56 Cal. 406, 407; *Temple v. People (N. Y.)* 4 Lana. 119, 123; *Hunter v. State*, 29 Ind. 80, 81.

"Burglary" is defined by Pen. Code, § 46, to be an unlawful entry in the nighttime, or an unlawful breaking and entry in the daytime, with intent to commit a misdemeanor or a felony. *State v. Hansen*, 38 Pac. 1023, 1024, 10 Wash. 235.

"Burglary" is defined by Pen. Code Cal. § 459, as follows: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, railroad car, with intent to commit grand or petty larceny, or any felony, is guilty of burglary." *People v. Webber*, 70 Pac. 1089, 138 Cal. 145.

"Burglary" is defined in 2 Ballinger's Ann Codes & St. § 7104, as unlawfully entering in the nighttime, or breaking and entering in the daytime, any dwelling house, or outhouse adjoining and occupied therewith, or any office, shop, store, warehouse, mill, factory, bank, church, railroad car, barn, stable, etc., in which goods, merchandise, or valuable things are kept for use, sale, or deposit, with intent to commit a misdemeanor or felony. The common-law definition of "burglary" is breaking and entering the dwelling house of another in the nighttime with intent to commit a felony. The simple idea of the common law which has obtained for hundreds of years, viz., the unlawful breaking and entering of some kind of an inclosed structure, has been retained by the statute, but the element of breaking in the nighttime has been dropped. *State v. Pettit*, 72 Pac. 1021, 1022, 32 Wash. 129.

Every person who enters any house, room, apartment, tenement, or other building with intent to commit grand or petty larceny or any felony is guilty of burglary. *People v. Goldsworthy*, 62 Pac. 1074, 130 Cal. 600. Every burglary committed in the nighttime is burglary of the first degree, and

every burglary committed in the daytime is burglary of the second degree. *Taylor v. Territory (Ariz.)* 64 Pac. 423.

Burglary is a disturbance, not of the fee of the burglarized building regarded as real estate, but of its habitable security. *State v. Gilligan*, 50 Atl. 844, 845, 23 R. I. 400. So that in burglary the word "ownership" means any rightful possession as against the burglar. Hence an accusation charging a larceny from the dwelling house of a person named is not sustained by proof that he was the owner in fee of a hotel, which he rented to and which was conducted by another, and that the theft was committed in a room of this hotel which was occupied by a guest of the latter. *Trice v. State*, 42 S. E. 1008, 116 Ga. 602.

#### Both breaking and entry necessary.

To constitute burglary, it is well settled that there must be both a breaking and entry, and an information is fatally defective which fails to charge both. *State v. Whitby*, 15 Kan. 402.

#### Consummation of intent.

Burglary is the breaking and entering a dwelling house of another in the nighttime with intent to commit a felony therein, whether the felonious intent be executed or not. *State v. Fitzsimon*, 27 Atl. 446, 447, 18 R. I. 236, 49 Am. St. Rep. 766; *State v. Johnson*, 34 La. Ann. 48, 49; *Hamilton v. State*, 11 Tex. App. 116, 121; *Martin v. State*, 1 Tex. App. 525, 529; *People v. Phelan*, 28 Pac. 855, 93 Cal. 111; *People v. Barry*, 29 Pac. 1026, 94 Cal. 481 (citing Russ. Crimes, 785); *State v. Langford*, 12 N. C. 253; *State v. Meche*, 7 South. 573, 574, 42 La. Ann. 273; *Clarke v. Commonwealth*, 25 Grat. 908, 912; *People v. Edwards*, 1 Wheeler, Cr. Cas. 871.

Burglary "is almost the only case where crime in the highest degree is not dependent on the consummation of the intent. In almost all other offenses there is a locus penitentia. But the law throws her mantle around the dwelling of man because it is the place of his repose, and protects not only the house in which he sleeps, but also all others appurtenant thereto, as parcel or part thereof, from meditated harm; thus the kitchen, the laundry, the smokehouse, and the dairy are within its protection, for each contributes in its way to the comfort and convenience of the place as a mansion or dwelling." *State v. Langford*, 12 N. C. 253.

#### Entry at night.

Burglary is the breaking and entering of a dwelling house in the nighttime with intent to commit a felony therein. *State v. McCall*, 4 Ala. 643, 644, 39 Am. Dec. 314; *State v. Potts*, 75 N. C. 129, 130; *State v. Foster*, 40 S. E. 209, 210, 129 N. C. 704;

*State v. Willis*, 52 N. C. 190 (quoting Arch. Cr. Pl. 251); *State v. Ginns (S. C.)* 1 Nott & McC. 583, 584 (citing 4 Bl. Comm. 224); *State v. Wilson*, 1 N. J. Law (Coxe) 439, 440, 1 Am. Dec. 216; *Connors v. State*, 45 N. J. Law (16 Vroom) 840, 342; *State v. McCall*, 4 Ala. 643, 644, 39 Am. Dec. 314; *Cole v. People*, 37 Mich. 544, 548; *Ducher v. State*, 18 Ohio, 808, 316; *State v. Kane*, 23 N. W. 488, 489, 63 Wis. 260; *Kyle v. Commonwealth*, 63 S. W. 782, 111 Ky. 404; *People v. Stapleton*, 8 Pac. 6, 9, 2 Idaho (Hasb.) 47; *State v. Gray*, 46 Pac. 801, 23 Nev. 301; *People v. Arnold (N. Y.)* 6 Parker, Cr. R. 638, 640; *In re Lagrave (N. Y.)* 45 How. Prac. 301, 302.

Burglary is the forcible breaking and entering of any house or any tent in the nighttime with the intent to commit murder, rape, mayhem, larceny, or other felony. *Rev. Laws* 332, § 59; *People v. Stapleton*, 8 Pac. 6, 9, 2 Idaho (Hasb.) 47.

"Burglary" is defined by Cr. Law Code, § 48, as follows: "If any person shall in the night season willfully, maliciously and forcibly break and enter into any dwelling house etc., with intent to kill, rob or commit a felony every person so defined shall be guilty of burglary." Under such definition it is an essential element of the crime that it be committed in the nighttime, and the defendant cannot be convicted of burglary by a proof that the breaking and entering was in the daytime. *In re McVey*, 70 N. W. 51, 52, 50 Neb. 481.

"Burglary" is defined by Cr. Code, § 36, without regard to whether the act is committed in the day or in the night time, but prescribes a heavier punishment for the latter. A conviction, therefore, may be had on an indictment for burglarizing a dwelling house which does not state whether committed in the day or night time, where the evidence shows it to have been committed in the night, the time of the commission of the act being under the statute but an aggravation of the offense. *Schwabacher v. People*, 46 N. E. 809, 811, 165 Ill. 618.

#### Entry in daytime.

Burglary in some states, by some statutes, may be committed in the daytime, as well as at night. Thus, under *Rev. St.* 365, § 70, burglary in the day is defined as "any breaking and entering of a dwelling or other house with intent to commit murder, rape, robbery or any other felony in the daytime." *Territory v. Duncan*, 6 Pac. 353, 5 Mont. 478.

If a door be shut and simply held in position by its own pressure upon the side and facing, it is a sufficient force and breaking to constitute a daytime "burglary" to push, pull, or shove it open with burglarious intent. *Duke v. State*, 57 S. W. 652, 653, 42 Tex. Cr. R. 3.

Burglary is the entering of a house by force, threats, or fraud at night, or in like manner by entering a house during the day and remaining therein concealed until night, and with the intent in either case to commit a felony, or the crime of theft. He is also guilty of burglary who, with intent to commit a felony or a theft, is guilty of breaking or entering a house in the daytime. *Hammons v. State*, 16 S. W. 99, 29 Tex. App. 445.

#### **Entry of church.**

Burglary, at common law, is an offense against the habitation of man. It may also be stated that the crime of burglary, even at common law, extends to the felonious breaking and entering a church. *People v. Richards*, 108 N. Y. 137, 142, 15 N. E. 371, 372, 2 Am. St. Rep. 373.

#### **Entry of master's chamber.**

It will amount to burglary if a servant in the nighttime open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder or rape, or for any other felonious design. Hence, where a servant who has a right to sleep in his master's dwelling goes in, not with intent to lodge, but with intent to steal by opening the door or raising the sash, and actually steals and carries away his master's goods, he commits a burglary. *State v. Howard*, 42 S. E. 173, 175, 64 S. C. 344, 58 L. R. A. 685, 92 Am. St. Rep. 804.

#### **Entry of shop.**

By statute the crime of burglary may be committed by breaking open a shop wherein goods, wares, and merchandise are deposited. *State v. Carrier* (Conn.) 5 Day, 131, 133.

#### **Entry of warehouse or granary.**

A building placed on a market garden, and used for storing tools and implements, and such seeds as were sown there, is not a warehouse nor a granary within the meaning of the Constitution punishing the offense of stealing in a warehouse or granary. *State v. Wilson*, 47 N. H. 101, 104.

#### **Felonious intent.**

To constitute burglary, there must be a breaking and entry with a felonious intent, and it is immaterial whether the intention to commit a felony is actually carried out, or only demonstrated by the attempt. *Wilburn v. State*, 41 Tex. 237, 239.

The offense of burglary consists of breaking and entering with intent to steal or commit any felony, and the commission of the crime of which the intent is charged is not the only evidence by which such intent may be proved. It may be shown by some other fact or circumstance, or by some act

or declaration of the accused. *People v. Marks* (N. Y.) 4 Parker, Cr. R. 153, 156.

"Burglary" is defined by *Burns' Ann. St.* 1894, as the "breaking and entering in the nighttime into any \* \* \* barn \* \* \* with intent to commit a felony." The breaking and entry must be done with the felonious intent. *Barnhart v. State*, 154 Ind. 177, 178, 56 N. E. 212, 213.

The breaking into and entering a dwelling house in the nighttime is not burglary unless it be done with intent to commit a felony. The breaking and entering a dwelling house, therefore, with an intent to cut off an ear of an inhabitant, is not a burglary, since the act of cutting off an ear is not a felony. *Commonwealth v. Newell*, 7 Mass. 245, 247.

"The offense is not complete without the felonious intent, and breaking and entering without this is only trespass." *State v. Meche*, 7 South. 573, 574, 42 La. Ann. 273 (citing *Abb. Law Dict.*).

In some of the states the entry by any person of any house, room, or store with intent to commit a larceny is declared to be burglary, but the intent with which the entry is made is a necessary element to constitute the crime. *People v. Phelan*, 28 Pac. 855, 98 Cal. 111.

In order to constitute burglary, the intent to steal or commit a felony must have existed at the time of the breaking and entering. If this intent was not formed in the mind of the offender until after the breaking and entering were complete, there was no burglary. A charge by which defendant attempted to have this principle presented instructed that the intent to steal must have existed "before and not after" the defendant entered the house. This instruction was calculated to lead the jury to believe that although the intent to steal may have existed at the time of the breaking and entering, yet if it did not exist after the house was entered, there would be no burglary. Nor is it essential to the crime of burglary that the intent spoken of shall exist before the breaking. It must be concurrent with the breaking and entering, and may be formed at the moment of time the breaking occurs. *Jackson v. State*, 15 South. 344, 345, 102 Ala. 167.

#### **Force.**

Burglary consists of an entry which, if made at night, must be by force, threats, or fraud; hence an entry through doors which were left open at night when the occupants of the house retired was not a sufficient entry by force to constitute burglary. *Williams v. State* (Tex.) 13 S. W. 609.

Burglary consists in violating the common security of a dwelling house in the

nighttime for the purpose of committing a felony. It makes no difference whether the doors are barred and bolted, or the windows secured, or not. It is enough that the house is secured in the ordinary way. *Commonwealth v. Stephenson*, 25 Mass. (8 Pick.) 354, 355.

#### **Larceny distinguished.**

See "Larceny."

#### **Occupancy of place entered.**

It is sufficient to constitute burglary that the building broken into be a dwelling house or mansion, whether any person be there at the time of the burglary or not. 2 East (Eng. Ed. 1803) 496, c. 15, § 11. It is agreed by all that a house where a man dwells for the part of the year, or a chamber in one of the inns of a court, or of a college wherein any person usually dwells, may be called his "dwelling house," whether any person was actually therein or not at the very time of the offense. Yet in all cases the owner must have quitted the house *animo revertendi* in order to have it still considered as his mansion when neither he nor any part of his family were in it at the time of the breaking and entering. *People v. Vangaasbeck* (N. Y.) 9 Abb. Prac. (N. S.) 328, 345 (quoting 1 Hale, P. C. 556).

#### **BURGLARY IN THE FIRST DEGREE.**

Burglary in the first degree is a breaking into or entering in the nighttime the dwelling house of another, in which there shall be at the time some human being, with intent to commit some felony therein, either by forcibly bursting or breaking the wall, or any outer door, window, or shutter of such house, or the lock or bolt of such door, or the fastening of such window or shutter, or by breaking in, in any other manner, while armed with some dangerous weapon, or with the assistance and aid of one or more confederates, men actually present aiding and assisting by unlocking an outer door by means of false keys, or by picking the lock thereof. *State v. Cash*, 16 Pac. 144, 145, 38 Kan. 50.

#### **BURGLARY IN THE THIRD DEGREE.**

"A person who either: First, with intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building \* \* \* is guilty of burglary in the third degree." Pen. Code, § 498. *People v. Bosworth*, 19 N. Y. Supp. 114, 116, 64 Hun, 72.

Laws 1863, c. 244, defining "burglary in the third degree" as entering a building or room or any part of a building with intent to commit crime, does not embrace the entering of a burial vault or a building erected

solely for the interment of the dead. *People v. Richards*, 13 N. Y. St. Rep. 515, 519.

#### **BURGURLY.**

Where, on trial of accused for burglary and larceny, the jury found accused guilty of "burgurly," the word so used was sufficiently *idem sonans* to justify a sentence and judgment for burglary. *State v. Smith*, 29 South. 20, 21, 104 La. 464.

#### **BURIAL PLACE.**

See, also, "Burying Grounds"; "Cemetery."

By reasonable implication the words "cemetery" and "burial place" include both public and private cemeteries and burial places, and an indictment that a person removed certain gates from the fence of a cemetery or burial place reasonably implies that they were removed from a public or private cemetery or burial place, and hence the indictment is sufficient to charge a violation of Rev. St. 1894, § 2041 (Rev. St. 1881, § 1962), prohibiting the removal of any fence or other work in or around any "public or private cemetery or burial place," under penalty of fine. *Lay v. State*, 39 N. E. 768, 769, 12 Ind. App. 362.

Where a religious corporation conveyed to individual members lots in their burial ground, the deed running to the party of the second part, his heirs and assigns, forever, to be used for the purpose of a "burial place" only, such language meant that there was a grant of the use of the lots as a place of burial, in subordination to the right of the corporation in the soil or freehold, and that the trustees had a right to sell the property and remove the remains of the dead. In re Reformed Presbyterian Church of City of New York (N. Y.) 7 How. Prac. 476-478.

The term "place of burial" means a place dedicated and set apart for the burial of the dead, and is not limited to the narrower import of tenanted graves, spots of ground actually occupied by buried corpses, but is to be interpreted according to the known habits and usages of the people to congregate their dead in places set apart for that sacred purpose. A cemetery set apart and used for burying the dead is a "place of burial" within Const. art. 207, exempting places of burial from taxation unless leased and used for purposes of private or corporate profit or income. *Metairie Cemetery Ass'n v. Board of Assessors*, 37 La. Ann. 32, 35.

#### **BURLAPS.**

Tariff Act Oct. 1, 1890, par. 364, relating to burlaps not exceeding 60 inches in width, does not include articles woven of flax, and

of jute and flax, less than 60 inches in width, used chiefly in the manufacture of clothing, for the particular purposes of stiffening collars and fronts of coats and other garments, the goods being known commercially as "canvas," "paddings," "ducks," "coatings," etc. *White v. United States* (U. S.) 65 Fed. 788, 790.

## BURN.

In an indictment charging that the accused did burn a house, the word "burn" implies that the house was consumed. "To burn" has for its first and leading meaning in Webster's Dictionary "to consume with fire," and such is its meaning as commonly used. *Hester v. State*, 17 Ga. 130, 132.

A charge that another "burned his own store" is not libelous per se, as simply to burn one's own store is not unlawful; but it must be made to appear by colloquium or averment, in order to render the word slanderous, that defendant charged the plaintiff with having willfully and maliciously burned his own store. *Bloss v. Tobey*, 19 Mass. (2 Pick.) 320, 325.

A charge that another "burned his property" is not per se slanderous, as the language does not import that the burning was unlawful, or that it was not innocently done. *Tebbetts v. Goding*, 75 Mass. (9 Gray) 254.

A count in a declaration for slander alleged that B., the plaintiff, owned a certain building and the goods therein; that the building and goods were insured and burned; and that, after the burning, the defendant, "speaking with reference thereto," and knowing of the insurance, accused the plaintiff of the crime of willfully burning the building and goods with intent to injure the insurers, by words spoken of the plaintiff substantially as follows: "B. burned the store." Another count alleged that the plaintiff petitioned to be and was adjudged a bankrupt, and that the defendant accused the plaintiff of the crime of disposing, otherwise than in bona fide transactions, within three months before his petition, and for the purpose of defrauding his creditors, of goods bought by him and unpaid for, attempting to account for them by fictitious losses, and doing acts in violation of the bankrupt act, by words spoken of the plaintiff during the pendency of the bankruptcy proceedings, substantially as follows: "B. burned the store;" "the defendant thereby referring" to the burning "referred to in the preceding count," whereby certain accounts and papers relating to the plaintiff's business were destroyed. Held, that both counts were bad, because they did not sufficiently show that any crime was imputed to the plaintiff by the words spoken. *Brettun v. Anthony*, 103 Mass. 37, 39.

A charge that another "burned his mill" is actionable as importing a crime, when used in connection with other language showing that it was intended to charge that the mill was burned to defraud insurers. *Chace v. Sherman*, 119 Mass. 387, 391.

### As blacken, scorch, or char.

To "burn" means to consume by fire, and in a case of arson, if the wood is blackened, but no fibers are wasted, there is no burning, yet the wood need not be in a blaze, and the burning of any part, however small, is sufficient to constitute the offense, and, if the house is charred in a single place so as to destroy any of the fibers of the wood, it is sufficient to constitute arson. *People v. Haggerty*, 46 Cal. 354, 355.

Evidence that the floor near the hearth was scorched—charred in a trifling way—was a sufficient burning to support an indictment for arson. *Regina v. Parker*, 9 Car. & P. 45.

"Burning," in the definition of "arson" as the burning, etc., of a house, means "the burning of any, the smallest, part of a house, and it is burned within the common-law definition of the offense when it is charred—that is, when reduced to coal and its identity changed—not when merely scorched or discolored by heat." *State v. Hall*, 93 N. C. 571, 573.

In an indictment for arson, "burn" does not refer to an entire consumption, but any charring of wood by fire is a sufficient burning to come within the statute charging burning. *Benbow v. State*, 29 South. 553, 554, 128 Ala. 1.

Where a wooden partition in a building, and annexed to it, was charred and in one place burned through, it was a sufficient burning to constitute arson. *People v. Simpson*, 50 Cal. 304, 306.

### As consume in part.

The burning of a dwelling house is supported by proof that some portion of the house was actually on fire, so that the substance of the wood of such portion was actually burned, although it was not consumed, and the substance and fiber of the wood was not actually destroyed. *Commonwealth v. Tucker*, 110 Mass. 403, 404.

"Burning," as used in St. 1804, c. 131, § 1, providing that if any person shall, by the burning of a building adjoining a dwelling house, burn such dwelling house in the nighttime, he shall be guilty of arson, mean "burning" as understood at common law; that is, that if any part of the dwelling house, however small, be consumed by the fire, the offense is complete. *Commonwealth v. Van Schaack*, 16 Mass. 105.

"The burning necessary to constitute arson of a house at common law must be actual burning of the whole or some part of the house. Neither a bare intention, nor even an attempt to burn a house by actually setting fire to it, will amount to the offense if no part of it be burned; but it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance, and the offense will be complete though the fire be put out or go out by itself." *Mary v. State*, 24 Ark. 44, 45, 81 Am. Dec. 60.

In the case of *The Glenlivet* [1894] Prob. Div. 48, in holding that the question whether a vessel injured by fire was a "burned vessel" within the meaning of the term in a marine policy, Lord Justice Smith said: "Suppose the cabin curtains were burned, the trial court should have told the jury that that did not constitute a burned ship. But suppose the after part of the ship was burned altogether, and the fore part was not burned at all, I think he should have told them that they might, if they liked, find that that was a burned ship, although there was only a partial burning. It seems to me impossible to lay down absolutely, in the affirmative or the negative, as to whether a partial burning does constitute a burned ship or not within the policy. It may or may not, according to the actual facts appertaining to the partial burning." *The London Assurance v. Companhia de Moagens do Barreiro*, 17 Sup. Ct. 785, 788, 167 U. S. 149, 42 L. Ed. 113.

The setting fire to and burning a part of a jail with a view of enabling a prisoner to escape is within a statute punishing the burning of jails, where the person intended to burn the building in order to effect his main design; but if he burned a part merely for the purpose of effecting his escape, and not with the intent of destroying the building, he is not guilty of burning the jail. *State v. Mitchell*, 27 N. C. 350, 353.

#### As set on fire.

In 1 N. R. L. 407, 36th Sess. ch. 29, imposing the death penalty for the willful burning of any inhabited dwelling, "burning" means the setting of a fire to an inhabited dwelling with criminal intent, and it is not necessary that the building should have been burned or entirely consumed in order to bring a case within the statute. *People v. Butler* (N. Y.) 16 Johns. 203, 204.

The word "burning," as used in the definition of arson to the effect that it is the burning of any house, does not require that the house be consumed, it being sufficient to show that a person has set fire to the house to the extent that some part of the house was on fire, unless it is made clearly to appear that it was accidental, or done for some object wholly different from the intention to burn up or consume the house. *Smith v.*

*State*, 5 S. W. 219, 220, 23 Tex. App. 357, 59 Am. Rep. 773.

As to what constitutes a "burning" within the meaning of the word in the definition of arson, a bare attempt, or attempt to do it by actually setting fire to a house, unless it actually burns, does not fall within the definition. *People v. Myers*, 20 Cal. 76, 78.

To constitute a "burning," within the meaning of the chapter relating to arson, it is not necessary that the building set on fire should have been destroyed. It is sufficient that fire is applied so as to take effect upon any part of the substance of the building. Pen. Code Cal. 1903, § 451; Pen. Code Idaho 1901, § 4925; Rev. Codes N. D. 1899, § 7386; Pen. Code S. D. 1903, § 546; Rev. St. Utah 1898, § 4330.

"Burning," within the meaning of that part of the Penal Code defining and punishing arson, does not imply that the building set on fire should be destroyed. It is sufficient if the fire is applied so as to take effect upon the substance of the building. Rev. St. Okl. 1903, § 2414.

#### BURNING.

"Burning," as used in the statute of frauds specifying burning as one method of revoking a will, means more than the singeing of the cover of the will. The act required must be palpable and visible, the intention seeming to be to prevent inferences drawn from slight circumstances. *Reed v. Harris*, 6 Adol. & El. 209, 8 Adol. & El. 1.

The term "burning," in the statute of wills of 1833, authorizing the revocation of wills by burning, does not mean entire consumption by fire. *Appeal of Evans*, 58 Pa. 238-242 (citing *Bibb v. Thomas*, 2 Wm. Bl. 1043; *Reed v. Harris*, 6 Adol. & El. 209).

#### BURNING FLUID.

"Burning fluid," as used in an insurance policy which provided that the same shall be void if any "camphene, spirit-gas, burning fluid" or chemical oils shall be kept on the premises, means fluids of the nature of those enumerated, or equally dangerous. *Wheeler v. American Cent. Ins. Co.*, 6 Mo. 235, 240.

#### Mixture of camphene and alcohol.

A fire insurance policy prohibiting the storing or use of camphene, spirit gas, or any "burning fluid" on the premises insured should not be construed to refer to the products of rock or mineral oil, such as naphtha, kerosene, etc., but to burning fluid which is a mixture of camphene and alcohol. *Putman v. Commonwealth Ins. Co. (U. S.)* 4 Fed. 753, 764.

"Burning fluid or chemical oils," in an insurance policy providing that if the assured



shall keep or use any camphene or spirit gas, or "burning fluid or chemical oils," on the premises covered by the policy, it should be void, means only such burning fluids and chemicals as are in their nature like camphene or spirit gas. *Mears v. Humboldt Ins. Co.*, 92 Pa. 15, 19, 37 Am. Rep. 647.

Burning fluid is said to be a highly explosive and very dangerous illuminative liquid, a mixture of camphene and alcohol. *Bennett v. North British & Mercantile Ins. Co.* (N. Y.) 8 Daly, 471, 473.

#### **Kerosene.**

"Burning fluid," as used in an insurance policy forbidding the insured to use any camphene, spirit gas, or any "burning fluid" or chemical oil on the premises, cannot mean every fluid that will burn, and does not include kerosene. *Mark v. National Fire Ins. Co.* (N. Y.) 24 Hun, 565, 569.

#### **BURNT STARCH.**

The ordinary meaning of the words "burnt starch" is starch which has been burned, but the word in a tariff act fixing a duty on burnt starch is to receive the meaning given in ordinary commercial operations, unless a trade meaning different from that in ordinary use is established by a preponderance of the evidence, which is to be determined by the jury. In a case at bar the jury found that glucose and grape sugar were not dutiable as "burnt starch." *Wellbacher v. Merritt* (U. S.) 37 Fed. 85, 87.

#### **BURSTING.**

A policy providing that the company should not be liable for any loss arising from "the bursting of boilers" includes any loss of which the bursting of boilers was the approximate cause, as where the boilers burst and the ship took fire therefrom and was burned up. "Contracts are to be construed according to the intention of the parties, and hence, although the burning of the boat or any injury by fire does not always or often attend the bursting of its boilers, yet it is a general opinion that such is sometimes the result, or, at least, that fire might sometimes be the necessary and inevitable consequence of the bursting of the boilers. The parties must be held to have understood that a loss so happening would be a loss arising from the bursting of boilers, so that the insured could not have expected the company to be liable for such loss when it was expressly agreed that they were not liable for any loss arising from the bursting of boilers." *Montgomery v. Firemen's Ins. Co.*, 55 Ky. (16 B. Mon.) 427, 442.

The term "bursting of boilers," as used in an insurance policy against any loss occasioned by fire except when caused by ex-

plosion of boiler, and except as limited by warranties therein, such as "bursting of boilers," means a breaking of the boiler from explosion, they being one and the same thing; but it does not include the collapsing of a flue, a flue being inside of and forming part of the boiler, if a flue boiler, but is not the boiler proper, and may collapse, leaving the boiler proper intact. The "collapsing" of a flue means a falling together suddenly, while an "explosion" means a sudden bursting from internal or other force. *Louisville Underwriters v. Durland*, 24 N. E. 221, 222, 123 Ind. 544, 7 L. R. A. 899.

#### **BURTHEN.**

See "Burden."

#### **BURYING GROUNDS.**

See "Free Burying Ground."

See, also, "Burial Place"; "Cemetery."

Where 40 acres of land were deeded to a church to be used as a burying ground, and only 1 acre of which had been adopted to such use, the balance of the tract was not exempt from taxation as church property used as burying ground. *Mulroy v. Churchman*, 3 N. W. 72, 73, 52 Iowa, 238.

"Burying grounds," as used in Act 1876, c. 216, which exempts from taxation graveyards, cemeteries, and burying grounds set apart for the use of any family or belonging to any church or congregation, means any ground devoted to burial purposes which is not used for any other object. The fact that a part only of the lot or piece of ground is occupied by graves does not confine the exemption to the spots of ground so appropriated. *Appeal Tax Court of Baltimore City v. St. Peter's Academy*, 50 Md. 321, 353.

#### **BUSHEL.**

See "Half Bushel."

The Vermont Statute of 1824, providing that the standard of weight of corn shall be 56 pounds to the bushel, meant that 56 pounds of corn, whether measuring more or less than the Winchester bushel, should be equivalent to a bushel. *Richardson v. Spafford*, 13 Vt. 245, 247.

"Bushels," as used in a contract for the sale of 1,000 "bushels" of good merchantable wheat at a certain price per bushel, should be construed to mean weight simply, and does not refer to the general meaning affixed to the term "bushel" as a mere measure of capacity. *Milk v. Christie* (N. Y.) 1 Hill, 102, 106.

"Bushel," taken by itself, and without reference to any custom or agreement, meant

a statute bushel. *Hockin v. Cooke*, 4 Term R. 314, 316.

## BUSHWHACKER.

The term "bushwhacker," as an old English word, would not of itself import anything of a criminal nature; much less would it imply any particular indictable offense known to our law. But of late the word has come to have a special application and a particular signification in popular use. It has found its way into the Constitution of the state, where it seems to have been used as equivalent to "that description of marauding commonly known as bushwhacking." In the modern sense of the word as now sometimes used in common speech, it seems to be applied to a class of persons who are not a part of any regular army, and are not answerable to any military discipline, but who are mere lawless banditti, engaged in plundering, robbing, murder, and all conceivable crimes. *Curry v. Collins*, 37 Mo. 324, 328.

## BUSINESS.

See "Chamber Business"; "Civil Business"; "Cold Storage Business"; "Commission Business"; "Common Business"; "Criminal Business"; "Dangerous Business"; "Executive Business"; "Express Business"; "General Business"; "Going Business or Concern"; "Incidental Business"; "Insurance Business"; "Interstate Business"; "Jobbing Business"; "Judicial Business"; "Junk Business"; "Lawful Business"; "Mechanical Business"; "Noxious Business"; "Ordinary Business"; "Public Business"; "Scalper's Business"; "Secular Business"; "Shipping Business"; "Theatrical Business"; "Worldly Business or Employment."

See "Actually Open for Business"; "Carry on Business"; "Doing Business"; "Open for Business"; "Transacting Business."

See "Course of Business"; "Place of Business"; "Usual Place of Business."

See, also, "Trade."

All business, see "All."

All other business, see "All Other."

Manufacturing business, see "Manufacture."

Other business, see "Other."

The word "business" is defined by Webster as that which occupies the time, attention, or labor of men for the purpose of profit or improvement. *Trustees of Columbia College v. Lynch* (N. Y.) 47 How. Prac. 273, 275.

Business "is that which busies or occupies the time, attention, or labor of one as his principal concern, whether for a longer or shorter time; employment; occupation; any particular occupation or employment;

mercantile transactions in general; concern; right or occasion of making one's self busy; affairs; transaction. As used in Comp. St. § 1356, requiring every person who shall carry on any gift, lottery, or prize distribution 'business,' to pay a license fee, it means any concern or scheme by which a gift, lottery, or prize distribution is made, without reference to the purpose for which it is made." *Territory v. Harris*, 19 Pac. 286, 287, 8 Mont. 140.

"Business" is defined as that which engages the time, attention, or labor of any one as his principal concern or interest, whether for a longer or shorter time; constant employment; regular occupation. So, under Code, § 3190, declaring that no contract of a minor can be disaffirmed where, by reason of the minor's having engaged in business as an adult, the other party had good reason to believe him capable of contracting, it is held that the term "engaging in business" should be construed as signifying an employment or occupation which occupied the minor's time for the purpose of a livelihood or profit; and hence evidence that a minor was employed as a farm laborer at a stipulated price per year, and while so engaged he purchased certain lots, was insufficient to show that he was engaged in business so as to preclude him from rescinding such purchase. *Beickler v. Guenther* (Iowa) 96 N. W. 895, 896.

The term "business consumption," as used in Laws 1897, p. 165, c. 378, § 475, giving the commissioner of water supply in New York discretion to cause water meters to be placed in places in which water is furnished for business consumption, does not confer on the commissioner authority to install meters in premises other than those wholly or partly subjected to use in some regular calling or vocation. It is certainly an unreasonable view that the Legislature had in mind at the time isolated instances of water supplied, even for some return, to an adjoining house, in a spirit of neighborly accommodation. Popularly, and therefore apparently, a supply of water under such conditions is not to be regarded as "business." *Foster v. Monroe*, 82 N. Y. Supp. 653, 654, 40 Misc. Rep. 449.

Under a charter of a city conferring power on it to require all persons, companies, and corporations engaged in any business or vocation within its limits to take out a license and pay a reasonable tax or charge therefor, the word "business" is not to be limited so as to render only such persons liable as transact the whole of their business within the city, but will include those who do only a portion of their business in the city. Thus a railroad company, though engaged in a business of a similar character outside the city limits, but which has an agent regularly employed to attend to its

business in the city, is subject to said license tax. *Florida Cent. & P. R. Co. v. City of Columbia*, 32 S. E. 408, 413, 54 S. C. 266.

The word "business," as used in Act Feb. 27, 1855, providing that all persons and associations doing business in the state of New York as merchants, bankers, or otherwise, and not residents of the state, shall be assessed and taxed, embraces everything about which a person can be employed. *People v. Commissioners of Taxes of New York* (N. Y.) 22 How. Prac. 143, 147.

"Business," within the rule that every man owes to every other the duty of due care to avoid injury, and, whether he manages his business in person or intrusts it to another, he must at his peril see that this obligation is observed, is not restricted as meaning business in an ordinary sense, but embraces everything the servant may do for the master with his express or implied sanction. It is immaterial to the master's responsibility that the servant at the time was neglecting some rule of caution which the master prescribed, or was exceeding his master's instructions, or was disregarding them in some particular, and that the injury which actually resulted is attributable to the servant's failure to observe the directions given him. *International & G. N. R. Co. v. Cooper* (Tex.) 30 S. W. 470, 472.

Testator was engaged in carrying on a large mercantile business, and had a large amount of debts due him. He appointed his sons-in-law and widow as executors, and instructed them to sell out the stock of goods on hand on specified terms, taking good security for the purchase money, and by a subsequent clause directed an inventory to be taken of all debts due him, as well as of all debts owing by him, and a copy of this inventory to be furnished to each of the executors, adding, "W. [one of the executors] is hereby charged with the winding up of the business, and after paying all the debts I owe, then the money, as fast as it is collected, to the amount of \$500 must be deposited in bank," and further providing that his acts should always be open to the inspection of the other executors, and, if he did not act justly in the collections, he should be dismissed and another one of the executors take his place, and directed the executors to employ a competent person "to assist him in winding up the business." Held, that the word "business" meant only the collection of the outstanding debts growing out of the testator's mercantile business. *Hollingsworth v. Hollingsworth's Ex'rs*, 65 Ala. 321, 329.

Within the meaning of an act fixing a tax on all agents of packing houses doing business within this state, the word "business" refers to the business of the agent,

and not that of the principal, for it is the agent, and not the principal, who shall pay the tax at the time of commencing to do business. *Stewart v. Kehrer*, 41 S. E. 680, 681, 115 Ga. 184.

"Trade or business," as used in Code 1871, § 1780, providing that all contracts made by the husband or wife, or either of them, for supplies for the plantation of the wife, may be enforced against her separate estate, and that when a married woman "engages in trade or business as a feme sole" she shall be bound by her contracts made "in the course of such trade or business" in the same manner as if she were unmarried, means "a trade or business other than that specifically mentioned and regulated by the statute, and the contracts arising out of such trade or business were intended to be different from those which she was authorized to make in her capacity as a feme covert." *Duncan v. Robertson*, 58 Miss. 390, 396.

#### Limited to ejusdem generis.

"Business," as used in Act April 9, 1872, giving priority to wages for labor and services rendered by any miner, mechanic, laborer, or clerk employed by persons engaged in the operation of any works, mines, manufacturing, or "business," means other business of the same general character as that specifically mentioned. *Reichard v. Dwyer* (Pa.) 10 Wkly. Notes Cas. 189.

Laws 1876, c. 122, forbidding the employment of children for any immoral purpose, exhibition, or practice, or in any "business, exhibition or vocation" injurious to the health or dangerous to the life or limb, means an employment either vicious in itself or one partaking of the character of an amusement, and would not include any productive industries or necessary occupations. *Hickey v. Taaffe*, 1 N. E. 685, 686, 99 N. Y. 204, 52 Am. Rep. 19.

#### Abstracting.

Abstracting is a "business" within Civ. Code, § 1674, providing that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business. *Ragsdale v. Nagle*, 39 Pac. 628, 630, 106 Cal. 332.

#### As action.

"Business" is a word of large signification, denoting employment or occupation in which a person is engaged to procure a living. "Business" and "employment" are synonymous terms, signifying that which occupies the time, attention, and labor of men for purposes of a livelihood or for profit. *Anderson's Law Dict.* The definitions contained in other dictionaries and various lexicons are substantially the same. The word "business," as used in Const. art. 8, § 5, providing that all civil and criminal business

in the county must be tried in such county, is not synonymous with the word "action," and is not an element either of a cause or right of action, and is meaningless in the connection in which it is used in the Constitution, and the clause can be made intelligible only by substituting in its place "causes of action." *White v. Rio Grande W. Ry. Co.*, 71 Pac. 593, 594, 25 Utah, 346. The word "business" as so used should be limited to business pending before the court, so that it applies only to actions and other proceedings actually brought. *Gibbs v. Gibbs*, 73 Pac. 641, 642, 26 Utah, 382. See, however, *Konold v. Ry. Co.*, 16 Utah, 151, 51 Pac. 256 (cited and approved in *Bach v. Brown*, 53 Pac. 991, 992, 17 Utah, 435), wherein it was said that the word "business," as used in the same constitutional provision, was used as a general term to include causes of action and all other business which might arise in any county, and the manifest intention was that all suits, civil and criminal, should be brought and the cases tried in the county in which the action arose.

#### Acting as agent.

A contract providing that the defendant should not do any "express business" over any other road running to a place on the line of the plaintiff's business means that the defendant should no longer carry on the express business on his own account, and that he should not engage in the business for profit, but does not prevent the defendant from entering into the service of another who is doing an express business over a road running to a place on the line of plaintiff's business. *Eastern Exp. Co. v. Meserve*, 60 N. H. 198.

"Business," as used in a contract in which the defendant sold to the plaintiff all his stock in trade and his rights, interests, and privileges acquired in selling a certain kind of tobacco on a certain described route, and providing that the defendant should not hinder or obstruct the plaintiff in the prosecution of the business on such described route, means that the defendant shall not prosecute the business of selling tobacco on the same route, or in the vicinity thereof, and selling tobacco as the agent of another on such route constituted a violation of the agreement, since the defendant did not have the right to interfere in the prosecution of the business he had transferred, either as principal or agent. *Ewing v. Johnson* (N. Y.) 34 How. Prac. 202, 205.

#### Acts under special authority.

Const. art. 4, § 22, subd. 10, forbidding the passage of local or special laws regulating county "business," applies only to the usual affairs of the county, the conduct of which engages the services of the officers, and does not refer to an act which can be done in a particular case under the authority

of a special law, the principal purpose and object of which is the relocation of a county seat. *Jackson County Com'rs v. State*, 46 N. E. 908, 911, 147 Ind. 476.

The term "business," when applied to a public corporation, signifies the conduct of the usual affairs of the corporation, and the conduct of such affairs as commonly engage the attention of such corporation, and does not include the performance of an act which can be done only in a particular case and by the authority of a special law. *Mount v. State*, 90 Ind. 29, 31, 46 Am. Rep. 192.

#### Agriculture or farming.

"Business," as used in St. 1862, c. 198, § 1, requiring that a married woman doing business on her own separate account must file a certificate with the town clerk, etc., does not mean only business as a "trader" in the ordinary sense of the word, or of a manufacturer or boarding house keeper, or other similar business, but may include agriculture as well. *Snow v. Sheldon*, 126 Mass. 332, 334, 30 Am. Rep. 684.

In *Mansf. Dig.* §§ 4624, 4626, 4630, authorizing a married woman to carry on any business on her separate account, and providing that her earnings therefrom shall be her sole and separate property, the term "business" signifies employment—that which employs time, attention, and labor. It does not signify trade alone, and hence the carrying on, improving, and cultivating of a farm is within the statute. *Hickey v. Thompson*, 12 S. W. 475, 476, 52 Ark. 234.

"Business" is defined to be "that which busies or occupies one's time, attention, and labor as his chief concern; that which one does for a livelihood; occupation; employment; as, his business was that of a merchant; to carry on the business of agriculture" (Cent. Dict.). Hence a lot used by a gardener for the cultivation of produce, and separated from his dwelling by streets, is exempt as a homestead under Const. 1876, art. 16, § 51, declaring that the homestead in a city shall consist of a lot or lots not to exceed a certain value, used for the purposes of a home "or as a place to exercise the calling or business of the head of a family." *Waggener v. Haskell*, 35 S. W. 1. 2, 89 Tex. 435.

#### Bringing or maintaining suit.

In a statute prohibiting a foreign corporation from doing business in the state without having first appointed a resident attorney on whom service of process may be made (Laws Or. 617, Act Oct. 24, 1864), as applied to a foreign life insurance company "business" means a doing of a life insurance business, and did not include the bringing or maintaining of a suit by such foreign company in a federal court located in the

state. *Northwestern Mut. Life Ins. Co. v. Elliott* (U. S.) 5 Fed. 225, 231.

#### **Conducting school.**

Where the owner of an estate covered with houses sold some of them subject to a covenant not to carry on any "trade, business or calling" therein to the annoyance or injury of any of the houses on the estate, the carrying on of a girls' school was a violation of the covenant, being a "business" or "calling" within its meaning. *Kemp v. Sober*, 1 Sim. (N. S.) 517, 520.

#### **As continuous business.**

"Business," as used in Act Feb. 27, 1855, § 1, providing that all nonresidents doing business in the state should be taxed on all sums invested in any manner in business as though they were residents, means a continuous business, and property sent into the state for the purpose of sale without reinvestment of proceeds is not employed in "business" so as to be taxable. The court said "the word 'business' embraces everything about which a person can be employed." *People v. Commissioners of Taxes of City of New York*, 23 N. Y. 242, 243.

#### **As doing business.**

In New York tax laws relating to the taxation of foreign corporations, and providing that every corporation, joint-stock company, etc., doing business in this state shall be subject to and pay a tax, as a tax upon its corporate franchise or "business," into the treasury of the state annually, to be computed as follows, etc., the word "business" refers back to the words "doing business in this state," as used in the same section, and means business done within the state. *People v. Equitable Trust Co.*, 96 N. Y. 387, 388, 393.

#### **Execution of instruments.**

Where a statute prohibits the transaction of "business" by certain corporations, the taking of a note was the making of a contract, which signified the doing of business within the prohibition of the law. *Hacheny v. Leary*, 7 Pac. 329, 332, 12 Or. 40.

"Business," as used in Rev. St. c. 83, § 1, forbidding the exercise of any secular labor, business, or employment on Sunday, will be construed to include the execution of a note in carrying out a previous contract, when such act is not a work or necessity or charity. *Lovejoy v. Whipple*, 18 Vt. 379, 383, 46 Am. Dec. 157.

Under the Constitution prohibiting unnecessary labor on Sunday, the execution and delivery of a promissory note upon Sunday has been declared "business of a person's secular calling," and generally an act to the disturbance of others, and as such is

prohibited under a penalty. *State Capital Bank v. Thompson*, 42 N. H. 369, 370 (citing *Brackett v. Hoyt*, 29 N. H. [9 Fost.] 264, 267).

The term "business," as used in the Revised Statutes, providing that no person shall do any manner of "labor, business or work" on Sunday, includes the execution of a bond. The Legislature intended to prohibit secular business, and did not confine the prohibition to manual labor, but extended it to the making of bargains and all kinds of trafficking. *Pattee v. Greely*, 54 Mass. (13 Metc.) 284, 286.

"Business," as used in Rev. St. 1878, § 4594, making it unlawful for any one to do any business on the first day of the week, is employed synonymously with "transaction," and hence, where a town board of supervisors were authorized to issue bonds in aid of a railroad upon the presentation of a petition signed by taxpayers, the affixing of a signature to such petition on Sunday was unlawful under section 4594. *De Forth v. Wisconsin & M. R. Co.*, 9 N. W. 17, 19, 52 Wis. 320, 38 Am. Rep. 737.

Labor, "business," or work, within the meaning of the statute prohibiting any labor, business, or work, except works of necessity and charity, on the Lord's day, includes the giving of a promissory note on Sunday in consideration of articles purchased on that day. *Towle v. Larrabee*, 26 Me. (13 Shep.) 404, 466.

#### **Good will.**

A contract for the sale of all a person's right, title, and interest in a grocery business cannot be construed to mean only the good will of the business. The good will of a business is not the business, but it is one result springing out of it. *McGowan v. Griffin*, 37 Atl. 298, 299, 69 Vt. 168.

The expression "transfer of the business" is an uncertain, equivocal expression, and may mean property, or it may mean good will. *Widdall v. Garsed*, 17 Atl. 418, 419, 125 Pa. 358.

#### **Hotel keeping.**

Under a statute giving a lien for labor and services rendered in any works, mines, manufactory, or other business, the words "or other business" do not include a hotel. *Appeal of Allen*, \*81 Pa. (32 P. F. Smith) 302, 304.

#### **Housekeeping.**

The word "business," as employed in the statute giving a debtor an exemption of \$250 from the stock in trade of the business in which the debtor is wholly or principally engaged, does not mean housekeeping, and hence where a woman was a partner in a merchandising business, but principally en-

gaged in keeping house for her husband, she was entitled to an exemption from the stock of the merchandising business. *McCoy v. Brennan*, 28 N. W. 129, 131, 61 Mich. 362, 1 Am. St. Rep. 589.

#### **Issue of insurance policy.**

The act of insuring a man's life in Washington territory by a Kansas company, the name, etc., of the man being sent into the home office by the soliciting agent of the company, and the policy thereupon issued there and sent out to Seattle, would not be doing "business," within the meaning of a statute of Washington territory prohibiting the doing of business by a foreign corporation which has not complied with the requirements of the law; but the subsequent accepting by such agent from the assured of a promissory note in payment of premium would be doing business, within such statute. To undertake to give an exact definition of the word "business" which could be applied as a test or criterion in every case would be impossible. It is said to be a word of large signification, and to denote the employment or occupation in which a person is engaged to procure a living. *Goddard v. Chaffee*, 84 Mass. (2 Allen) 395, 79 Am. Dec. 796; *Martin v. State*, 59 Ala. 34, 36. Under a statute providing that any person who shall do any manner of labor, business, etc., shall be punished, etc., the loaning of money and taking a note therefor was held to be "business," within the meaning of such statute. *Troewert v. Decker*, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808. In *Bloom v. Richards*, 2 Ohio St. 387, 388, the court, by Thurman, J., said: "That it seems to be the common expression of the courts that the making of a contract is 'business,' within the meaning of acts inhibiting doing business on a particular day. The taking of a note for a loan or debt, or other consideration, is the making of a contract, and is a transaction which signifies business. The transaction is in fact the doing of business." *Hacheny v. Leary*, 7 Pac. 329, 331, 12 Or. 40.

#### **Keeping betting establishment.**

The keeping of an establishment for the purpose of enabling persons to bet on horse races is not a useful or necessary occupation, and cannot be characterized as a "business," and a city may pass an ordinance punishing the same, though the person conducting such place may have received a license from the city to conduct a "business." *Odell v. City of Atlanta*, 25 S. E. 173, 174, 97 Ga. 670.

#### **As lawful business.**

"Trade or business," as used in *Tayl. St. 1550*, § 32, exempting from execution the stock in trade, etc., of any person used and kept for the purpose of carrying on his trade or business, means lawful trade or business, and hence does not apply to a person en-

gaged in the sale of intoxicating liquors without a license. *Walsch v. Call*, 32 Wis. 159, 161.

#### **Loaning money.**

"Business," as used in *Rev. St. § 4595*, prohibiting the performance of any business on Sunday, would include such transactions as the loaning of money and a promise to repay. *Troewert v. Decker*, 8 N. W. 26, 51 Wis. 46, 37 Am. Rep. 808.

"Business," as used in *Rev. St. 1898*, § 4595, providing that any person who shall do any manner of labor or business or work on the Sabbath Day shall be punished, should be construed to include loaning money and taking a note therefor. The settlement of an old account for merchandise sold and the taking of a note therefor is business. Such acts by a person are business of his own. *Howe v. Ballard*, 89 N. W. 136, 137, 113 Wis. 375.

#### **Making contract.**

"Business or work of their ordinary callings," as used in *Act 1741*, c. 14, § 2, providing that all and every person shall on the Lord's Day, commonly called Sunday, carefully apply themselves to the duties of religion and piety, and shall not do any labor, business, or work of their ordinary callings, does not mean that all worldly labor shall be totally discontinued, but applies only to work and labor of one's ordinary calling, and does not extend to all kinds of labor indiscriminately, and therefore, where a person whose ordinary calling was that of a banker tried a horse on Sunday and entered into a contract to purchase it, the contract was not void as in contravention of the statute. *Amis v. Kyle*, 10 Tenn. (2 Yerg.) 31, 35, 24 Am. Dec. 463.

*St. 29 Car. II*, c. 7, § 5, providing that no tradesman, artificer, workman, or other person shall do worldly "labor, business or work of their ordinary calling" on Sunday, is limited only to labor, business, or work done in the course of a man's ordinary calling, and hence a contract of hiring men on Sunday between a farmer and a laborer was not within the statute. *King v. Inhabitants of Whitnash*, 7 Barn. & C. 596.

"Business," as used in statutes forbidding the exercise of business on Sunday, has commonly been construed to include the making of a contract. There is a distinction between labor and business, for though labor may be business it is not necessarily so, and the converse, that business is not always labor, is equally true. Where a statute merely prohibits labor on the Sabbath, it does not prohibit making a real contract, which is not labor, but business. *Adams v. Hamell* (Mich.) 2 Doug. 73, 43 Am. Dec. 455, was an exchange of horses. The court decided against the validity of the contract, saying

that no case could be more clearly a matter of business within the statute. *O'Donnell v. Sweeney*, 5 Ala. 467, 470, 39 Am. Dec. 336, is directly in point, the court holding that the sale of the horses on Sunday was a matter of business, because it is a worldly business or employment, and falls within the letter as well as within the meaning of the statute. *Bloom v. Richards*, 2 Ohio St. 387, 399.

#### **As money making occupation.**

"Business," as used in the general incorporation statutes of Oregon, authorizing the formation of corporations for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, is not restricted in meaning to a scheme for making money, but includes any object that is consistent with the interest of society, and may engage the attention of men and invite their co-operation; and a corporation may lawfully be organized under such statute for the purpose of guarantying bonds of an educational institution to strengthen its credit. *Maxwell v. Akin* (U. S.) 89 Fed. 178, 180.

One may keep a billiard table or a tennis alley for the amusement of himself or his family without being engaged in keeping them as a "business." *Eubanks v. State*, 17 Ala. 181, 183.

#### **As occupation for livelihood or profit.**

"Business" is a word of large signification, and denotes the employment or occupation in which a person is engaged to procure a living. *Goddard v. Chaffee*, 84 Mass. (2 Allen) 395, 79 Am. Dec. 796.

"Business," as used in Civ. Code, § 2610, defining fellow servants as "servants about the same business," signifies the employment and occupation in which the person is engaged to procure a living. *Brush Electric Light & Power Co. v. Wells*, 35 S. E. 365, 367, 110 Ga. 192.

"The definition of 'business' by the lexicographers is sufficiently broad and comprehensive to embrace every employment or occupation, and all matters that engage a person's attention or require his care. The meaning of the legislatures as expressed in the statutes is not as extensive. 'Business,' in a legislative sense, is that which occupies the time, attention, and labor of men for purposes of livelihood or for profit; a calling for the purpose of a livelihood. It is used in the latter meaning in the statutes relating to license taxes." *State v. Boston Club*, 12 South. 895, 896, 45 La. Ann. 585, 20 L. R. A. 185; *Moore v. State*, 16 Ala. 411, 414.

#### **Occupation of contractor.**

Act May 12, 1891 (P. L. 54), making money due from any contractor for labor and services which accrued within six months

preceding the sale or transfer of the real or personal property, business, or other property connected therewith in carrying on the same of the contractor on account of his death or insolvency, a lien on such property, should be construed to include the occupation of a contractor engaged in the erection of buildings and other work. His engagement in the erection or construction of buildings or works under contract constituted a "business," within the ordinary meaning of that word; that is, any employment or occupation in which a person is engaged to procure a living, embracing everything about which a man can be employed. *Brown v. German-American Title & Trust Co.*, 34 Atl. 335, 343, 174 Pa. 443 (citing *Goddard v. Chaffee*, 84 Mass. [2 Allen] 395, 79 Am. Dec. 796; *People v. Commissioner of Taxes of City of New York*, 23 N. Y. 242, 244).

#### **One or two acts as constituting.**

In a contract by which a party agreed to not engage or be interested in the wood "business" so long as the other party was engaged in that business, the term is not used to denote an isolated act or two of disposing of wood for the special convenience and interest of the party, but a congregation of acts that may fairly constitute the carrying on of the wood business, defined in the contract as "buying and selling or furnishing wood." *Parkhurst v. Brock*, 47 Atl. 1068, 1069, 72 Vt. 355.

P. L. 1896, p. 307, § 97, requiring foreign corporations before transacting any business in the state to file with the Secretary of State a certain statement as to its capital stock, etc., and designating an office in the state, and an agent on whom process against it may be served, cannot be construed to mean a single sale of its product and the accepting a guaranty of payment in the state. In *Hoagland v. Segur*, 38 N. J. Law (9 Vroom) 230, 237, it was held that the term "business," with relation to the banking business, did not denote a single act of receiving deposits, but the aggregation of acts which fairly constituted the occupation of a banker; that it was a word frequently used as synonymous with "occupation," and signified more than the doing of acts which are usually done by persons engaged in the pursuit of a particular calling. *Delaware & H. Canal Co. v. Mahlenbrock*, 43 Atl. 978, 979, 63 N. J. Law, 281, 45 L. R. A. 538.

The term "business," as used in a statute forbidding the engaging in the business of hawking and peddling, is continuous in its character, not necessarily implying a single act or any number of acts, and is synonymous with the term "employment"; and that one who, without being engaged in a particular business, did a single act appertaining thereto, did not fall within its meaning. *Sterne v. State*, 20 Ala. 43, 46.

The term "business," as used in Rev. Code, § 3618, forbidding the engaging in the business of retailing spirituous liquors without a license, is a synonym of "employment," and signifies that which occupies the time, attention, and labor of a man for the purpose of gaining a livelihood or profit, and does not include a single sale of liquor. *Martin v. State*, 59 Ala. 34, 36.

One act of selling liquor without an intention of engaging in the business does not constitute engaging in or carrying on such business within the meaning of the statute, providing a penalty for being engaged in or carrying on the "business" of a retailer in spirituous liquors, etc. *Bryant v. State*, 46 Ala. 302, 303.

Under an act forbidding the doing of any worldly "business" on the Lord's Day, the offense consists in the exercise of the business, and may include one or more separate acts, so that each act done in one day in any worldly business does not constitute a distinct and separate offense. *Friedeborn v. Commonwealth*, 6 Atl. 160, 113 Pa. 242, 57 Am. Rep. 464.

#### Operation of stage.

The term "business," in a municipal charter authorizing a city to levy and collect a license tax on trades, professions, and business, includes the business of a stage company in receiving and discharging passengers within the municipal limits, although such passengers are carried either into or out of the municipality. *City of Sacramento v. California Stage Co.*, 12 Cal. 134, 138.

#### Operation of street railway.

The operating of a street railway is a "business," within the statute requiring the payment of a license for carrying on a business. *City of New Orleans v. New Orleans City & L. R. Co.*, 4 South. 512, 513, 40 La. Ann. 587.

#### As ordinary business.

An instruction, in an action for personal injuries, that in assessing the plaintiff's damages the jury should consider the permanent loss and damage arising from any disability resulting to the plaintiff from the injury, which renders him less capable of attending to his business than he would have been if the injury had not been received, refers to "his business" any business which the plaintiff might undertake to carry out, and there is no difference in meaning between the words "his business" and "his ordinary business." *Treadwell v. Whittier*, 22 Pac. 266, 267, 80 Cal. 574, 5 L. R. A. 498, 13 Am. St. Rep. 175.

"Business," as used in V. S. § 583, providing that every trust company or savings bank incorporated by the state and doing "business" therein shall pay a tax to the

State Treasurer upon the average amount of its deposits, means the ordinary business of the corporation conducted by itself under its corporate powers, and an insolvent savings bank in the hands of a receiver for the purpose of liquidation is not doing "business" within the meaning of the statute. *State v. Bradford Sav. Bank & Trust Co.*, 44 Atl. 349, 350, 71 Vt. 234.

#### As profits.

As used in a contract stating that A. & B. had formed a partnership, and that they employed C. as their treasurer, who was to receive in payment for his services "ten per cent. of the business," and that C. was to be allowed to furnish capital for the firm, the term "ten per cent. of the business" meant 10 per cent. on the profits, and not 10 per cent. on the whole amount of the business. *Funk v. Haskell*, 132 Mass. 580, 581.

#### As property.

See "Property."

#### As regular employment or established business.

In Pub. St. c. 11, § 20, cl. 1, providing that all goods, wares, and merchandise, and other stock in trade, including stock employed in the business of manufacturing in cities or towns within the commonwealth other than where the owner resides, shall be taxed in those places where the owners have or occupy stores, shops, or wharves, the word "business" refers to an established, and not a transient, "business," which shall have a local habitation in a town other than where the owner dwells. *Ingram v. Cowles*, 23 N. E. 48, 49, 150 Mass. 155.

The term "business" in common parlance means that employment which occupies the time, attention, and labor; that which a man occasionally engages in as opportunity offers or inclination prompts is for the time being his business; yet so far as the question where a person's usual place of business is at which notice of dishonor of negotiable paper may be given, the law uses the term "business" to indicate a regular and legal employment, not one that is occasional, irregular, or illegal. *Stephenson v. Primrose* (Ala.) 8 Port. 155, 167, 33 Am. Dec. 281.

The words "calling and business" used in the Constitution, authorizing the exemption of a man's place of business, are evidently used in a very broad sense. Taken together, they embrace every legitimate avocation in life in which an honest support for a family may be obtained. The latter word was probably used, in contradistinction to the other, to denote that which Mr. Webster defines to be the general meaning of the word—"that which occupies the time, attention, and labor of men for the purpose of profit or improvement," and this may be temporary. The calling may exist as a fact, whether it be prac-



ticed or not; with the other, the actual employment in the given occupation furnishes the only means to determine whether the business exists or not. *Shryock v. Latimer*, 57 Tex. 674, 677.

The keeping by a widow of a home for herself and her children at which she occasionally entertained for pay relatives of the family, while she neither had nor made any effort to get boarders other than members of the family, had none of the elements of an established business, within St. 1895, c. 488, § 14, providing for damages for persons owning an "established business" on lands taken for the Metropolitan Reservoir. *Gavin v. Commonwealth*, 65 N. E. 37, 182 Mass. 190.

#### As trade.

"Business," as used in a covenant in a deed prohibiting the grantee from carrying on or permitting any offensive or dangerous trade or "business" on the premises, will not be used in its comprehensive general sense, but will be limited when used in connection with the word "trade" (citing *Wakefield v. Fargo*, 90 N. Y. 213, 216; *Hickey v. Taaffe*, 99 N. Y. 204, 209, 1 N. E. 685, 52 Am. Rep. 19; *Appeal of Pardee*, 100 Pa. 408, 412), so that the covenant is not violated by the construction of a temporary railroad over which to carry soil excavated from other land. *Bohn-sack v. McDonald*, 56 N. Y. Supp. 347, 349, 26 Misc. Rep. 493.

In Laws 1892, c. 602, requiring any person intending to conduct the trade, business, or calling of a plumber, etc., to submit to examination before engaging in the business, etc., the words "trade, business, or calling" are synonymous, and have relation to the mechanical employments, one's trade, etc., being that business which he has learned and fitted himself to follow. *People v. Warden of City Prison*, 39 N. E. 686, 689, 144 N. Y. 529, 27 L. R. A. 718.

Gen. St. c. 133, § 32, exempting from execution the "tools, implements and fixtures necessary for carrying on trade or business," applies to such as mechanics, artisans, handicraftsmen, and others whose manual labor and skill afford means of earning their livelihood, and does not include those merely engaged in the business of buying and selling merchandise, not to exempt the weights and measures, horses and carriages, or other articles used by them in their trade, and so does not apply to one engaged in keeping a meat market and grocer's shop. *Wallace v. Bartlett*, 108 Mass. 52, 54.

#### Of banks of deposit.

The definition of the "business of banks of deposit" in the encyclopedias embraces the receiving of the money or valuables of others to keep until called for by the depositors. 1 Enc. Am. "Banks," 543; 1 Enc. Eng. "Arts and Sciences," 833, 837, 847. And although

in modern times the business of receiving general deposits has constituted the principal business of banks, it cannot be said that the receiving of special deposits is so foreign to the banking business that corporations authorized to carry on that business are incapable of binding themselves by the receipt of such deposits. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 95, 36 Am. Rep. 582.

#### Of common carrier.

A hotel owned by a railroad corporation, and kept by its lessees as a hotel and place of summer resort, is not included within the exemption from ordinary taxation enjoyed by the corporation in respect to such of its property as is held and used for the proper business of a common carrier. *Hennepin County v. St. Paul, M. & M. Ry. Co.*, 44 N. W. 63, 64, 42 Minn. 238.

#### Of corporation.

"Business," as used in the English companies act of 1862 (section 161), permitting the transfer to a new company of the business or property of a corporation being voluntarily wound up, does not include uncalled capital. *Bank of China, Japan & The Straits v. Morse*, 61 N. E. 774, 780, 168 N. Y. 458, 56 L. R. A. 139, 85 Am. St. Rep. 676.

A statute providing for the taxation of a corporation in a city, town, or county in which their office for "business" is located, cannot be limited to so narrow a construction as to say that it means simply the place where the annual meeting of stockholders or directors is held, which might authorize a corporation to have its place for business located in a farm house, or in some town wherein it had no business, in order to evade taxation, but the Legislature must have used the term in its ordinary significance, and intended it to refer to the place in the state where its principal business operations were carried on. *Detroit Transp. Co. v. City of Detroit Assessors*, 51 N. W. 978, 980, 91 Mich. 382.

#### Of court.

1 Rev. St. (5th Ed.) 143, §§ 4, 5, declaring that no court shall be open to transact any "business" on election day, means such business as is to be transacted in open court, and does not embrace a judicial sale conducted by one of the officers of the court. *King v. Platt*, 37 N. Y. 155, 157.

#### Of express company.

The word "business," as used in an ordinance providing for license tax on express companies for business done exclusively within the city of Leavenworth, cannot relate to the unloading of goods from the car of the railroad express agent, the hauling them to the city office or the consignee, the receiving the charges thereon, the keeping of the office and books of the company by the agent, or any of the other numerous details of the

business in the city, but would relate to a case where the express company received goods or packages in one part of the city and delivered them to another part of the city, and this would be "business" done exclusively within the city. *City of Leavenworth v. Smith*, 48 Pac. 924, 925, 5 Kan. App. 165.

#### **Of family concerns.**

A statute exempting from the payment of tolls persons going on the ordinary domestic "business of family concerns" meant that the business must be ordinary or common business, such as usually requires attention at frequent intervals at the return of the different seasons, or on such occasions of necessity as commonly, though perhaps infrequently, arise. It must be domestic business, and must relate to family concerns. *Green Mountain Turnpike Co. v. Hemmingway*, 2 Vt. 512, 516.

#### **Of insurance.**

69 Ohio Laws, p. 141, § 1, authorizing an insurance company "to carry on the business of insurance," implies that the company could make investments of its capital which is required to pay policies. *National Bank of Washington v. Continental Life Ins. Co.*, 41 Ohio St. 1, 14.

#### **Of manufacturing corporation.**

"Business," according to the *Standard Dictionary*, is, first, a pursuit or occupation; and, second, any occupation connected with the details of trade or industry or commercial affairs, as the banking business. The principal business of a corporation, engaged in the manufacturing and selling its manufactures of iron and steel is such manufacturing and selling and not the banking of its funds derived from its sales, which makes its principal place of business the place where such manufacturing and selling is carried on instead of the place of banking. In re *Elmira Steel Co.* (U. S.) 109 Fed. 456, 470.

#### **Of a mine.**

"Business of a mine," as used in 7 & 8 Geo. IV, c. 31, § 2, allowing compensation for the felonious demolition of any building or erection used in conducting the business of a mine, included all that was done about the mine toward preparing the ore in a marketable state, and was not merely the getting of the rough ore from the mine to the surface. *Barwell v. Hundred of Winterstoke*, 14 Q. B. 704, 708.

#### **Of vegetables.**

A rule charging defendant with conducting "the business of vegetables in a public market" is equivalent to charging the "conducting the business of dealing in, or selling vegetables," since no other "business of vegetables" could be conducted in a public mar-

ket except that of selling or dealing in them. *State v. Cendo*, 38 La. Ann. 828, 829.

#### **More hazardous business.**

That a person insured under a policy prohibiting the devoting of a building to a more hazardous business lights it with gasoline is not a carrying on of such a business in violation of the provision of the policy. *Mutual Fire Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. 407.

#### **Whose business it is.**

The words "whose business it is," in Act March 3, 1865, providing that every person, firm, or corporation whose business it is as a broker to negotiate the purchase or sales of stocks, etc., shall be regarded as a broker, and shall pay a certain license, operates to limit the term "broker" to those persons only who pursue the business of selling stocks, etc., as a trade or means of making a livelihood. A sale, by a person doing a banking business, of security received by him for the payment of a legitimate loan, does not make him a broker. *Warren v. Shook*, 91 U. S. 704, 710, 23 L. Ed. 421.

#### **BUSINESS AGENT.**

Code Civ. Proc. § 411, authorizing service of process on foreign corporations doing business, and having a managing or "business agent," cashier, or secretary, within the state, by service on such agent, etc., does not mean every man who does any kind of business for a corporation, nor every person who might incidentally or occasionally transact some business for such corporation. The term means one bearing a close relation to the duties of managing agent, cashier, or secretary of the corporation. It must be an agent who is appointed, designated, or authorized to transact and manage one or more distinct branches of business which may be and is conducted and carried on by the corporation within the state where the service is made—one who stands in the shoes of the corporation in relation to the particular business managed, conducted, and controlled by him for the corporation. To constitute a managing or business agent, the agent must be one having in fact a representative capacity and derivative authority, and not one created by construction or implication contrary to the intention of the parties. *Doe v. Springfield Boiler & Mfg. Co.* (U. S.) 104 Fed. 684, 686, 687, 44 C. C. A. 128 (citing *Mulhearn v. Press Pub. Co.*, 20 Atl. 760, 53 N. J. Law [24 Vroom] 150; *Mikolas v. Hiram Walker & Sons*, 76 N. W. 36, 73 Minn. 305; *Gottschalk Co. v. Distilling & Cattle Feeding Co.* [U. S.] 50 Fed. 681; *Wall v. Chesapeake & O. R. Co.* [U. S.] 95 Fed. 398, 400, 37 C. C. A. 129; *Denver & R. G. R. Co. v. Roller* [U. S.] 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77).

**BUSINESS CORPORATION.**

A railroad company is a business corporation within the meaning of the bankrupt law, so that its provisions apply to it. *Winter v. Iowa, M. & N. P. Ry. Co.* (U. S.) 30 Fed. Cas. 329; *Adams v. Boston, H. & E. R. Co.* (U. S.) 1 Fed. Cas. 90, 92.

An insurance company created by the laws of a state to transact the business of insurance is included in the business corporations to which the provisions of a bankrupt act apply. *In re Independent Ins. Co.* (U. S.) 13 Fed. Cas. 13, 14; *In re Hercules Mut. Life Assur. Co.* (U. S.) 12 Fed. Cas. 12.

The fact that an educational institution may acquire and convey property necessary to the accomplishment of its object, and may charge tuition for instruction, does not render it a business or trading corporation. *McLeod v. Lincoln Medical College of Coter University* (Neb.) 96 N. W. 265, 266.

**BUSINESS HOMESTEAD.**

To preserve a place of "business homestead," which is separate and distinct from the home of the family, two things must concur: (1) The head of the family must have a calling or business to which the property is adapted and reasonably necessary; (2) such property must be used as a place to exercise the calling or business of the head of the family. *Alexander v. Lovitt* (Tex.) 56 S. W. 685, 686 (citing *Shryock v. Latimer*, 57 Tex. 674).

To protect a place of business as a "business homestead," it must be used as such. It must be used as a place of business for the head of the family, and not for some one else, and it must be reasonably adapted to such business. Thus a house in which the owner formerly carried on a bakery business, but which he had not used for that purpose for seven years, is not exempt as a business homestead, though he expects to go into the bakery business again as soon as he is able. *Ford v. Fosgard* (Tex.) 25 S. W. 445, 448.

Where machinery constituting partnership assets was adapted to use in a factory, and was attached thereto with the intention of there using it permanently, it became an immovable fixture, and, the partners being married men, it also became a part of the business homesteads of the respective families, and was not subject to mortgage with or without the consent of the wives. *Phelan v. Boyd* (Tex.) 14 S. W. 290, 294.

**BUSINESS HOURS.**

See "Usual Business Hours."

There may be little difficulty in towns and cities, where there are business hours, in deciding that a demand should be made for the payment of a note within those hours,

but, where no particular hours are known for making and receiving payments, there is more difficulty in determining what would be a reasonable hour for this purpose; the general rule being that the party has all the day to make his payment, which, in relation to bills and notes, should not be so varied as to prevent the maker having a fair opportunity to make arrangements and provide the means of payment before he is subjected to suit. *Lunt v. Adams*, 17 Me. (5 Shep.) 230, 231.

"Business hours," as used in reference to presenting a note for payment, means that a presentment must be made at a reasonable hour in case the note is not payable at any bank or place where business was transacted during stated hours in each day; and the question whether a presentment is within reasonable time cannot be made to depend on the private and peculiar habits of the maker of the note, not known to the holder, but must be determined on consideration of the circumstances which in ordinary cases would render it seasonable or otherwise. *Farnsworth v. Allen*, 70 Mass. (4 Gray) 453, 455.

The term "business hours," within which a railway company, in the exercise of due care, is to keep its station open for the delivery of goods, does not necessarily mean the hours of the day during which the company required its station agent's services, but the hours during which persons engaged in business in that community kept their places open generally for the transaction of business. *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133, 154 (Gil. 119, 138).

**As extending to bedtime.**

Business hours for the presentation of a bill for payment, except where the paper is due from a bank, generally range through the whole day, down to bedtime in the evening. *Cayuga County Bank v. Hunt* (N. Y.) 2 Hill, 635, 638.

The rule that the presentment of a note must be made within "business hours" does not mean within the business hours of a bank, when used in reference to a bank which has ceased to do business, in reference to a demand made on an indorser who is the manager of the bank. "When the note is payable at a bank, it is to be presented during banking hours, and the payer is allowed until the expiration of banking hours for payment; but when not to be paid at a bank, but to an individual, presentment may be made at any reasonable time during the day, during what are termed 'business hours,' which, it is held, range through the whole day, to the hours of rest in the evening." *Waring v. Betta*, 17 S. E. 739, 741, 90 Va. 46, 44 Am. St. Rep. 890.

The term "business hours" in which a bill must be presented for payment, when not considered in connection with banks, means the whole day, down to the hours of rest in

the evening. Thus a bill payable at the office of an attorney was held presented in quite reasonable time, as remarked by Best, C. J., though presented at 8 o'clock in the evening in the month of February. *Triggs v. Newnham*, 1 Car. & P. 631. Lord Ellenborough, in *Morgan v. Davison*, 1 Starkie, 114, ruled that a bill payable at a counting house was presented at a proper time, though presented between 6 and 7 o'clock in the evening, when no one was left there but a girl to take care of the premises. In another case the note was payable at No. 15 G. street. It was presented between 7 and 8 o'clock in the evening, when the door was found locked, and the messenger was unable, upon knocking, to obtain admission. And Lord Tenterden, C. J., after adverting to the well-known custom in regard to banks, requiring that presentment should be made within business hours, said that in other cases the rule of law is that the bill must be presented at a reasonable hour, and it was accordingly ruled that the presentment was made in a reasonable time. A presentment of a note made at the office of the maker in Chicago at 5:20 p. m., when the office was found locked, held to be a sufficient presentment. *Clough v. Holden (Mo.)* 20 S. W. 695, 698.

The words "business hours," in Stock Corporation Law, § 53, as amended by Act 1895, c. 384, requiring such a corporation to keep a stockbook open for the inspection of its stockholders and certain others during office hours, are not confined to the hours of business which any particular individual may establish for himself, but, with the exception of banking houses, they range through the whole day, down to the hours of rest in the evening, or at least during the hours which are customarily devoted to business in the particular community where the transaction occurs. Thus a demand made at 3:15 o'clock in the afternoon, while the officer on whom the demand was made was still in his office, was during the usual hours of transacting business, within the contemplation of the statute. *Cox v. Island Min. Co.*, 73 N. Y. Supp. 69, 73, 65 App. Div. 508.

Within the meaning of a rule that a note must be presented for payment during the usual business hours of the day on which it is due, business hours, except in the case of banks, include the whole day, unless there be some known custom or usage of trade to the contrary. And as the general usage of banks is to limit their business transactions to certain hours, a presentment out of banking hours is not sufficient. *Swan v. Hodges*, 40 Tenn. (3 Head) 251, 252.

#### **BUSINESS HOUSE.**

The use of a dwelling house in part by boarders occupying it with the family does not render it a business house, within an ordinance allowing sales of liquor by business

houses in the business portion of the city. *Shea v. City of Muncie*, 46 N. E. 138, 144, 148 Ind. 14.

#### **BUSINESS INSTITUTION.**

A trades council is not a business institution; the only element of business in which it was engaged being the furnishing to tradesmen of printed cards certifying that they are proper persons for the members of trades unions to deal with, suitable to be displayed in conspicuous places in such tradesmen's places of business, which was supplemented by the issue of a small pamphlet containing the names and addresses of tradesmen and persons in business in the town, with items of information and advice; no compensation being either required or received by the trades council from the tradespeople for granting or continuing such indorsements. It is in no sense a competing business with the publication of a daily newspaper. *Barr v. Essex Trades Council*, 30 Atl. 881, 889, 53 N. J. Eq. 101.

#### **BUSINESS LOSSES.**

See "Losses of Business."

#### **BUSINESS MANAGER.**

See "General Business Manager"; "Manager."

#### **BUSINESS PORTION OR SECTION.**

An ordinance forbidding the sale of liquor in the residence portion of a city, and permitting such sale only in the "business portion of the city," does not include a certain part of the city partly used for residence purposes, because a grocery or other business was here and there carried on therein. *Shea v. City of Muncie*, 46 N. E. 138, 144, 148 Ind. 14.

In an ordinance granting a franchise for lighting the streets of the city, the words "business section" mean that part of the city which is mainly and chiefly devoted to business purposes or uses. It is that part in which stores, factories, offices, shops, and the like, predominate. The word "business" is here used in contradistinction from the word "residential" or "dwelling" or "vacant" or "unoccupied." *Capital City Gaslight Co. v. City of Des Moines*, 61 N. W. 1066, 1070, 93 Iowa, 547.

#### **BUSINESS PURPOSES.**

A letter to the writer's clerk, who had been engaged under a contract for two years to conduct the business of a shipping agent, in which letter the writer inclosed a remittance, with directions that it should be applied to "business purposes," would not exclude the application of a portion of it to

the payment of the clerk's salary, in the absence of any evidence that the words should bear a restricted meaning. *Smith v. Thompson*, 8 O. C. 44, 59.

### BUSINESS TAX.

By the acts of 1846, 1858, and 1867, the city of Pittsburg was empowered to levy and collect a tax upon all goods, wares, and merchandise, and upon all articles of trade and commerce, sold in said city. By the act of 1877 it was provided that the city treasurer should prepare a registry or list of all delinquents in business tax, and place the same in the hands of a collector, etc. Held, that the business tax there referred to was the tax for the sale of goods, wares, merchandise, etc., provided for in the previous acts. *Appeal of Keystone Bridge Co. (Pa.)* 7 Atl. 579, 583.

### BUSINESS TIME.

Where an accident policy recites that plaintiff is by occupation a locomotive fireman, a provision that he should have a certain sum per week for 30 weeks' continuous and total loss of such "business time" as might result from accident, refers to his occupation, and does not mean that there is to be no payment unless the insured is incapacitated from performing any kind of business. *Pennington v. Pacific Mut. Life Ins. Co.*, 52 N. W. 482, 483, 85 Iowa, 468, 39 Am. St. Rep. 306.

### BUT.

#### As except.

"But," as used in Const. art. 1, § 9, providing that "the right to trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts," etc., is used in its customary meaning of "except," so that the provision in regard to civil cases is an exception. *First Nat. Bank v. Foster*, 61 Pac. 466, 467, 9 Wyo. 157, 54 L. R. A. 549.

In 58 Ohio Laws, p. 54, providing that "this act shall not affect the estate by the curtesy of any husband in the real property of his wife after her decease, but during the life of such wife, or any heir of her body, such estate shall not be taken for the payment of his debts," etc., but means "except that." *Robert v. Sliffe*, 41 Ohio St. 225, 231.

The word "but," as used in Tenn. Const. art. 2, § 28, requiring all taxes to be uniform and equal throughout the state, "but the Legislature shall have the power to tax merchants, peddlers, and privileges in such manner as they may from time to time direct," is significant of the purpose intended to be accomplished. It indicates what follows in an exception to that which has gone before, and is not to be controlled by it. Its mean-

ing is that although in taxing property the Legislature is forbidden to tax it except according to its value, yet as to merchants, peddlers, and privileges the Legislature is not to be restricted, but may exercise the power without restriction either to the amount or as to the manner or mode of exercising the power. *Western Union Tel. Co. v. Harris* (Tenn.) 52 S. W. 748, 752 (citing *Stonestreet v. Harrison*, 55 Tenn. [8 Helsk.] 456, 478).

"But" indicates the intention of those who use it to limit or restrain the sense or effect of something which had before been said, and is used only with a view of limiting or restraining the preceding language, and not with a view of enlarging it. *Stonestreet v. Harrison*, 15 Ky. (5 Litt.) 161, 164.

The primary meaning of the word "but" is except, and it is manifestly used in that sense in a statute requiring the taxation of all property but that used for educational and charitable purposes. *Chesapeake & O. R. Co. v. Miller*, 19 W. Va. 408, 436.

In a constitution providing that none except citizens shall be elected to any office, but the governor and judges must have attained the age of 30, the word "but" indicates that the convention knew that the first clause expressed a general rule, and desired to except from it governors and judges. In other words, it is an exception the same as if, after allowing all voters to be chosen to office, it had said, except the governors and judges must have attained the age of 30. *State v. McAllister*, 38 W. Va. 485, 502, 18 S. E. 770, 24 L. R. A. 343.

#### As on the contrary.

Const. art. 9, § 1, providing that revenue shall be raised by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of their property, such value to be ascertained by some person or persons elected or appointed in such manner as the General Assembly shall direct, but the General Assembly shall have power to tax peddlers, auctioneers, brokers, and express interests or business, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, held, that the word "but" is used in an exceptive or adversive sense, and means "on the contrary" or "on the other hand." *Sterling Gas Co. v. Higby*, 25 N. E. 660, 662, 134 Ill. 557.

The word "but," as used in Acts 1901, c. 4912, providing that when bonds of a county have been issued they shall not be held invalid on account of any irregularity in the proceedings, but wherever disposed of for value then they shall be in full force and effect, is used conjunctively in the sense of "on the contrary." *Potter v. Lainhart* (Fla.) 33 South. 251, 259.

**As or.**

In a will directing that, on the death of testator's daughter, one-half the income of the residue of his estate should be paid to his son, and upon decease of testator's wife, if his son survive her, then the whole of such net income should be paid to the son for life, but, in case the son should die leaving testator's wife surviving, then, during the life of such wife, the widow of the son should receive one-third of his share of the income, "but" is almost identical in meaning with the word "or," which may be substituted for it. In re Cox's Estate, 38 Atl. 564, 565, 180 Pa. 139.

**As yet or still.**

"But" may, in order to give effect to the obvious intent of a statute, be considered to mean "yet" or "still." Adams v. Yazoo & M. V. R. Co., 22 South. 824, 825, 75 Miss. 275.

**As word of limitation.**

In a will providing, "I also give, devise, and bequeath to my wife, E., all the rest and residue of my real estate, but, on her decease, the remainder thereof, if any, I give and devise to my said children," "but" is a word of limitation, and shows that the testator intended that the previous gift, which was apparently absolute, should not remain absolute, but should be limited by that which followed. It indicates a proviso, condition, or qualification, and, in connection with the rest of the sentence, reduces the previous gift by carving out, not an absolute, but a possible, remainder for the children. Leggett v. Firth, 29 N. E. 950, 132 N. Y. 7.

**BUTCHER.**

The ordinary and natural understanding of the word "butcher" is one who kills and sells cattle for human food. Blumhardt v. Rohr, 17 Atl. 266, 268, 70 Md. 328.

"Butcher" means a person who cuts and sells meat as well as a person who actually slaughters animals and dresses the carcasses. Green v. State, 19 S. W. 1055, 56 Ark. 386.

A "butcher," as defined by Webster, is one who slaughters animals or dresses their flesh for market; one whose occupation is to kill animals for food. It is quite well to designate one conducting a meat shop as a "butcher," yet it is perhaps improper, and it will be more correct to say that he who slaughters the animals and prepares them for market is a butcher, while he who sells the flesh at a store is the keeper of a meat market. And where an ordinance intended to regulate and license the vending of meat or meat markets uses the word "butcher," as the meaning is obvious, and as it has a right by its charter to license such markets, the word "butcher" will be construed to mean

the keeper of a meat market. City of Rockville v. Merchant, 60 Mo. App. 365, 369.

Rev. Law, § 101, requiring butchers to take out license, will be held to mean a person who himself actually slaughters the animals to be used as food; and, although a butcher might, or might not, cut up and sell by retail in the market the bodies of the animals he had slaughtered, a person who merely buys the bodies of the animals already slaughtered for meat, and cuts them up and retails them at a market stall, is not a butcher, within the meaning of the law. Henback v. State, 53 Ala. 523, 526, 25 Am. Rep. 650.

"Butcher," as used in Act 1881, c. 149, § 4, imposing a privilege tax on butchers, etc., means a person who kills animals to sell their flesh. It does not include the keeper of a family grocery under a merchants' license, though he may retail meat during a small part of the year, limiting the business to a particular class of meats purchased from farmers. Eastman v. Jackson, 78 Tenn. (10 Lea) 162, 163.

**BUTCHER SHOP.**

As store, see "Store."

It is not necessary to constitute a butcher shop that animals shall be actually slaughtered and dressed there for market, but a shop used exclusively for the sale of meat is a butcher shop, though no animals are slaughtered or dressed there. Green v. State, 19 S. W. 1055, 56 Ark. 386.

"Butcher shop" is a synonymous term with "meat market." Wiest v. Luyendyk, 41 N. W. 839, 840, 73 Mich. 661.

**BUTCHERED.**

The word "butchered," as used in a dying declaration that the injured man had been butchered by the doctors, simply means killed in an unusual, cruel, or wanton manner. State v. Gile, 8 Wash. 12, 22, 35 Pac. 417.

**BUTTER.**

See "Imitation Butter"; "Process Butter."

For the purpose of the provision relating to the sale of adulterated cheese or butter, the terms "butter" and "cheese" mean the products usually known by those names, and which are manufactured exclusively from milk or cream, or both, with salt and rennet, and with or without coloring matter. Rev. St. Me. 1883, p. 923, c. 128, § 6.

For the purpose of the statutory provisions relative to the sale of imitation butter and cheese, the terms "butter" and

"cheese" shall mean the products which are usually known by these names, and are manufactured exclusively from milk or cream, with salt and rennet, and with or without coloring matter. Rev. Laws Mass. 1902, p. 547, c. 56, § 35.

For the purposes of acts relating to the sale of imitation butter, the term "butter" shall be understood to mean the product usually known by that name, and which is manufactured exclusively from milk or cream, or both. Gen. St. Minn. 1894, § 6991. The term "butter," as used in the chapter of the Penal Code relating to adulterated dairy products, is understood to mean the product usually known by that name, and which is manufactured exclusively from milk or cream, or both. Rev. Codes N. D. 1899, § 7648.

The terms "butter" and "cheese" shall be understood to mean the products usually known by those names, and which are manufactured exclusively from milk or cream, or both, with salt, and with or without coloring matter, and, if cheese, with rennet. Pub. St. N. H. 1901, p. 402, c. 127, § 22.

The term "butter" shall mean the product usually known by that name, manufactured exclusively from milk or cream, or both, with or without salt or coloring matter. V. S. 1894, § 4340.

The word "butter," as used in an act relating to oleomargarine, shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter. U. S. Comp. St. 1901, p. 2228. The term "butter," as used in an act relating to oleomargarine, is defined to mean an article of food, as defined in Act Aug. 2, 1886. Supp. U. S. Comp. St. 1903, p. 267.

The world has but one understanding of what is meant by the word "butter," and we must assume that such is the sense that the Legislature used the term in Pub. Act 1901, No. 22, entitled an act to prevent deception in the manufacture and sale of imitation butter. A fair inference from the statute is that the Legislature undertook to prevent deception by preventing the sale of any yellow oleomargarine, and it undertook to accomplish this by prohibiting the coloring of oleomargarine yellow, and this is fairly within the title. *People v. Rotter*, 91 N. W. 167, 168, 131 Mich. 250.

Under the express provisions of Ohio act to prevent deception in the sale of dairy product, the terms "natural butter and cheese produced from pure, unadulterated milk, or cream from the same," "butter and cheese made from unadulterated milk or cream," "butter or cheese, the product of the dairy," and "butter and cheese," shall be understood to mean the products usually known by the

term "butter and cheese," and which butter is manufactured exclusively from pure milk or cream, or both, with salt, and with or without harmless coloring matter, and which cheese is manufactured exclusively from pure milk or cream, or both, with salt and rennet, and with or without any harmless coloring matter or sage. *State v. Capital City Dairy*, 57 N. E. 62, 64, 62 Ohio St. 350, 57 L. R. A. 181.

## BUTTERINE.

Butterine or oleomargarine is a name given to compounds resembling butter in appearance and flavor, put on the market as substitutes for it. A law requiring such substitutes to be distinctly labeled is within the police power of the state. *Butler v. Chambers*, 30 N. W. 308, 309, 36 Minn. 69, 1 Am. St. Rep. 638.

## BUTTY COLLIER.

"Butty colliers" are two or more working colliers who join together and enter into agreements with their employers to get coal or iron from certain pits at so much a yard or so much a ton, and are in the habit of doing work themselves, and of employing other men under them, to increase the quantity raised. *Bowers v. Lovekin*, 6 El. & Bl. 584.

## BUY.

See "Agreement to Buy."

"Buy," as used in an indictment charging that defendants did feloniously, and with intent to defraud a certain person, "buy" from him a certain team of horses, should be construed in the sense of negotiating, and not that the defendants gave a good consideration for the horses obtained. *Pinney v. State*, 59 N. E. 383, 384, 158 Ind. 167.

The phrase, "buy stock and carry it on a margin," in a statement that a customer employs a broker to buy stock for him and carry it on a margin, imports that the stock shall be actually bought and actually received by the broker; and, if in such case the stock is actually bought and actually received by the broker, the transaction is not within St. 1890, c. 437, providing that whoever contracts to buy on margin any securities, having at the time no intention to perform by actual receipt and payment, may sue for any payment made, provided that the other party had reasonable cause to believe that no intention to actually perform existed. *Marks v. Metropolitan Stock Exch.*, 63 N. E. 410, 411, 181 Mass. 251.

**As authority to pledge.**

An authority to buy and sell by no means implies authority to pledge. *Trent v. Sherlock*, 66 Pac. 700, 701, 28 Mont. 85.

**Discount distinguished.**

Buying a note, as distinguished from discounting it, is a transaction where the seller does not indorse the note, and is not accountable for it. *Farmers' & Mechanics' Bank v. Baldwin*, 23 Minn. 198, 206, 23 Am. Rep. 683; *Newell v. First Nat. Bank of Somerset*, 13 Ky. Law Rep. 775, 777 (citing *Bouv. Dict.*); *Nellsville Bank v. Tuthill*, 80 N. W. 154, 155, 4 Dak. 295 (citing 1 *Bouv. Law Dict. tit. "Discount"*).

**BUYER.**

See "Public Buyer."

"Buyer" is a term used in the law of sales to designate the person purchasing the goods which is the subject of a sale. *Eldridge v. Kuehl*, 27 Iowa, 160, 173.

**BUYER'S OPTION.**

"Buyer's option," as used in an order to buy stock on a 60 days' buyer's option, means with a right on the part of the purchaser to take and pay for it at any time within 60 days, if he chooses. *Pickering v. Demeritt*, 100 Mass. 416, 421.

**BUYER'S RISK.**

A contract of sale to be shipped to purchasers "f. o. b. California, buyers' risk," did not impose on the purchasers the assumption of the risk of any damage resulting from improper packing or shipping in a defective car, where the seller was the owner and shipper, but only such risk as arose after the contract was entered into. *Rose v. Weinberger*, 37 S. E. 868, 112 Ga. 628; *Rose v. Weinberger*, 34 S. E. 28, 29, 108 Ga. 533, 75 Am. St. Rep. 73.

**BUYING OF TITLES.**

Buying of titles is the buying or selling of lands out of the possession of the vendor, and held adversely at the time. This was for a long period an offense, the contract being champertous. The sale of such a title is not a valid consideration for a promise. *Whitaker v. Cone*, 2 Johns. Cas. 58, 59; *Brinley v. Whiting*, 22 Mass. (5 Pick.) 348, 356.

**BY.**

In its primitive sense the word "by" expresses relation to place, though by its various, remote, and casual associations that meaning is variously modified. In relation to place it clearly does signify at or near, but its import is more definite when used to express the relation of time. In this application it signifies on or before. The popular signification of words, that which use had made familiar in the affairs of men, must be adopted in giving construction to their

agreements. *Ferguson v. Coleman* (S. C.) 3 Rich. Law, 99, 100, 45 Am. Dec. 761.

Lord Coke says that the word "by" or "bye" signifies habitation. *Hanna v. Nassau Electric R. Co.*, 18 App. Div. 187, 142, 45 N. Y. Supp. 437, 440.

**As according to.**

In an agreement that the issues and questions arising in one proceeding shall be settled and determined by the final judgment in other proceedings, "by" will be construed to mean "according to." "The preposition 'by' is often used in the sense, and this is one of its definitions." *Haubert v. Haworth*, 78 Pa. (28 P. F. Smith) 78, 83, (citing *Webster's Dict.*).

**Agency indicated.**

"By its trustees," as used in a declaration stating that an action was brought by the Fifth Baptist Church, by its trustees, are not a part of the name of the plaintiff, but are inserted, like "by attorney" or "next friend," to indicate by whose agency, and not in whose behalf, the action is brought. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 11 Sup. Ct. 185, 186, 137 U. S. 568, 34 L. Ed. 784.

"By, per, pro," attached to a signature, and adding a description thereto, such as "cashier," "secretary," "president," or "agent," sufficiently indicates and shows that such person signed an official name in the capacity stated alone, and not personally. The use of the words "by," "per," or "pro" does not necessarily add to the certainty of what is thus expressed, and it is common to use these words in commercial business, it being sufficiently understood that the paper is signed by the officer or agent named, and for the corporation. *Liescher v. Kraus*, 43 N. W. 166, 167, 74 Wis. 387, 5 L. R. A. 496, 17 Am. St. Rep. 171.

"Injuries done to person or property," as used in Rev. Code, 1845, § 1, subdiv. 4, making steamboats liable for injuries done to persons or property by said boat or vessel, means injuries in which the boat is an agent, such as collisions and the like, and does not embrace the act of the captain thereof in putting an employé ashore in violation of the contract of employment. *Blass v. The Robert Campbell*, 16 Mo. 266, 267.

The provision that an application for a writ of certiorari must be made "by or in behalf of" the party aggrieved authorizes verification by a duly authorized attorney. *In re Belmont*, 81 N. Y. Supp. 280, 281. 40 Misc. Rep. 133.

**As alongside.**

Logs found in a mill pond on the line of a railroad, and three or four rods from it, may well be said to be "lying by the rail-



road." *Hopkins v. Rays*, 44 Atl. 102, 68 N. H. 164, 73 Am. St. Rep. 554.

#### As along the line of.

Where a deed described the line of the premises intended to be conveyed as running by the land of D. the word "by" is to be construed as meaning "along the line of," and not as meaning "over" or "across." *Bailey v. White*, 41 N. H. 837, 843.

As used in a deed stating one call to Smith's land, and thence by said Smith's land to a certain point, means along the external boundary of the land. "The word 'by' does not mean 'over,' or 'across,' but along the line of Smith's land, and such is both its legal and common acceptation." *Peaslee v. Gee*, 19 N. H. 273, 277.

The words, "to" "from," and "by," when used to express boundaries, ordinarily mean terms of exclusion, and are always to be understood in that way, unless there is something in the connection which makes it manifest that they were used in a different sense. *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491, 537.

Bounding of one piece of land "by" another piece, whether such other be long or narrow, or in any other form, locates the line at an edge, and not through the middle of the adjoining premises. *Woodman v. Spencer*, 54 N. H. 507, 511.

#### As at request of.

A complaint charged that the plaintiff, as treasurer of a corporation, acting under the direction of its directors, expended \$800 in its behalf over and above his receipts from its funds, and that the corporation was indebted to him. Held, that the phrase "under and by the direction of the board of directors" simply meant that the expenditures were made at the request of the company. *Simmons v. Sisson*, 26 N. Y. 264, 275.

#### As in.

In Const. art. 4, § 24, providing that no lottery shall be authorized "by this state," the phrase "by this state," is synonymous with the phrase "in the state," and the effect of the provision is not only to limit the legislative power to create public lotteries to be conducted and managed solely by the state for the purpose of raising revenues, but it also prohibits the state from authorizing any lottery for any purpose, public or private. *State v. Overton*, 16 Nev. 136, 149.

#### As on or before.

Where an order for goods made subject to countermand "by a certain time" was altered by the writing of the word "before" over the word "by," the alteration was immaterial, it not having changed the meaning of the order. *Express Pub. Co. v. Aldine Press*, 17 Atl. 603, 609, 126 Pa. 347.

A contract to do a certain thing or complete work "by a certain time" should be construed to require completion of the contract before the time specified. *Rankin v. Woodworth*, 3 Pen. & W. 48.

"By," as used in a contract to deliver barley, requiring a delivery by a certain day, is practically synonymous with "on" or "before" that day, and hence it was no fatal variance that the declaration alleged that the contract required a delivery on or before the day. *Coonley v. Anderson* (N. Y.) 1 Hill, 519, 522.

"By," in a notice that premises will be vacated by January 1st, evidently meant that the premises would be vacated when that time had arrived; that is to say, before that time. *Wilson v. Rodeman*, 8 S. E. 855, 857, 30 S. C. 210.

"By," as used in Hill's Ann. Laws, § 541, providing that appellant must by the second day of next term file with the clerk a transcript, means "on" the second day, and not "before." *Wachsmuth v. Routledge*, 51 Pac. 443, 444, 36 Or. 307 (citing *Richardson v. Ford*, 14 Ill. [4 Peck] 332).

The word "by," as used in a contract for the construction of a building, and containing a stipulation that the contractor shall finish the house by April 1st, means before April 1st. *Miller v. Phillips*, 31 Pa. (7 Casey) 218, 221.

"By" has many significations, but when used to designate a terminal point of time it is defined by the Century Dictionary to mean "not later than; as early as"; the Standard defines it "not later than"; and Webster. "not later than; as soon as"; and, as used in an agreement that a subscription was not to be binding unless a certain sum was subscribed "by July 1st," meant that the whole amount should be subscribed not later than July 1st. *Elizabeth City Cotton Mills v. Dunstan*, 27 S. E. 1001, 121 N. C. 12, 61 Am. St. Rep. 654.

The word "by," as used in an order extending the time for a party to file his notice of motion for a new trial from December 23, 1878, until January 9, 1879, and also ordering that the bill of exceptions and statement be filed "by" January 20, 1879, allows the party to file his bill of exceptions and statement on January 20, 1879. *Higley v. Gilmer*, 3 Mont. 433, 438.

In an option given February 7th, provided no better offer was received that day by mail, to close "by February 8th" includes the latter day. *Blalock v. Clark*, 45 S. E. 642, 643, 133 N. C. 306.

#### As through the means of.

"By," as used in Stock Corporation Law, § 48, providing that no conveyance or transfer of any property by any corporation which

shall have refused to pay any of its notes or other obligations, when due by it or any of its officers, directors, or stockholders, will be construed as equivalent to the phrase "through the means, act, or instrumentality of," so that the section would read, "no conveyance, assignment, or transfer of any property of any such corporation by it, or effected through the means, act, or instrumentality of any one who is an officer, director, or stockholder thereof, shall be valid;" and hence it is not necessary that a director should act officially in making the transfer. *O'Brien v. East River Bridge Co.*, 55 N. Y. Supp. 206, 208, 36 App. Div. 17.

In Gen. St. c. 161, § 54, providing that whoever designedly, by false pretense, obtains any property from another, shall be punished, the phrase "false pretense" is substantially equivalent to the words "by means of a false pretense" or "under false color and pretense," and an indictment charging that the defendant obtained goods under a false and fraudulent pretense was sufficient to meet the requirements of the statute. *Commonwealth v. Walker*, 108 Mass. 309, 313.

#### As to.

In a complaint under St. 1869, c. 415, § 32, for the unlawful selling of intoxicating liquor, a description of the person to whom the sale was made as a certain person whose name is not known "by" the complainant will be construed to mean "to," and therefore to be sufficiently precise and formal, though the preposition "to" should have been used instead of "by" in averring complainant's want of knowledge of the name of the person to whom the liquor was sold. *Commonwealth v. Griffin*, 105 Mass. 175, 176.

#### As the whole length of.

A description in a deed, which described the line bounding the property as running "thence by the lands" of a certain person, does not indicate that the whole of the line is along the lands designated. If the line ran partially so only, it would answer the description. *Rieglesville Del. Bridge Co. v. Bloom*, 7 Atl. 478, 479, 48 N. J. Law (19 Vroom) 368.

#### By a bay, creek, pond, river, slough, strait, or stream.

The words "to," "by," "along," "with," "in," "up," or "down," a creek, river, slough, strait, or bay, mean the middle of the main channel thereof, unless otherwise expressed. *Pol. Code Cal.* 1903, § 3906; *Pol. Code Mont.* 1895, § 4106.

The words "by the pond," used to designate a boundary of land, are to be construed as fixing the boundary in the center of the pond. *Lowell v. Robinson*, 16 Ma. 357, 361, 33 Am. Dec. 671.

"By," as used in grant of land bounded by a fresh water stream, means to the thread of the stream. *Morgan v. Reading*, 11 Miss. (3 Smedes & M.) 366, 399.

A deed in which it is recited that part of the land is "bounded by the river" means that the grant extends to the thread of the river. *Lunt v. Holland*, 14 Mass. 149, 150.

A deed, the description of which recites that the property conveyed is bounded on one side "by" a certain river, means that the grantee takes title to the bed of the water course. *Hayes' Ex'r v. Bowman* (Va.) 1 Rand. 417, 420.

#### By a highway or street.

Where, in stating the course of a line along a river, it is described as running to a stake by the river, the word "by" makes the river a boundary. *Rix v. Johnson*, 5 N. H. 520, 522, 22 Am. Dec. 472.

A boundary "on a stream," or "by a stream," or "to a stream," includes the flats, at least to low-water mark, and, in many cases, to the middle thread of the river. *Thomas v. Hatch* (U. S.) 23 Fed. Cas. 946, 949.

A deed describing land as bounded "by" a highway or street is to be construed as including the land to the center of the street or highway. *Fraser v. Ott*, 30 Pac. 793, 794, 95 Cal. 661; *Baltimore & O. R. Co. v. Gould*, 8 Atl. 754, 756, 67 Md. 60; *Hollenbeck v. Rowley*, 90 Mass. (8 Allen) 473, 475; *Holloway v. Delano*, 18 N. Y. Supp. 700, 703, 64 Hun. 27; *Cochran v. Smith*, 26 N. Y. Supp. 103, 105, 73 Hun. 597; *Firmstone v. Spaeter*, 25 Atl. 41, 150 Pa. 616, 30 Am. St. Rep. 851; *Lee v. Lee* (N. Y.) 27 Hun. 1, 4.

As used in a deed describing land as bounded "by a public highway or street," it will be considered as bounded by the center of the street, unless it clearly appears that it was intended to make the side line of the street a boundary instead of the center. *Moody v. Palmer*, 50 Cal. 31, 36.

"There can be no doubt that ordinarily, when one conveys property bounded 'by a street' then actually opened and used, in the absence of any fact to show a contrary intent, the description will be deemed to carry the title to the center of the highway. But that presumption is not a conclusive presumption of law. It is only a presumption of fact, existing because of what is supposed to be the intention of the parties to the transaction, and it is subject to be overruled, and another construction given to the deed, if a contrary intention can fairly be inferred by reference to the situation of the lands and the condition and relations of the parties to them. This presumption arises from the fact that ordinarily the state, when it takes land for highway purposes, does not take

the fee of the property, but only the right to use and occupy the land so taken for the purposes of the highway, leaving the naked fee in the owner for whom the land is taken; and when that owner conveys land abutting upon the highway, if the fee of the highway did not also pass to his grantee, there would be left a strip of land the width of the highway, as to which the original owner would own the fee, without any rights except to use it as a highway, and the abutting owner, not having the fee, would have no power to enforce his rights against a person who sought to use the highway for any purpose to which it was not properly to be devoted. To obviate this, it has been held that, although the highway was not included in terms in the deed, yet, where land is conveyed bounded by an existing highway, the fee did pass to the abutter; but, where the fee of the land used for the highway is owned by the state, that presumption cannot arise, nor is there any reason for its existence." *Graham v. Stern*, 64 N. Y. Supp. 728, 729, 51 App. Div. 406.

Where a part of the description in a deed read "thence by said road" easterly to the place of beginning, the phrase "thence by said road" meant a grant to the margin of the road, and did not carry title to any of the land embraced within the road. *Sibley v. Holden*, 27 Mass. (10 Pick.) 249, 20 Am. Dec. 521.

A conveyance of real estate describing the property as "by and along" a certain public highway does not carry with it the fee to the center of the road as part and parcel of the grant. *Peabody Heights Co. v. Sadtler*, 63 Md. 533, 537, 52 Am. Rep. 519.

In the case of land bounded "by a highway," the grant extends to the center of the highway; but where it is bounded by and along the side of such highway, the boundary is fixed at the side thereof, leaving still in the grantor the fee of the land over which the highway passes, subject only to the easement of public right of way. *Child v. Starr* (N. Y.) 4 Hill, 369, 382.

Where a conveyance of city lots described the premises as bounded "southerly by the northerly line or side of T's lane," the grantee was limited to the northerly side of the lane, and the description did not carry him to the center thereof. *Jones v. Cowman*, 4 N. Y. Super. Ct. (2 Sandf.) 234, 237.

A grant of land described as bordering "on, along, or by" a highway will by legal implication carry a fee to the center of a road, as the law never presumes that, in parting with his interest in the land adjoining a public way, the grantor meant to reserve the fee in the way subject to the public easement. But this presumption, like all other presumptions, may be rebutted, and if it plainly appears from the language used

and the nature of the property that the grantor meant to limit the grant to the line of the road, and reserve for himself the fee in the roadbed subject to the use of it by the public as a highway, then, of course, this plainly expressed intention must prevail. So a deed conveying land by metes and bounds, where one of the boundary lines is described as "extending to a post standing on the south side of the road, thence bounding the road north 87 degrees west," establishes a boundary at the side, and not at the center, of the highway. *Hunt v. Brown*, 23 Atl. 1029, 75 Md. 481.

The phrase "by said road on the easterly and northerly side thereof," as descriptive of the boundary of land, will be construed, unless a contrary intent appears on the face of the deed of the land, to fix the line as the easterly and northerly side of the road, and not at the center line of the road. *Holmes v. Turner's Falls Co.*, 8 N. E. 646, 651, 142 Mass. 590.

A description in a deed in which one boundary is given as a line running by the highway, and by the land of another, shows an intention to make the line of an adjoining landowner the boundary line in that direction. *Thompson v. Major*, 58 N. H. 242, 245.

#### By a mountain or ridge.

The words "to," "on," "along," "with," or "by" a mountain or ridge, mean summit point, or summit line, unless otherwise expressed. *Pol. Code Cal.* 1903, § 3905; *Pol. Code Mont.* 1895, § 4105.

#### By the shore line.

The words "along," "with," "by," or "on," the shore line, mean on a line parallel with and three miles from the shore. *Pol. Code Cal.* 1903, § 3907.

#### BY ANY FALSE PRETENSE.

The false assertion of possession of money, on the credit whereof goods were obtained, is a false pretense within Act July 12, 1842, § 21, P. L. 345, providing that "every person who, with intent to cheat or defraud another, shall \* \* \* by any false pretense whatever, obtain from any person any money," etc. *Commonwealth v. Burdick*, 2 Pa. (2 Barr) 163, 164, 44 Am. Dec. 186.

#### BY AUTHORITY.

Where the phrase "by authority" is printed on the title page of a volume purporting to contain the laws of another state, such phrase sufficiently shows that it is printed by the authority of the Legislature of that state, and hence warrants its admission in evidence. *Merrifield v. Robbins*, 74 Mass. (8 Gray) 150, 151.

The phrase "by authority of," as used in a recital in municipal bonds to the effect that they are issued by authority of the provisions of a given statute, means an assertion that in issuing the bonds the provisions of the statute designated have been followed or conformed to. *Bates v. Riverside Independent School Dist.* (U. S.) 25 Fed. 192, 194.

#### BY CONFESSION.

See "Judgment by Confession."

As used in a justice's judgment docket declaring that judgment was entered "by confession," the term "by confession" is surplusage, and was evidently inadvertently used as synonymous with the words by consent. *Jewett v. Sunback*, 58 N. W. 20, 22, 5 S. D. 111.

#### BY THE COURT.

Where in partition, after a trial by jury as to certain issues, the action is, by consent of the parties, proceeded with before the court, and it makes additional findings of facts, the trial is not "by the court without a jury." *Bowen v. Sweeney*, 88 N. E. 271, 143 N. Y. 349.

#### BY DIRECT LINE.

Where a portion of a tract of land was bounded with reference to a stream, it was held that the terms "by direct line" showed that the meander of the stream was not intended, but that it was intended to close the survey by a single line drawn from one point to another. *Thomas' Lessee v. Godfrey* (Md.) 8 Gill & J. 142, 152.

#### BY THE DRINK.

Rev. St. 1845, p. 348, declares that all accounts of grocers or other retailers of spirituous liquors, for liquors retailed, sold, or delivered for a greater or higher amount than 50 cents, shall be void, excepting that the act should not prevent any grocer, retailer, or other person from selling spirituous liquors in larger quantities than a quart, and recovering for the same. In an action to recover on an account, where the evidence showed that a large part of the account was for whisky sold to the defendant, "by the drink" could not be construed to mean a quart, so as to bring the sale within the provision of the exception of the act, but clearly meant sales at retail in quantities less than a quart. *Sappington v. Carter*, 67 Ill. 482, 485.

#### BY ESTIMATION.

The words "contained by estimation," following a description of land in a deed, indicates that the statement of the quantity of acres in a deed is mere matter of description,

not of the essence of the contract, and the buyer takes the risk of the quantity if there be no intermixture of fraud in the case. *Jenkins v. Bolgiano*, 53 Md. 407, 420; *Weart v. Rose*, 16 N. J. Eq. (1 C. E. Green) 290, 297; *Stebbins v. Eddy* (U. S.) 22 Fed. Cas. 1192, 1194.

Where a deed describes the land conveyed as a specified number of acres by estimation, the phrase "by estimation" intimates that a positive declaration as to quantity was not intended; but where there is a gross error in the estimated quantity, the party injured will be relieved in equity, as for instance where a mortgage was executed upon real estate to secure the payment of the balance of purchase money, and the difference between the quantity of land expressed in the deed and that actually contained in the tract was greater in value than the amount secured by the mortgage, the vendee was entitled to abatement. *Mendenhall v. Steckel*, 47 Md. 453, 465, 28 Am. Rep. 481.

"The terms 'by estimation,' 'more or less,' or other expressions of similar import, added to a statement of quantity, are only to be considered as covering inconsiderable or small differences one way or the other, and do not in themselves determine the character of the sale." *Hays v. Hays*, 25 N. E. 600, 126 Ind. 92, 11 L. R. A. 376.

A contract for the sale of goods said to contain a certain quantity "by estimation" is to be construed to authorize only such a slight variation from the quantity designated in the contract as, from the circumstances of the case or the nature of the articles, may seem reasonable to the court. *Brawley v. United States*, 96 U. S. 168, 171, 24 L. Ed. 622.

"Containing by estimation," as used in a deed reciting that the premises conveyed contained by estimation a certain number of square feet, is equivalent to the words "more or less," and such words control the statement of the quantity or of the length of the lines, so that the purchaser will not be entitled to relief under a written contract to sell. *Tarbell v. Bowman*, 108 Mass. 341, 344.

#### BY FIRE.

See "Loss by Fire."

#### BY THE FIRST BOAT.

An order for goods which directed that they be forwarded "by the first boat" meant that they should be forwarded at the earliest opportunity. *Johnson v. Chambers*, 12 Ind. 102, 113.

#### BY FORCE OF.

A reinsurance policy by which the insurer agreed to pay all such sums as the insured

may, "by force of such policies," become liable to pay, renders the insurer liable where the insured was compelled to pay for a failure to keep alive a certain policy by receiving payments when tendered, it being by the force of the contract that the insured became liable. *Fisher v. Hope Mut. Life Ins. Co.*, 69 N. Y. 161, 163; *Fischer v. Same*, 40 N. Y. Super. Ct. (8 Jones & S.) 291, 299.

#### BY THE HANDS OF JUSTICE.

See "Die by the Hand of Justice."

#### BY HIS EXPRESS DIRECTION.

Where it appeared that the witness wrote the testator's name at the end of the will "at his own request," the jury might infer that he wrote it, in the words of the statute, "by his express direction," which means that the authority for it must be actively and positively conferred, not passively by silent acquiescence. *Barr v. Graybill*, 13 Pa. (1 Harris) 396, 399.

#### BY HIS OWN ACT.

See "Die by His Own Hand or Act."

#### BY HIS OWN HAND.

See "Die by His Own Hand or Act."

#### BY THE INDEMNIFIED.

As used in the condition of a credit insurance policy to a firm, providing that it should be void in the event of discontinuance of business "by the indemnified," the phrase quoted has relation to the act of the indemnified (either his voluntary act or the consequence of his voluntary act), and not to the death of one of the firm. *American Credit Indemnity Co. v. Cassard*, 34 Atl. 703, 704, 83 Md. 272.

#### BY THE LAW OF THE LAND.

The term "by the law of the land," etc., in Bill of Rights, art. 12, providing that "no man shall be arrested, imprisoned, etc., but by the judgment of his peers, or the law of the land," cannot, we think, be used in their most bald and literal sense, to mean the law of the land at the time of the trial, because the laws may be shaped and altered by the Legislature from time to time, and such a provision, intended to prohibit the making of any law impairing the ancient rights and liberties of the subject, would under such a construction be wholly nugatory and void. The Legislature might simply change the law by statute, and thus remove the landmark and the barrier intended to be set up by this provision in the Bill of Rights. It must therefore have intended the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England,

before the settlement of this country, and the emigrants themselves and their descendants, had found safety for their personal rights. *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 342, 343 (quoting 2 Kent, Comm. [6th Ed.] 13).

#### BY MEANS OF.

A policy of insurance conditioned to pay all loss which might happen "by means of fire" would not cover a loss occasioned by removal of the goods from the building on account of fire in contiguous property, though there was a reasonable apprehension that the goods would be reached by the flames. *Hillier v. Allegheny County Mut. Ins. Co.*, 3 Pa. (8 Barr) 470, 471, 45 Am. Dec. 656.

An indictment alleging that the killing was done "with and by means of" poison sufficiently charges the mode of killing. *State v. Labounty*, 21 Atl. 730, 731, 63 Vt. 374.

#### BY OPERATION OF LAW.

See "Surrender by Operation of Law."

The term "by operation of law," as used in relation to assignments—that is, assignments by operation of law—means cases where the title or right of property vests in a person, not by his own act or agreement, but by the single operation of law, as in the case of the devolution of title upon an administrator, or where the estate of an intestate is cast upon the heir. *Burke v. Backus*, 53 N. W. 458, 459, 51 Minn. 174.

Civ. Code, § 1511, providing that failure to perform an executory contract shall be excused where it is prevented "by operation of law," means an interference by some positive legal rule or enactment; and a writ sued out by a private litigant will not excuse the non-performance of a contract, although it may deprive the contractor of the means of performance, but such deprivation is not by operation of law; it is the act of an individual, and not of the government. *Klauber v. San Diego Street Car Co.*, 30 Pac. 555, 556, 95 Cal. 353.

#### BY POISON.

Where injuries resulting from poison or contact with poisonous substances are excepted in an insurance policy, the insurer is not liable for injuries resulting from carbolic acid being thrown in the face of the insured. There is a very evident distinction between the words "by taking of poison" and "by poison." The expression "by taking of poison" may very well be held to mean the internal use of poison, but such cannot be considered the meaning of the words of the certificate in this case, except by a forced construction. This distinction is pointed out by Judge Gray, in his opinion in the case of

Paul v. Travelers' Ins. Co., 20 N. E. 347, 112 N. Y. 472, 3 L. R. A. 443, 8 Am. St. Rep. 758, where the words "inhaling of gas" were under consideration in connection with a clause in a policy relieving the defendant from liability for injuries occasioned by the "inhaling of gas." The court there held that those words applied only to a voluntary and intelligent action on the part of insured. The death of insured was occasioned by the gas being turned on in a room where insured was sleeping and breathing the air impregnated with the gas. Judge Gray says: "If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt." Here the words of the certificate are "by poison," and not "by taking of poison," making the language of Judge Gray directly in point. *Meehan v. Traders' & Travelers' Acc. Co.*, 68 N. Y. Supp. 821, 822, 34 Misc. Rep. 158.

#### BY REASON OF.

An allegation in a complaint that certain injuries were caused "by reason and in consequence of" defendant's negligence is equivalent to an allegation that the injury was caused wholly by defendant's negligence, or without the fault of plaintiff, and is therefore a sufficient allegation that the plaintiff is not guilty of contributory negligence. *Benedict v. Union Agricultural Soc.*, 52 Atl. 110, 113, 74 Vt. 91.

#### BY RIGHT OF REPRESENTATION.

Inheritance by "right of representation" takes place when the linal descendant of any deceased heir takes the same share or portion of the estate of an intestate that the parent of such descendant would have taken, if living. *B. & C. Comp. Or.* § 5590.

The words "by right of representation," as used in a will providing that the residue shall go "in equal shares by right of representation" to testator's nephews and nieces, means that they should take per stirpes. *Siders v. Siders*, 48 N. E. 277, 169 Mass. 523.

#### BY STATUTE.

By "the enacting clause," or "by statute," as used in the books, is meant such an enacting clause or statute provision as creates an offense and gives a penalty. When it is said "where an action is given by statute or by the enacting clause," and in another section, or subsequent statute, exceptions are enacted, the plaintiff need not notice them. *Berry v. Stinson*, 23 Me. (10 Shep.) 140, 144.

#### BY THE SIDE OF.

See "Side."

#### BY THE STATE.

In a statute making it invalid for any person to sell or dispose of intoxicating liquors within three miles of a certain railroad during the construction of the road, unless "licensed by the state," the words "unless licensed by the state" mean unless licensed by authority under the state. The state having made no provision to grant such license otherwise than is provided by the general law, by the county commissioners, the license issued by the county commissioners is the one referred to in the act. *State v. Dobson*, 65 N. O. 346, 347.

#### BY THE YEAR.

Where a parol lease was "by the year," unaccompanied by more specific words, the term "by the year" signified a lease for one year. *Pleasants v. Claghorn (Pa.)* 2 Miles, 302, 304.

#### BY TWO-THIRDS VOTE.

Authority given a school district meeting to take action "by vote," or "by a two-thirds vote," shall mean by vote, or by a two-thirds vote, in a meeting warned as provided by law. *V. S.* 1894, 804.

#### BY VIRTUE OF.

The phrase "by virtue of" means "by or through the authority of" (Cent. Dict.), and it has such meaning in Act April 5, 1889, § 1, giving a lien for labor performed or material furnished for any building or improvement under or "by virtue of" the contract with the owner, or his agent, trustee, contractor, or contractors. *Bassett v. Mills*, 34 S. W. 93, 94, 89 Tex. 162.

"By virtue of," as used in Rev. St. Tex. art. 3921, providing that all surveys properly made "by virtue of" valid land certificates shall be deemed valid, means capacity or power adequate to the production of a given effect. *Adams v. Houston & T. C. Ry. Co.*, 7 S. W. 729, 741, 70 Tex. 252.

When used in bonds of a municipal corporation, which recited that said bonds were issued by virtue of a certain statute, the phrase "by virtue of" imports, as to bona fide purchasers for value, full compliance with the statute, and precludes inquiry as to whether the precedent conditions were performed before the bonds were issued. *Independent School Dist. v. Stone*, 1 Sup. Ct. 84, 87, 106 U. S. 183, 27 L. Ed. 90.

#### BY VIRTUE OF HIS EMPLOYMENT.

The phrase "trust by virtue of his employment," as used in Civ. Code, § 1985, providing that everything which an employé acquires by virtue of his employment, except

his compensation, belongs to the employer, has no application to acquisitions by the employé not coming within the scope or purpose of his employment. An employé, while working for his master in grading a site for a mill on government land, found and took possession of gold. The master took the gold from him, claiming to own it because of the provisions of the statute. The gold was not found by virtue of the employment, and did not belong to the master, since the employment was not to search for gold, but to excavate and throw away earth removed. *Burns v. Clark*, 66 Pac. 12, 14, 183 Cal. 634, 85 Am. St. Rep. 233.

### BY VIRTUE OF HIS OFFICE.

Color of office distinguished, see "Color of Office."

Acts done "virtute officii" are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him. *Feller v. Gates*, 67 Pac. 416, 417, 40 Or. 543, 56 L. R. A. 630, 91 Am. St. Rep. 492; *Gerber v. Ackley*, 37 Wis. 43, 44, 19 Am. Rep. 751; *People v. Schuyler*, 4 N. Y. (4 Comst.) 173, 187; *State v. Fowler*, 42 Atl. 201, 203, 88 Md. 601, 42 L. R. A. 849, 71 Am. St. Rep. 452.

The term "virtute," as in the cognate expression "virtute officii," is used to denote merely the power or authority proceeding from the employment. *Burns v. Clark*, 66 Pac. 12, 14, 183 Cal. 634, 85 Am. St. Rep. 233.

The phrase "by virtue of his office," as used in a bond providing that the obligor should faithfully account for and pay over all moneys received by virtue of his office, means moneys received under the law of his office, and not in violation thereof. *Renfroe v. Colquitt*, 74 Ga. 618, 628.

The expression "by virtue of office," and the expression "under color of office," mean very different things. "Proper fees are received by virtue of the office; extortion is under color of office." Any rightful act in office is by virtue of the office. A wrongful act in office may be under color of office; "color" meaning not the thing itself, but only the appearance thereof. *Broughton v. Haywood*, 61 N. C. 380, 382.

In 1 Rev. Laws, p. 155, providing that if any action on the case be brought against any sheriff concerning any matter or thing done by him by virtue of his office the action should be laid in the county where the act was done, the clause "by virtue of" means an act which is within the limits of his authority as an officer, but in the doing of which the authority is exercised improperly, or the confidence which law reposed in the officer is abused. *Seeley v. Birdsall*, 15 Johns. 267, 269.

Money paid to a sheriff to redeem land from a foreclosure sale is money received by him by "virtue of his office," within the meaning of Gen. St. 1878, c. 8, § 198. In *re Grundysen*, 53 Minn. 346, 349, 55 N. W. 557.

"Taking a security by a public officer 'virtute officii' implies that the act is lawful, either by the common law or by the authority of some statute." *Burrall v. Acker* (N. Y.) 23 Wend. 606, 608, 85 Am. Dec. 582.

### BY VOTE.

Authority given a school district meeting to take action "by vote," or "by a two-thirds vote," shall mean by vote, or by a two-thirds vote, in a meeting warned as provided by law. V. S. 1894, 804.

Under Comp. St. c. 20, § 38, a school district was given the power by a majority vote to locate a schoolhouse. Section 54 provided that, when a district voted to have two or more schoolhouses, the district shall "by vote," or in such other manner as the legal voters present may determine, fix on the location. In construing the phrase "by vote," the court said: "The phrase 'by vote' is always construed to mean by vote of the majority, unless the express term of the act show another intent. Thus sections 40 and 46 of this chapter show that the vote to rebate taxes and to omit the names of such as are not able to pay their taxes must be by a vote of two-thirds of the voters present, while sections 37 and 43 show that the words 'by vote' mean by vote of a majority. Such is the ordinary meaning, attached by popular use to the phrase 'by vote' or 'the voters agree,' and the language of statute is to be interpreted according to common use." *Bean v. Prudential Committee School Dist. No. 11*, 88 Vt. 177, 178.

### BY WAY OF.

The phrase "by way of" is idiomatic, and perhaps may be difficult of rendition into exact phraseology, but may be taken to mean "as for the purpose of," "in character of," "as being," and was so intended to be construed in an act providing that certain companies should pay an annual tax, for the use of the state, "by way of" a license for their corporate franchise. Act April 18, 1884, § 1. *Jersey City Gaslight Co. v. United Gas Imp. Co.* (U. S.) 46 Fed. 264, 266.

### BY-LAW.

"In modern times the term 'by-laws' is employed to denote the private laws of corporations or other boards or bodies. Their history is briefly this: Where the Danes acquired possession of a shire in England, the township was often called a 'by,' and, as they enacted laws of their own, they were

called 'by-laws' or 'town laws.'" Board of Health of City of Yonkers v. Copcutt, 24 N. Y. Supp. 625, 628, 71 Hun, 149.

Lord Coke says that a by-law or ordinance may be defined to be "the law of the inhabitants of the corporate place or district, made by themselves or the authorized body, as distinguished from the general laws of the country or the statute laws of the particular state." Hanna v. Nassau Electric R. Co., 18 App. Div. 137, 142, 45 N. Y. Supp. 437, 440.

A by-law is a subordinate law. It must not conflict with law, constitutional, statutory, or common. It must not conflict with the constitution of the corporations as found in its charter. Subject to these qualifications, a by-law is distinguishable from the charter of the corporation by the fact that it is subject to alteration. A by-law cannot destroy or impair a right, and must therefore be a reasonable exercise of the internal management of the corporation. Peck v. Elliott (U. S.) 79 Fed. 10, 14, 24 C. C. A. 425, 38 L. R. A. 616.

By-laws are rules to regulate the management of the affairs of a corporation, that it may more readily and conveniently fulfill the purposes for which it was created, and the power to make them exists at common law. They may be of general or limited duration, according to the necessity or convenience of the corporation, but must apply to all members of the corporation alike. A regulation made by directors as to the time when any particular installment of capital stock shall be paid, if applicable alike to all such subscriptions, would be, in substance and effect, a valid by-law regulating the stock of the corporation. Germania Iron Min. Co. v. King, 69 N. W. 181, 182, 94 Wis. 439, 36 L. R. A. 51.

The by-laws of a corporation are the rules adopted by it, which become its private statutes for its own government unless contrary to the laws of the land. The management of a corporation's affairs is regulated by its laws, and most frequently its directors or managers are chosen in accordance with their provisions. The by-laws are adopted in the first instance by the members of the association at a meeting where all must at least have an opportunity to be present, and when adopted they become as binding upon every member as the charter itself. A corporation may begin to live the moment its charter issues, but it may not be able to act for the purposes of its creation until those to whom the franchises are given and who make up its corporate existence have agreed how it shall act, and what it shall do, and who shall immediately direct its conduct. The agreement of the members of a corporation as to what shall be its mode of life is found in its by-laws, and their first and most important duty is to adopt them.

When by-laws have once been adopted, they become the permanent rule to govern the association's conduct. Bagley v. Reno Oil Co., 50 Atl. 760, 761, 201 Pa. 78, 56 L. R. A. 184.

The term "by-law" was originally applied to the laws and ordinances enacted by public or municipal corporation. The difference between a by-law of a private company and the law enacted by a municipality is wide and obvious. The former is merely a rule prescribed by the majority, under the authority of the other members, for the regulation and management of their joint affairs. A by-law of a municipal corporation is a local law enacted by public officers by virtue of legislative powers delegated to them by the state. A power to enact by-laws for the regulation of the business of a company does not give it any authority to regulate the private business of the stockholders. Monroe Dairy Ass'n v. Webb, 57 N. Y. Supp. 572, 574, 40 App. Div. 49.

A by-law of a corporation in respect to payment of subscriptions to stock is but a regulation between the corporation and the subscriber. Crissey v. Cook, 72 Pac. 541, 542, 87 Kan. 20.

By-laws of business corporations are, as to third persons, private regulations, binding as between the corporation and its members or third persons having knowledge of them, but of no force as limitations per se as to third persons of an authority which, except for the by-law, would be construed as within the apparent scope of the agency. Newman v. Lee, 84 N. Y. Supp. 106, 108, 87 App. Div. 116.

Acts 1847, c. 166, authorizes towns to make all by-laws that may be necessary to preserve the peace, good order, and internal police therein, and to annex suitable penalties, etc. In passing upon the meaning of the phrase "pass by-laws," in determining the question whether or not a town was authorized by that phrase to prohibit the sale, by any person not duly licensed, of intoxicating liquor, the court says: "The power is given in general words, but the words are so general as to indicate that some restriction as to reasonable limits was in the mind of the Legislature, and that such restriction intended to apply, with a just regard to the objects to be attained, and the subject-matter on which it was to operate; that is, the power conferred was to be limited to such objects as are usually sought and obtained by municipal by-laws. It was further said that the fact that the Legislature used the term "by-laws," and gave the power to make by-laws, showed that they did not intend to give an unlimited power; the term by-laws having a peculiar and limited signification, being used to designate the orders and regulations which a corporation, as one of its legal incidents, has power to make, and



which is usually exercised to regulate its own actions and concerns, and the rights and duties of its members amongst themselves. This has been somewhat extended in the case of municipal and other quasi corporations, but a broad distinction has always been made between the authority of a corporation to make by-laws and the general power of making laws. Had the Legislature intended to grant to the town the power to pass the regulation mentioned, it would have used the term "laws," and not "by-laws." *Commonwealth v. Turner*, 55 Mass. (1 Cush.) 493, 495.

Gen. Laws, p. 896, declares that, on the passage or adoption of every by-law or ordinance to enter into contract by any council or board of trustees of any municipal corporation, the ayes and nays shall be called and recorded, and that a concurrence of a majority of all members elected shall be required. Held, that the words "by-law or ordinance" are employed in a general sense, and comprehend all by-laws and ordinances which shall be adopted by the corporation. *Tracey v. People*, 6 Colo. 151, 153.

#### Law imposing penalty.

The term "by-law" has a peculiar and limited signification, and is used to designate the orders and regulations which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own action and concerns, and the rights and duties of its members amongst themselves. This has been somewhat extended in the case of municipal and other quasi corporations, but there is a distinction between the authority of a corporation to make by-laws and the general power of making laws, and, as used in an act authorizing towns to make by-laws necessary to preserve the peace, does not authorize such towns to make laws imposing penalties on all persons for selling intoxicating liquors without a license. *Commonwealth v. Turner*, 55 Mass. (1 Cush.) 498, 496.

#### Ordinance synonymous.

A by-law is a law made by a municipality for the regulation of affairs within its authority; an ordinance. *Century Digest*. In general and professional use, the term "ordinance" is almost, if not quite, equivalent in meaning to the term "by-law," and is the word most generally used to denote the by-laws adopted by municipal corporations. So that an ordinance granting a franchise is a by-law of a general or permanent nature, within Code 1873, § 492, requiring publication of such by-laws, and providing that they shall take effect and be in force at the expiration of five days after they had been published. *State v. Omaha & C. B. Ry. & Bridge Co.*, 84 N. W. 983, 984, 113 Iowa, 30, 52 L. R. A. 315, 86 Am. St. Rep. 357. See,

also, *Nat. Bank of Commerce v. Town of Grenada* (U. S.) 44 Fed. 262, 263.

The word "ordinance," as applied to cities, shall be synonymous with the word "by-law." *Rev. Laws Mass. 1902*, p. 89, c. 9, § 5, subd. 15.

The terms "ordinances," "rules," "regulations," and "by-laws" are all equivalent to the term "ordinance." *Taylor v. City of Lambertville*, 10 Atl. 809, 811, 43 N. J. Eq. (16 Stew.) 107; *Hunt v. Common Council of City of Lambertville*, 45 N. J. Law (16 Vroom) 279, 282.

#### Regulation distinguished.

A by-law of an incorporated company differs from a regulation, in this: that the validity of the former is a judicial question, while that of the latter is matter in pais. *Compton v. Van Volkenburgh*, 34 N. J. Law (5 Vroom) 134, 135.

#### Resolution distinguished.

A by-law is a permanent rule of action, in accordance with which the corporate affairs are to be conducted. A by-law differs from a resolution, in that a resolution applies to a single act of the corporation, while a by-law is a permanent and continuing rule, which is to be applied to all future occasions, so that, where a resolution was passed by the directors of a corporation, it was sufficient to authorize the act, without a by-law being passed for such purpose. *Steger v. Davis*, 27 S. W. 1068, 1070, 8 Tex. Civ. App. 23.

"A by-law is a rule or law of a corporation for its government. It is an act of legislation, and the solemnities and sanction required by the charter for its passage must be observed. A by-law may be in the form of a resolution and require the same solemnities to pass it, but a resolution is not necessarily a by-law." *Drake v. Hudson R. Co.*, 7 Barb. 508, 539.

Hill's Ann. Laws Or. 1887, § 3221, subd. 6, providing that corporations may make by-laws for the sale of stock for unpaid assessments, means by-laws which are general, affecting every delinquent subscriber and all delinquent stock, and a resolution which is merely directed against the stock or interest of a particular stockholder, is not a by-law. *Budd v. Multnomah St. Ry. Co.*, 15 Pac. 659, 662, 15 Or. 413, 3 Am. St. Rep. 169.

#### Statute distinguished.

The terms "by-laws," "ordinances," and "municipal regulations" have substantially the same meaning, and are the laws of the corporate district made by the authorized body, in distinction from the general laws of the state. They are local regulations for

the government of the inhabitants of the particular place. They are not laws in the legal sense, though binding on the community affected. They are not prescribed by the supreme power of the state, from which alone a law can emanate, and therefore cannot be statutes which are the written will of the Legislature, expressed in the form necessary to constitute parts of the law. *Rutherford v. Swink*, 35 S. W. 554, 555, 98 Tenn. (12 Pickle) 564.

## BYROAD.

A byroad is one which individuals who live some distance from a public road in a newly settled country make in going to the nearest public road—that is, it is a road which is used by the inhabitants, but is not laid out—and very often it is called a "driftway," and is a road of necessity in newly settled countries. *Van Blarcon v. Frike*, 29 N. J. Law (4 Dutch.) 516, 517.

### As private road.

A byroad is an unfrequented path or obscure road. As used in a legislative enactment authorizing owners of land to construct swinging gates across private and by roads, it means every road which does not come within the description of public roads. *Stevens v. Allen*, 29 N. J. Law (5 Dutch.) 68, 71.

In a statute providing that, if any byroad heretofore used as such by the inhabitants shall be shut up or rendered impassable, the person so aggrieved may institute proceedings to open it, the term "byroad" means a private, unfrequented, or obscure road, and is used in opposition to a private road laid out according to law. *Perrine v. Farr*, 22 N. J. Law (2 Zab.) 356, 372.

### As public road.

The way connecting two public roads which the public, as well as the owner of

land thereon, had used to pass from one of the public thoroughfares to the other, and to the farm of such person, for over 50 years, may properly be designated as a byroad. *Clement v. Bettie*, 48 Atl. 567, 65 N. J. Law, 675.

As its name imports, a byroad is an obscure or neighborhood road, in its earlier existence not used to any great extent by the public, yet so far a public road that the public have right of free access to it at all times. To constitute such road, the land occupied by it must have been given up or dedicated by its owner for the purpose of a byroad to all who may wish to enjoy it. *Wood v. Hurd*, 34 N. J. Law (5 Vroom) 87, 89; *Yeomans v. Ridgewood Tp.*, 46 N. J. Law (17 Vroom) 508, 509.

## BYSTANDER.

The term "bystanders," as used in statutes allowing or requiring talesmen to be taken from the bystanders, means only those who are actually present in court. *Phillips v. Gratz* (Pa.) 2 Pen. & W. 412, 417, 23 Am. Dec. 33. Persons who have been in attendance on the session of the court as bystanders. *Savage v. State*, 18 Fla. 909, 952.

A statute permitting a sheriff to select talesmen from "bystanders or others" did not mean such as were accidentally in attendance on the court, but might well include persons whose presence the sheriff had taken previous means to obtain. *Patterson v. State*, 4 Atl. 449, 452, 48 N. J. Law (19 Vroom) 381.

A bystander is one who stands near; one who has no concern with the business transacted. As used in Rev. St. 1889, § 2170, providing that, where the judge refuses to allow a bill of exceptions, it may be signed by three bystanders, it does not include an attorney connected with the trial of the cause in which the bill is filed. *State v. Jones*, 14 S. W. 946, 947, 102 Mo. 305.

## C

## C. A. F.

"C. a. f." is a term well understood in the meat trade, meaning cost and freight. *Pepper v. Western Union Telegraph Co.*, 11 S. W. 783, 87 Tenn. (3 Pickle) 554, 4 L. R. A. 660, 10 Am. St. Rep. 699.

## C., B. &amp; Q. R. R. CO.

The letters "C., B. & Q. R. R. Co.," in a petition in proceedings to take depositions to perpetuate testimony, which gives defendant's name as C., B. & Q. R. R. Co., and states that plaintiff expects to bring an action against such defendant, is not a sufficient designation of the defendant, as judicial notice cannot be taken that these letters stand for the Chicago, Burlington & Quincy Railroad Company. *Accola v. Chicago, B. & Q. R. Co.*, 30 N. W. 503, 504, 70 Iowa, 185.

## C.—CT.—CTS.

The abbreviations "c." and "ct." stand for cents. *Hunt v. Smith*, 9 Kan. 137, 153.

The abbreviations "c.," "ct.," and "cts." stand for cent or cents, and, at the head of a column, sufficiently indicate the character of the figures below. *Jackson v. Cummings*, 15 Ill. (5 Peck) 449, 453.

The abbreviation "cts." means cents, and, when used at the top of columns of figures in an assessment roll, is sufficient information that the figures under the same were so many cents. *Linck v. City of Litchfield*, 31 N. E. 123, 126, 141 Ill. 469.

The letters "cts." in an indictment have been construed as an abbreviation for the word "cents," and there is no variance, although the word "cents" is written out in the instrument described in the indictment and offered in evidence. *Barnett v. State*, 54 Ala. 579, 583.

The usual marks expressive of dollars and cents, when employed according to general and long practice, as in stating accounts and the like, may be treated as part of our language by adoption and use, but are not a part of the English language, within the meaning of the statute requiring declarations and other pleadings to be drawn in the English language. *Clark v. Stoughton*, 18 Vt. 50, 51, 44 Am. Dec. 361.

## C. L. R. P. OATS.

Where a memorandum was for the delivery of a certain number of C. L. R. P. oats, such

term was an abbreviation for "car loads of Texas rust proof oats." *Wilson v. Coleman*, 6 S. E. 693, 694, 81 Ga. 297.

## C. O. D.

## As collect on delivery.

"C. O. D." means collect on delivery. *American Exp. Co. v. Wettstein*, 28 Ill. App. 96, 100; *The Illinois (U. S.)* 12 Fed. Cas. 1178, 1190.

"C. O. D." are the initial letters of the words "collect on delivery," and, when used in an express receipt, are a direction to collect the amount named of the ultimate consignee on the delivery of the goods to him by the last carrier. *Collender v. Dinsmore*, 55 N. Y. 200, 206, 14 Am. Rep. 224.

"C. O. D." is an abbreviation used in the express business, which means collect on delivery, or, more fully stated, deliver upon payment of the charges due the seller for the price, and the carrier for the carriage, of the goods. *State v. Intoxicating Liquors*, 73 Me. 278, 279; *State v. O'Neil*, 58 Vt. 140, 158, 2 Atl. 586, 56 Am. Rep. 557.

The letters "C. O. D.," as used in connection with a package sent by express, mean that the express company shall collect, on delivery, the price of the goods and the cost of the transportation from the consignee. *Adams Exp. Co. v. McConnell*, 27 Kan. 238, 240.

## Judicial notice.

The initials "C. O. D.," as used by carriers, mean collect on delivery, or, more fully stated, deliver on the payment of the charges due the seller for the price, and the carrier for the carriage, of the goods. These initials have acquired a fixed and determinate meaning, which courts and juries may recognize from general information. *State v. Intoxicating Liquors*, 73 Me. 278, 279 (cited in *State v. Carl*, 43 Ark. 353, 360, 51 Am. Rep. 565).

"C. O. D." is an abbreviation meaning collect on delivery, of which fact the court will take judicial notice, so that parol evidence of the meaning of the abbreviation is not necessary or admissible. *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 14 South. 672, 681, 101 Ala. 446.

The meaning of the abbreviation "C. O. D.," as used by expressmen, is not a matter of such common knowledge that a court can take judicial notice of it, but its meaning is for the jury. *McNichol v. Pacific Exp. Co.*, 12 Mo. App. 401, 407.

**As part of contract of shipment.**

"C. O. D." are the first letters of the words "collect on delivery," and, where goods intrusted to a common carrier are marked "C. O. D." the contract of the carrier in connection therewith is not only for the safe carriage and delivery of the goods to the consignee, but, further, that he will collect on delivery, and return to the consignor, the charges on such goods. *United States Exp. Co. v. Keefer*, 59 Ind. 263, 267.

"C. O. D." are the initial letters of the words "collect on delivery," and mean that an express company or other common carrier, in addition to its engagement to carry goods, shall deliver them to the consignee only after first receiving from him the amount of money marked on the box, and will deliver the money to the consignor. *American Exp. Co. v. Lessem*, 39 Ill. 312, 333; *Rathbun v. Citizens' Steamboat Co.*, 1 City Ct. R. 107.

"C. O. D." placed on a package committed to a carrier is an order to the carrier to collect the money for the package at the time of its delivery. It is a part of the undertaking of the carrier with the consignor, a violation of which imposes on the carrier the obligation to pay the price of the article delivered. *Fleming v. Commonwealth*, 18 Atl. 622, 623, 130 Pa. 138, 5 L. R. A. 470, 17 Am. St. Rep. 763.

The letters "C. O. D." marked on goods transported by an express company, are not of themselves sufficient evidence of an agreement that the company is to collect the price for the goods when sold. *American Merchants' Union Exp. Co. v. Wolf*, 79 Ill. 430, 434.

**As affecting sale.**

A "collect on delivery" sale is one where the seller delivers the goods to a carrier with instructions to deliver the goods on condition that the buyer pay the carrier the price named and agreed on. When goods are so forwarded, and marked "C. O. D.," the carrier is the agent of the purchaser to receive the goods from the seller, and the agent of the seller to collect the price from the purchaser. The sale is therefore complete when the goods are delivered to the carrier. *Pilgreen v. State*, 71 Ala. 368.

Where the sellers of goods send them to the purchaser by an express company, directing the company to collect on delivery, such phrase imports that payment and delivery were to be simultaneous acts, and hence, until such payment and delivery, the title remained in the vendor. *Baker v. Bourcicault*, 1 Daly, 23, 27.

"C. O. D." means collect on delivery, and shows an intention not to give credit. Its purpose is to retain control of the goods

by the shipper, and thereby secure himself against possible default of the consignee. *Wagner v. Hallack*, 3 Colo. 176, 184.

**As relating to transportation charges.**

"C. O. D." are the initial letters of the words "collect on delivery," and, when placed on a package shipped by express, mean that the value or price of the package, marked thereon, will be collected on delivery and transmitted to the consignor. The letters have nothing to do with the transportation charges on the package. *American Merchants' Union Exp. Co. v. Schier*, 55 Ill. 140, 141.

**CABIN.**

"Cabin," as used in a court record showing that a plaintiff recovered final judgment for the premises sued for, "to wit, a certain cabin standing and being upon the southwest quarter," etc., includes the land occupied by the cabin, as well as the cabin superstructure. *Harvie v. Turner*, 46 Mo. 444, 447.

**Of vessel.**

The cabin of a vessel includes both the part used as a dining room and that used as a sitting room, as well as the staterooms connected with each part. *Leckie v. Sears*, 109 Mass. 429, 430.

**CABINET.**

A "cabinet" is defined by Worcester to be a set of boxes or drawers for curiosities; any place in which things of value are hidden; a closet; a small room. The word is used in Tariff Act Oct. 1, 1890, par. 524, reciting that the term "antiquities," as used in such act, shall include only such articles as are suitable for souvenirs or cabinet collections, in either of the significations given by Worcester. In *re Glaenger* (U. S.) 67 Fed. 532, 533.

A bequest of "my cabinet or collection of curiosities consisting of coins, medals, gems, oriental stones and other valuable things," does not include ornaments of the person, such as diamonds and pearls made up for wear, though they were occasionally shown with it. *Cavendish v. Cavendish*, 1 Brown, Ch. 467.

**CABINET AND MAHOGANY DOOR MAKER.**

A cabinet and mahogany door maker, within the meaning of a contract by which defendant agrees to teach plaintiff the business of cabinet and mahogany door making, cannot be construed as requiring defendant to teach the plaintiff the business of cabinet-making, but only the business of cabinet

door making and mahogany door making. *Stroud v. Frith*, 11 Barb. 300, 302.

### CABINET WARE.

"Cabinet ware," as used in a fire policy insuring cabinet ware, meant articles in finished state, and hence such articles in process of manufacture were not covered by the policy. *Appleby v. Astor Fire Ins. Co.*, 54 N. Y. 253, 259.

### CABLE SYSTEM.

The cable system, with reference to street railways, is generally understood to imply a stationary engine and an underground cable. *Hooper v. Baltimore City Pass. Ry. Co.*, 37 Atl. 359, 361, 85 Md. 509, 38 L. R. A. 509.

### CABRON.

A man who consents to his wife's prostitution. *Escareno v. State*, 16 Tex. App. 85, 90.

### CADASTRE.

"Cadastre," in Spanish law, is an official statement of the quality and value of real property in any district, made for the purpose of justly apportioning the taxes payable on such property. *Strother v. Lucas*, 37 U. S. (12 Pet.) 410, 423, 9 L. Ed. 1137.

### CADAVER.

As property, see "Property."

The word "cadaver," which is used by Lord Coke in the maxim that "cadaver nullius in bonis," is now an English as well as a Latin word. Webster and other lexicographers say it is a dead human body; a corpse. *Griffith v. Charlotte, C. & A. R. Co.*, 23 S. C. 25, 32, 55 Am. Rep. 1.

### CADET.

Cadets at West Point, by long and settled usage, having the force of law, are appointed by a certificate under the hand and seal of the Secretary of War. They are neither commissioned officers, nor common soldiers, nor noncommissioned officers, but are inferior officers, and, for purposes of instruction, may be required to serve as officers, noncommissioned officers, or privates. *Babbitt v. United States*, 16 Ct. Cl. 202, 211.

Cadets serving at West Point are part of the army. A person serving as such is serving in the army, and the time during which he is so serving is a part of the actual

time of service by him in the army. *United States v. Morton*, 5 Sup. Ct. 1, 2, 112 U. S. 1, 28 L. Ed. 613.

### CADET ENGINEERS.

The term "cadet engineers," when applied to the members of the Naval Academy, means that class who are studying to be naval constructors or steam engineers. *United States v. Redgrave*, 6 Sup. Ct. 444, 447, 116 U. S. 474, 29 L. Ed. 697.

### CALCIFICATION.

"Calcification" is a term used with reference to arteries, and means a deposit of lime salts in the walls of the tube, making it rigid and fragile, instead of elastic, as it is in health. It was held, in connection with other diseases, to render false a representation as to health in an application for insurance. *Commercial Travelers' Mut. Acc. Ass'n v. Fulton* (U. S.) 79 Fed. 423, 424, 24 C. C. A. 654.

### CALCINED MAGNESIA.

Calcined magnesia is a preparation of magnesia made from sulphate of magnesia and bicarbonate of soda, calcined by heat, and is a medicinal preparation, within Rev. St. § 2504, Schedule M, p. 480 (2d Ed.), fixing the rate of import duty upon pills, powders, tinctures, etc., or other medicinal preparations recommended to the public as proprietary medicines, or prepared according to some private formula or secret art as remedies. *Ferguson v. Arthur*, 6 Sup. Ct. 861, 864, 117 U. S. 482, 29 L. Ed. 979.

### CALC-SPAR.

Calc-spar is crystallized carbonate of lime, being caused by the dissolution of the original solid limerock, which is carried into every accessible cavity or fissure, and crystallizes in coarse crystals, filling the cavity, and is called "spar." It is necessarily of comparatively recent formation, and, where a seam of it is found cutting across the country, with ore contiguous to it on either side, the plain and inevitable inference is that at some epoch subsequent to the deposit of the body of ore a fissure occurred, which in process of time has been filled with the spar. Its existence is no impeachment of the identity of the bodies of ore in which it occurs, and does not constitute a division between lodes in general. *Phillipotts v. Blasdel*, 8 Nev. 61, 71.

### CALCULATE—CALCULATED.

"Calculate" means to compute or reckon. *Oakes v. Mitchell*, 15 Me. (3 Shep.) 360, 362.

**As adapted.**

The word "calculated" has been defined to mean suited or adapted to by design. *Gerriah v. Norris*, 63 Mass. (9 Cush.) 167, 170.

"Calculated," as used in an instruction authorizing the jury, in a prosecution for murder, to convict if they believed defendant willfully struck another with a pistol that was a deadly weapon, or "calculated" to produce death, was not equivalent to "intended," so as to render the instruction erroneous, but was synonymous with "adapted," "fitted," or "suited." *Smallwood v. Commonwealth (Ky.)* 40 S. W. 248.

**As intended.**

"Calculate" primarily means to compute mathematically. It implies the power to think, to study, and to reason. It is usually applied to sentient beings—those having the faculty of sensation; the power to perceive, reason, and think. As a provincialism, it is sometimes used in the sense of to intend, to design, to plan, or to propose. The word, in an action for personal injuries, which charged that a certain act of the defendant was well calculated to, and did, frighten plaintiff's horse, was construed to have been used in the latter sense. *Keeley Brewing Co. v. Parnin*, 41 N. E. 471, 473, 13 Ind. App. 538; *Oakes v. Mitchell*, 15 Me. (3 Shep.) 360, 362.

**CALENDAR.**

The word "calendar" originates from the verb "calare." "Calendar" means a division of time in years, months, weeks, and days, and a register of them. *Rives v. Guthrie*, 48 N. C. 84, 86.

The ordinary signification of the word "calendar" is a list or enumeration of causes arranged for trial in court. *Titley v. Kaehler*, 9 Ill. App. (9 Bradw.) 537, 539.

The word "calendar" may or may not be synonymous with the statutory word "docket." Its ordinary signification is a list or enumeration of causes arranged for trial in the court, but there is nothing in the word from which it can be determined how such list is to be made up, or upon what principle the various causes are arranged thereon. *Titley v. Kaehler*, 9 Ill. App. (9 Bradw.) 537, 539.

**CALENDAR MONTH.**

A calendar month is a month as designated in the calendar, without regard to the number of days it may contain. In commercial transactions it means a month ending on the day in the succeeding month corresponding to the day in the preceding month from which the computation began, and, if the last month have not so many days, then on the last day of that month. *Daley v. Anderson*,

48 Pac. 839, 840, 7 Wyo. 1, 75 Am. St. Rep. 870 (citing *Migotti v. Colvill*, 4 C. P. Div. 233).

The term "calendar month," in a statute providing that charitable bequests shall be void unless executed at least one calendar month before the decease of the testator, means a month according to the calendar or almanac, which is not uniform as a lunar month, but varies. Thus a will executed on February 27, 1883, by a testator who died March 28, 1883, was executed one calendar month prior to testator's death. In *re Parker's Estate*, 14 Wkly. Notes Cas. 566.

**CALENDAR YEAR.**

The calendar year is composed of 12 months, varying in length according to the common or Gregorian calendar. In *re Parker's Estate*, 14 Wkly. Notes Cas. 566.

**CALENDS.**

The calendar of the Romans had a peculiar arrangement. They gave particular names to three days of the month. The first was called the "calends." In the four months of March, May, July, and October, the seventh day was called "nones," and in the four former the fifteenth days were called "ides," and in the last the thirteenth were thus called. *Rives v. Guthrie*, 48 N. C. 84, 87.

**CALF.**

Under Code, § 3072, providing that two cows and a calf shall be exempt from execution, the term "calf" does not include a yearling heifer. *Mitchell v. Joyce*, 28 N. W. 473, 474, 69 Iowa, 121.

The term "calves," as used in Revenue Act, § 4, imposing a tax on cows and calves, does not include heifers and steers which are over one year of age. *Milligan v. Jefferson County*, 2 Mont. 543, 546.

**CALL.**

See "On Call."

A call is the privilege of calling for, or not calling for, the thing bought. *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 97, 43 N. E. 774, 778, 31 L. R. A. 529.

**For stock subscriptions.**

In a subscription for shares of stock in a corporation, providing that the stockholders were to pay for their shares on call by the company, "call" meant merely a step in the process of collection; and where a company, becoming insolvent, abandoned all action under its charter, the original mode of making calls upon the stockholders cannot be pursued, and the debt, therefore, as between the

debtor and creditor of a corporation, must be treated as due, without further demand. *Hatch v. Dana*, 101 U. S. 205, 215, 25 L. Ed. 885.

Call, as used in the corporation statutes in reference to calls on corporation stock, is synonymous with the word "assessments," as used in such statutes. *Stewart v. Walla Walla Printing & Pub. Co.*, 20 Pac. 605, 606, 1 Wash. St. 521.

"Call," as used with reference to the power of a company of making calls, is capable of three meanings. They either mean the resolution, or its notification, or the time when it becomes payable. It must mean one of these three. *Ambergate, N. & B. & E. J. Ry. Co. v. Mitchell*, 4 Exch. 540, 543.

A call is an assessment made by corporation, or the directors thereof, on the subscriptions for shares, within the amount of the unpaid sums on the number of shares subscribed. *Santa Cruz R. Co. v. Spreckles*, 3 Pac. 661, 663, 65 Cal. 193.

The terms "calls"—on unpaid subscription to capital stock—and "assessments" are used interchangeably in our statutes. *Stewart v. Walla Walla Printing & Pub. Co.*, 1 Wash. St. 521, 522, 20 Pac. 605.

A "call," as used in relation to corporations, is an official declaration by the directors that the sum subscribed, or any specified installment thereof, is required to be paid. *Germania Iron Min. Co. v. King*, 69 N. W. 181, 182, 94 Wis. 439, 36 L. R. A. 51; *Brad-dock v. Philadelphia, M. & M. R. Co.*, 45 N. J. Law (16 Vroom) 363, 365; *American Alkali Co. v. Campbell* (U. S.) 113 Fed. 398, 400.

#### In descriptions of land.

The general or descriptive call in entries of the description of lands is such as calls for objects possessing such notoriety in themselves, or so particularly described, that attention is directed to the neighborhood of the land. *Stockton v. Morris*, 19 S. E. 531, 533, 39 W. Va. 432.

A particular or locative call is one which contains a reference to objects which more specifically describe or locate the land entered than those referred to in a general call. *Stockton v. Morris*, 19 S. E. 531, 534, 39 W. Va. 432.

In *Bouvier's Law Dictionary*, the word "call" is defined thus: "In American land law, the designations in an entry, patent, or grant of land of visible natural objects as limits to the boundary." And Webster defines the word as a reference to or statement of an object, course, distance, or other matter of description in a survey or grant requiring or calling for a corresponding object, etc., on the land. The meaning of "calling" for a corner or boundary is well understood in the law. It is necessarily applicable to

written instruments, such as entries, surveys, patents, grants, and deeds. *King v. Watkins* (U. S.) 98 Fed. 913, 922.

#### In stock exchange.

A call memorandum or writing, executed for a valuable consideration, giving the bearer the right to call upon the subscriber for certain shares of stock therein named within a stated time, and at a given price, is not an agreement to sell such stock, within the meaning of section 25 of the war revenue act of 1898, and is not subject to the stamp tax imposed on such agreements. Such instrument merely gives an option, requiring a further agreement to effect a sale. *White v. Treat* (U. S.) 100 Fed. 290, 291.

Within the peculiar language of dealers in stocks and options, a call is defined to be the privilege of calling for or not calling for the thing bought, as distinguished from "put," which is the privilege of delivering or not delivering the thing sold. *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 43 N. E. 774, 778, 160 Ill. 85, 31 L. R. A. 529.

Within the peculiar language of persons dealing in optional contracts, a call is the privilege of calling for or not calling for the thing bought, and is simply a mode adopted for speculating in difference in market values of grain or other commodities. *Osgood v. Bauder*, 89 N. W. 887, 890, 75 Iowa, 560, 1 L. R. A. 655; *Pixley v. Boynton*, 79 Ill. 351, 353; *White v. Barber*, 8 Sup. Ct. 221, 230, 123 U. S. 392, 31 L. Ed. 243; *Pearce v. Foote*, 113 Ill. (1 Peck) 228, 234, 55 Am. Rep. 414; *Miller v. Bensley*, 20 Ill. App. (20 Bradw.) 528, 530.

#### Of a meeting.

The call of a meeting of a county board, in the legal sense of the term, is a summons to the parties entitled to meet, directing them to meet. It involves something more than a mere purpose in the mind of the caller, or an expression of that purpose unheard, unseen, and unknown. It implies a communication of that purpose to the parties to be affected. In some way or other, notice must be given; and, if there be no regulation as to the manner of notice, it must be personal, at least where personal notice is practicable. *Paola & F. R. Ry. Co. v. Anderson County Com'rs*, 16 Kan. 302, 307.

#### Of a minister to church.

A call is an instrument issuing from the congregation of a church to a minister to become its pastor, which may be signed either by the elders and deacons, by the trustees, or by a select committee, and attested by the moderator of the meeting. It is an instrument of a purely ecclesiastical character, having relation to the spiritual concerns of the church, rather than to its temporal affairs, purporting on its face to be the act of

the congregation; and, being put forth, accepted, and relied upon as such, it is an act of the congregation, and not of the persons signing it. *Paddock v. Brown*, 6 Hill, 530, 532.

#### CALL AT.

Liberty to call at or to enter or touch at, certain ports, when given in a marine policy, imports that such liberty is based upon a purpose to be accomplished by entering such ports, which is to be inferred from the character of the voyage, and by the cargo and the circumstances and nature of the adventure; and a reasonable delay at the authorized port to accomplish such purpose is not a deviation. *Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 7, 16.

Where a bill of lading authorized a vessel to call at any port or ports whatsoever, such provision did not include or give her authority to put into a port of refuge, where such act was necessary by reason of the ship's failure to load an adequate cargo of coal for the voyage, so as to entitle her to charge the loss of cargo, etc., consumed by reason of such negligence, as a general average charge. *Hurlbut v. Turnure* (U. S.) 81 Fed. 208, 211, 26 C. C. A. 835.

#### CALL DEPOSITS.

In banking circles, deposits are often qualified or distinguished as time and call deposits. The former is for a specified time, and the latter is subject to call at the pleasure of the depositor. *State v. Cadwell*, 44 N. W. 700, 701, 79 Iowa, 432.

#### CALLED.

An indictment against one for gaming, which charges him with betting at a game called "pool" instead of at a game of pool, is sufficient. *Thompson v. State* (Tex.) 28 S. W. 684.

#### CALLED FOR TRIAL.

See "Regularly Called for Trial."

By the term "called for trial" is meant the stage of the case where both parties have announced that they are ready, or when a continuance, having been applied for, has been denied. *Code Cr. Proc. Tex.* 1895, art. 641; *McGrew v. State*, 31 Tex. Cr. R. 336, 20 S. W. 740; *Shaw v. State*, 17 Tex. App. 225.

Rev. St. Wis. § 2478, providing that one desiring a jury trial shall demand a jury at the time the action is "called for trial," means that the party must demand a jury when the action is called for trial on a particular day, but does not mean that a jury must not be demanded at the mere opening of the court on the first day of the term, for

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the purpose of ascertaining, in a general way, what cases are for trial at the term. *State v. Clark*, 80 N. W. 122, 125, 67 Wis. 229.

Calling a case for trial is an announcement or declaration by the court that the case has been reached in its order, and that the judicial examination of the issues of law and fact upon which the decision of the case depends is about to begin. *Moore v. Sargent*, 14 N. E. 466, 468, 112 Ind. 484.

#### CALLED FORTH.

There is a sound distinction between the calling forth of the militia, and their being in actual service and employment of the United States, contemplated both in the Constitution and the acts of Congress. The Constitution enables Congress to provide for the government of such part of the militia as may be employed in the service of the United States, and makes the President commander in chief of the militia when called into the actual service of the United States. If the former clause included the authority to call forth the militia, as being, in virtue of the call of the President, in actual service, there would certainly be no necessity for the distinct clause authorizing it to provide for the calling forth of the militia, and the President would be commander in chief not merely of the militia in actual service, but of the militia ordered into service. The term "actual service" means something more than a mere calling forth of the militia. It includes some act of organization, mustering, or marching done or recognized in obedience to the call in the public service. The terms "called forth" and "employed in the service" cannot, in any appropriate sense, be said to be synonymous. From the very nature of things, the call must precede the service. *Houston v. Moore*, 18 U. S. (5 Wheat.) 1, 64, 5 L. Ed. 19.

#### CALLED ON.

The clause "called upon to pay," as used in a contract wherein certain stockholders of a corporation agreed to indemnify all those who became indorsers of the company's paper, for the sums they were called upon to pay, is equivalent to "compelled or required to pay." *Taylor v. Coon*, 48 N. W. 123, 128, 79 Wis. 76.

"Called upon," as used in a guaranty that, if plaintiff should be called upon to pay certain rent, the guarantor would repay on demand, has reference to the legal obligation to pay, so that, unless plaintiff was legally bound to pay, the defendant is not liable on his guaranty. *H. Koehler & Co. v. Reinheimer*, 45 N. Y. Supp. 337, 338, 20 Misc. Rep. 62.

Within a statute entitling persons to vote in a parish on certain occupancy, and where



they had been called upon to pay certain rates, a tenant was called upon to pay where he occupied under an agreement with the landlord that he should pay all rates and taxes, and the landlord had called upon the tenant to pay, and he had paid, and the landlord, in turn, had paid the rates according to the stipulation. *Cook v. Luckett*, 2 C. B. 168, 173.

### CALLING.

See "Ordinary Calling"; "Unlawful Calling."

Secular calling, see "Secular Business."

A calling is defined to be usual occupation, profession, or employment; vocation; so that a lot used by a gardener for the cultivation of produce, and separated from his dwelling by streets, is exempt as a homestead, under Const. 1876, art. 16, § 51, declaring that the homestead in a city shall consist of a lot or lots not to exceed a certain value, used as a place to exercise the calling or business of the head of the family. *Waggener v. Haskell*, 35 S. W. 1, 2, 89 Tex. 435.

In *Laws N. Y. 1892, c. 602*, requiring any person intending to conduct the trade, business, or calling of a plumber, etc., to submit to examination before engaging in the business, etc., the terms "trade, business, or calling" are synonymous, and have relation to the mechanical employments; one's trade, etc., being that business which he has learned and fitted himself to follow. *People v. Warden of City Prison*, 39 N. E. 686, 689, 144 N. Y. 520, 27 L. R. A. 718.

### CALLING THE DOCKET.

Calling a list or docket is the public calling of the docket at the commencement of each term of court for the purpose of disposing of the same with regard to setting a time for trial, entering an order for a continuance, default, nonsuit, or some other disposition of the case. *Blanchard v. Ferdinand*, 132 Mass. 389, 391.

### CALUMNY.

In the civil law "calumny" signified an unjust prosecution or defense of a suit, and the phrase is still so used in the courts of Scotland and in the ecclesiastical and admiralty courts of England. *Lanning v. Christy*, 30 Ohio St. 115, 117, 27 Am. Rep. 431.

### CAMPBENE.

Camphene is turpentine purified by repeated distillation. *Putnam v. Commonwealth Ins. Co. (U. S.)* 4 Fed. 753.

It cannot be said, as a matter of law, that the words "camphene" or "spirit gas,"

within the meaning of a fire policy prohibiting the lighting of the insured premises with camphene or spirit gas, includes burning fluid. *Stettiner v. Granite Ins. Co.*, 12 N. Y. Super. Ct. (5 Duer) 594, 596.

### CAMP HUNTING.

"Camp hunting," which is prohibited by Act Feb. 11, 1897, is defined by the statute to mean persons camping in the woods, or at or near any house, with guns and dogs, for the purpose of hunting game, etc. *Du Bose v. State*, 74 S. W. 292, 293, 71 Ark. 347.

### CAMP MEETING.

A "camp meeting" is universally understood to be a religious meeting, so that charging a person with being intoxicated at a camp meeting and creating a disturbance is equivalent to charging her with disturbing a religious meeting, and slanderous per se. *Thomas v. Smith*, 27 N. Y. Supp. 589, 591, 75 Hun, 573.

The term "camp meeting" means a religious meeting, and hence an allegation in a criminal complaint charging the wrongful sale of liquors within one mile of the place of holding the camp meeting is a sufficient allegation of the violation of a statute prohibiting such sales. *State v. Read*, 12 R. I. 135, 137.

St. 1867, c. 59, prohibited persons, during the time of holding a camp meeting or field meeting for religious purposes, from maintaining a building for furnishing provisions or refreshments without permission from the authorities or officers having charge or direction of the meeting, it was held that "Camp meeting" means "any meeting held in the open air for periods of some days in succession, and designed largely, among other purposes, to attract those who do not attend or attend irregularly stated places of public worship, to induce them to listen to religious instruction, and thus awaken in them a religious interest"; and, in order to receive the protection of the law, such meeting need not be the result of an organization or of an organized body, but any camp or field meeting, however informally arranged, is within the statute. *Commonwealth v. Bearse*, 132 Mass. 542, 547, 42 Am. Rep. 450.

Wag. St. 504, § 30, providing that every person who shall disturb any "camp meeting, congregation or other assembly of people met for religious worship" shall be guilty of a misdemeanor, means a particular piece of ground set apart for the purpose of such meeting, and houses which are used for public worship, but does not apply to a religious meeting held in a public square. *State v. Schieneman*, 64 Mo. 886, 887.

Act 1809, pp. 49, 50, prohibiting the retailing of liquors within one mile of a place set apart for the worship of Almighty God, should be construed to include a camp meeting. *State v. Hall* (S. C.) 2 Bailey, 151.

## CAN.

See "As Soon as Can Be"; "As Speedily as Can Be"; "Best He Can"; "Could."

### As is competent.

The word "can," as used in Code Ga. § 2414, relating to the execution and attestation of wills, and making all persons competent witnesses to the same who "can swear" to their signature, refers to the question of ability to swear, not to recollection or accuracy of vision, but to legal capacity to testify. Synonymous with the word "can," in the connection in which it is used in this statute, are the expressions "is able to," "is competent to," "has the capacity to," or, negatively speaking, "is not unable to," "has not the lack of power to," "has not the inability to," "is not incompetent to," "lacks not the capacity to"; and it is unreasonable, if not absurd, to construe the words "can swear" as meaning that the witness must have the requisite memory and the keen physical perception which would enable him, after the lapse of weeks, months, and years, to distinguish and identify a mere cross-mark or other ordinary device representing his signature. *Gillis v. Gillis*, 23 S. E. 107, 110, 96 Ga. 1, 80 L. R. A. 143, 51 Am. St. Rep. 121.

### As is possible.

"Can be removed," as used in Act 1836, making it the duty of the overseers of every district to furnish relief to every poor person within the district, not having a settlement therein, who shall apply to them for relief, until such person can be removed to the place of his last settlement, means until such person can with propriety and safety be removed, and not the mere physical possibility of removal, and the statute does not permit, much less command, the transportation of a pauper whose state of health forbade removal. *Kelly Tp. v. Union Tp. (Pa.)* 5 Watts & S. 535, 536.

The allegation that property "cannot be divided without a sale" can have but one meaning, and that is that a partition in kind is impossible without virtual destruction of the property. That loss or injury to the parties, or some of them, is the natural sequence of an attempt to partition in kind that which cannot be divided without a sale, is too plain for discussion. *Ballantyne v. Rusk*, 36 Atl. 361, 362, 84 Md. 649.

### As may.

"Can play," as used in Code, § 4213, prohibiting saloon keepers who have billiard

tables on which the public can play from permitting minors to play thereon, means that the table is kept so that the public may play thereon, not necessarily for pay, but it must be such as the public are invited or permitted to play on. *Sikes v. State*, 67 Ala. 77, 81.

## CANADA CURRENCY.

A note made and indorsed in Michigan, and payable "in Canada currency," is payable in lawful money, and is therefore negotiable. The phrase means simply that it is payable in Canada money at the Canada standard, and it is governed as to the amount it calls for by the same rule as if it had been made in Canada, payable in so many dollars, without containing a further direction. *Black v. Ward*, 27 Mich. 191, 200, 15 Am. Rep. 162.

## CANADA MONEY.

A note negotiated and payable in "Canada money" is payable in such money as is current by law in Canada. *Thompson v. Sloan*, 23 Wend. 71, 75, 35 Am. Dec. 546.

## CANAL.

See "Irrigation Canal."

"A canal is an artificial trench for transportation. They originate under state statutes and charters. Canals are constructed, owned, and managed either by the state itself or by a company incorporated by state law, and their use may be made subject to state tolls, which cannot be done by any state or under a state law with regard to navigable waters." The admiralty jurisdiction of the United States does not extend to canals. *Warn v. Easton & McMahon Transit Co.*, 2 N. Y. Supp. 620, 622.

An incorporated canal includes as constituent parts the bed, berm bank, towpaths, and tollhouses, and collector's offices, and, if the canal is not subject to taxation, the property forming such constituent parts are not taxable. A house erected as a tollhouse by such a canal company is not subject to taxation, although it is occupied not merely as the collector's office, but also as his family residence. *Schuylkill Nav. Co. v. Berks County Com'rs*, 11 Pa. (1 Jones) 202, 203.

The term "canal," as treated in its application to each of the several canals in state of New York, embraces all the lands within the blue lines, as well the banks as the prism. *Genesee Valley Canal R. Co. v. Slight*, 1 N. Y. Supp. 554, 556, 49 Hun, 35, 14 N. Y. Civ. Proc. 420.

"Canal," as used in a deed wherein the property conveyed was described as bounded on one side by a line parallel with the

northeasterly line of a certain canal two feet therefrom, meant the whole excavation made for the purpose of the canal, and that the line of the canal was therefore the top of the canal bank, and not the edge of the water. *Bishop v. Seeley*, 18 Conn. 389, 393.

**As natural water course.**

See "Natural Water Course."

**As public highway.**

A canal is a public highway, and is not the less so because of the tolls charged, or by reason of its being subject to the regulations of the company operating it. *Barnett v. Johnson*, 15 N. J. Eq. (2 McCart.) 481, 485.

A canal is a public highway within the meaning of a statute prescribing regulations for railroads crossing public highways. *Lehigh Val. R. Co. v. Dover & R. R. Co.*, 43 N. J. Law (14 Vroom) 528, 531.

In Rev. St. Ind. 1838, p. 337, § 17, authorizing the board of internal commission to acquire by donation or purchase for the state the necessary ground for the profitable use of any water power that might be created by the construction of the Central Canal, the word "canal" means a navigable, public highway for the transportation of persons and property. It must not only be in a condition to hold that water that can be used for navigation, but it must have in it, as part of the structure itself, the water to be navigated ready for use. A mill race carrying water for hydraulic purposes is not enough. *Kennedy v. Indianapolis*, 103 U. S. 599, 604, 26 L. Ed. 550.

**As public utility.**

"A canal is such a public utility that private property may be subjected to its construction under the power of eminent domain." *Cooper v. Williams*, 4 Ohio (4 Ham.) 253, 287, 22 Am. Dec. 745.

**CANAL BOAT.**

Rev. St. § 4251 [U. S. Comp. St. 1901, p. 2929], providing that no "canal boat" shall be subject to a libel in any of the United States courts for the wages of any person who may be employed on board thereof, refers to the employment in which the vessel is engaged at the time of the rendition of the service, and not to the form of the vessel. "A vessel engaged in navigating the canals should be held to be a canal boat within the meaning of this statute, without reference to its form. A boat not engaged in navigating canals is not a canal boat within the meaning of this statute, whatever may be its form." Hence a boat which had been formerly navigating a canal was no longer a "canal boat" when it was employed in transporting articles about a harbor. *Smith v. The William L. Norman* (U. S.) 49 Fed. 285, 286

"Canal boat," as used in N. Y. Act May 6, 1870, fixing rates of wharfage, and providing that all "canal boats" navigating the canals in the states shall pay the same rates as heretofore, would include a vessel propelled by steam power for the sole purpose of towing boats on the canal. *The Vermont* (U. S.) 28 Fed. Cas. 1152.

**Nature of towage as affecting.**

A canal boat does not cease to be a canal boat because she is towed through a canal by a steam yacht, and hence is not liable for an employée's wages under Rev. St. § 4251 [U. S. Comp. St. 1901, p. 2929], providing that a canal boat without mast or steam power shall not be so liable. *The George Urban, Jr.* (U. S.) 70 Fed. 791, 792.

A canal boat is a canal boat only when it continues to be a boat on a canal, and although it has no mast or steam engine. Yet, when a steam tug is attached to it by a rope for the purpose of taking it from one part of the river to another, it does not become ipso facto a steamboat, and so remain ever after. *Buckley v. Brown* (U. S.) 4 Fed. Cas. 568, 567.

A boat built for canal navigation, which had been engaged in it during the season and was on a return voyage from Brooklyn in tow of a steamboat, a mode of navigation practiced by hundreds of canal boats, which are not by such an occasional trip transmuted from their primitive and unpretending character of "Podunk scows" into the more ambitious if not more respectable class of vessels of the United States. *Hicks v. Williams* (N. Y.) 17 Barb. 523, 529.

**As vessel.**

A canal boat is a vessel. *The Heseekiah Baldwin* (U. S.) 12 Fed. Cas. 93.

An act authorizing seizure of seagoing or ocean-bound vessels, or any other vessels, in order to collect a debt for towing, applies to canal boats. *Crawford v. Collins* (N. Y.) 45 Barb. 209, 271; *Fralick v. Betts* (N. Y.) 13 Hun, 632, 633. CONTRA, see *Many v. Noyes* (N. Y.) 5 Hill, 34, 35.

A canal boat is a vessel within the meaning of the statute providing for the collection of demands against ships and vessels. *King v. Greenway*, 71 N. Y. 413, 417.

A canal boat is not a vessel of the United States. *Hicks v. Williams* (N. Y.) 17 Barb. 523, 525.

**CANAL FUND.**

A "canal fund" is the fund established for the support of the canals. *People v. New York Cent. R. Co.* (N. Y.) 34 Barb. 123, 135.

Const. art. 7, §§ 1, 2, 3, providing that certain tolls chargeable on railroads should form a part of the state "canal funds," can-

not be construed to mean that such revenue is a part of the canal, so that legislation with regard to such toll charges could be held to be legislation as to canals themselves. The revenues of a person, natural or artificial, are not the person nor a part of the person. "Canal," as used in the Constitution, must be construed in its ordinary sense, meaning a material structure, and only such things are a part of the canal as are necessary to its use or consequent upon its position. The constitutional provision (article 7, § 6) that the Legislature shall not sell, lease, or otherwise dispose of any of the canals of the state refers to the structures of the canals, and a disposition of a part of their revenues, or of any funds appropriated to their support, is not forbidden. *People v. New York Cent. R. Co.* (N. Y.) 84 Barb. 123, 132.

## CANCEL—CANCELLATION.

To cancel is to annul. *Golden v. Fowler*, 26 Ga. 451, 464.

To "cancel" is to cross out, to "obliterate" is to blot out. The former leaves the words legible; the latter leaves the words illegible. By either method a will can be legally revoked in whole or in part. *Townsend v. Howard*, 29 Atl. 1077, 1078, 86 Me. 285.

"Cancel," as used in an agreement by one person to cancel the indebtedness of another to a third person, means to "pay." *Auburn City Bank v. Leonard* (N. Y.) 40 Barb. 119, 120.

### Annul synonymous.

One meaning of the word "cancel" is to "annul," and hence, where arbitrators found that a mortgage and note should be null and void and canceled, "cancel" was synonymous with "annul." *Golden v. Fowler*, 26 Ga. 451, 464.

### Defacement or obliteration necessary.

There can be no such thing as the "cancellation" of an instrument, either as a physical fact or as a legal inference, unless the instrument itself is in some form defaced or obliterated. Such is the express definition of the term in legal significance. In *re Akers' Will*, 77 N. Y. Supp. 643, 646, 74 App. Div. 461.

### Effect.

In *Capital City Mut. Fire Ins. Co. v. Detwiler*, 23 Ill. App. 656, the court says the term "cancellation of a contract" necessarily implies a waiver of all rights thereunder by the parties. If, after breach by one of the parties, they agree to cancel it, and make a new contract with reference to this new subject-matter, that is a waiver of any cause of action growing out of the original breach, and this is the rule even though the original

contract was under seal. *Dreifus v. Columbian Exposition Salvage Co.*, 45 Atl. 870, 872, 194 Pa. 475, 75 Am. St. Rep. 704.

### Agreement.

"Cancel," as used in an agreement indorsed on a prior agreement to purchase land, which states that for value received "we cancel" the annexed and within agreement, means no more than "doing away with," and hence is not sufficient to authorize the party purchasing the land to recover prior payments of the purchase price. *Winton v. Spring*, 18 Cal. 451, 455.

Cancellation is appropriate when there is an apparently valid written agreement of a transaction embodied in writing, while in fact, by reason of mistake of both or one of the parties, either no agreement at all has really been made, or the agreement is different from that which was intended. *De Voin v. De Voin*, 44 N. W. 839, 841, 76 Wis. 66 (citing *Pom. Eq. Jur.* pp. 843, 844).

### Insurance policy.

Where a fire insurance policy was made void by the removal of the insured goods to another building in another town, "cancellation" is not an accurate term to describe it, though it is used by the parties. The policy is not canceled, but rendered nugatory and void by the insured's own act. *Davison v. London & Lancashire Fire Ins. Co.*, 42 Atl. 2, 3, 189 Pa. 132.

### Lease.

"Canceled," as used in a will directing land be sold so soon as the leases are canceled, will not be construed to mean expired or determined, but in its ordinary sense, and so will authorize the tenants to cancel the lease before the expiration of the term. *Toland v. Toland*, 55 Pac. 681, 682, 123 Cal. 140.

### Mortgage.

*Revision*, p. 707, § 23, providing that when any mortgage, duly registered, shall be redeemed, it shall be the duty of the clerk, on application by the mortgagor or the person redeeming and producing to him such mortgage canceled, or a receipt thereof signed by the mortgagor or his executors, administrators, or assigns, to enter in a margin to be left for that purpose, opposite the abstract, a minute of such redemption, is satisfied by the act of tearing off the seals on such mortgage, if done with the intent of cancellation. *Baldwin v. Howell*, 15 Atl. 236, 242, 45 N. J. Eq. (18 Stew.) 519.

The mere tearing off of the seals of a mortgage by an unauthorized person does not amount to a cancellation, nor, indeed, will its entire destruction in such a manner. It must be given up and canceled by consent of

the owner. *Lilly v. Quick*, 2 N. J. Eq. (1 H. W. Green) 97, 103.

#### Revenue stamp.

U. S. Revenue Act, requiring certain instruments to be stamped and the stamp canceled by the initials of the person using or affixing the same, does not require such cancellation to be made by affixing the initials of all those who may become parties to the instrument; as, for instance, where a note passes through the hands of several indorsers, the initials of the person originally using the stamp are a sufficient cancellation. *Spear v. Alexander*, 42 Ala. 572, 575.

#### Will.

The word "canceled" is derived from the word "cancelli," crossbars or latticework. Hence, as originally used, it referred to making cross-lines in the writing, and is defined by Webster: "To cross lines of a writing and deface it." From this is derived the synonym as defined by Webster: "To annul or destroy, as to cancel an obligation." Therefore, where it is apparent that the cross-lines in a will have been made by a testator with the evident intention of effecting a revocation, it has been held that such an act is sufficient to work a revocation of the will, as provided by 2 Rev. St. p. 64, § 42, which outlines two general methods of revocation—by destruction or cancellation. In *re Alger's Will*, 77 N. Y. Supp. 166, 167, 38 Misc. Rep. 143.

Where a will is so marked by testator, whether by lines drawn across it or otherwise, as to show that the act was designed by him to render the will of no effect, there is a cancellation. *Warner v. Warner's Estate*, 37 Vt. 356, 362.

In order to operate as a revocation of a will, cancellation thereof must be made with the intention that it shall operate as a revocation. Revocation is an act of the mind, which can be demonstrated by some outward and visible sign. *Dan v. Brown* (N. Y.) 4 Cow. 483, 490, 15 Am. Dec. 395.

As used in Rev. St. pt. 2, p. 64, c. 6, tit. 1, art. 2, § 42, providing that no will in writing, nor any part thereof, shall be revoked or altered otherwise than by some other will in writing, or unless such will be burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same by the testator himself, "canceled" means something more than the mere act of canceling, and includes *animo revocandi*. "The cancellation of a will does not necessarily involve its revocation. The canceling itself is an equivocal act, and, in order to operate as a revocation, must be done *animo revocandi*." In *re Wood's Will*, 11 N. Y. Supp. 157, 2 Con. Sur. 144.

A "cancellation of a will" is any act done to it which in common understanding would

be regarded as a cancellation if done to any other instrument, and it is not understood to mean exclusively drawing crossed lines on the paper. *Appeal of Evans*, 58 Pa. (8 P. F. Smith) 238, 244.

A will is not canceled because of a writing on a sheet of paper attached to it, or even on the will itself, stating "I revoke this will," under the statute providing that it shall be canceled only by burning or destroying the same, or by some writing witnessed as a will is witnessed, where nothing was done to any portion of the written or printed matter constituting the will, no part of which was altered and no interlineation made, and all that constituted the will remained as perfect as when first written. In *re Ladd*, 18 N. W. 734, 736, 60 Wis. 187, 50 Am. Rep. 355.

#### Same—By drawing line through signature.

A "cancellation" is in legal meaning an equivalent to and synonymous with an "obliteration." This cancellation or obliteration may be effected by words written across the instrument, as "obliterated" or "canceled." The end may be equally well accomplished by any erasure, partial or complete; it may be done by drawing the pen through the words. Any act of this sort is effectual, for the reason that it puts the instrument in condition whereby its invalidity appears on its face the moment it is produced. Under a statute providing that a will may be revoked by burning, tearing, or obliterating it, a line drawn lengthwise through the name of testatrix, or an upright line through each of the words thereof, accompanied by a declaration or intention to destroy the will, is a sufficient obliteration. *Glass v. Scott*, 60 Pac. 186, 188, 14 Colo. App. 377.

One of the recognized modes of revoking a will is by cancellation. In its primal significance the word means a "latticework." As applied to writings, it means the nullification of a writing by drawing upon its face lines in the form of a latticework, crisscross. Usually, in legal as well as in common acceptance, cancellation is accomplished by the drawing of any lines over or across words with intent to nullify them. It is a common business practice to cancel negotiable instruments and other written contracts by drawing such lines through the signature of the maker, and where such form of cancellation has been used in the will it is sufficient to revoke it. In *re Olmsted's Estate*, 54 Pac. 745, 746, 122 Cal. 224.

#### Same—By marking "canceled."

A will may be canceled by any act done to it which stamps upon it an intention that it shall have no effect, though the act be not a complete obliteration or physical destruction. As distinguished from "destruction," "cancellation" implies a preservation

of the instrument with something on it indicative that it has ceased to be operative. Writing the word "canceled" on a will operates as a cancellation thereof. *Appeal of Evans*, 58 Pa. (8 P. F. Smith) 238, 242.

**Same—By marking "obsolete."**

The word "canceling" in Act April 8, 1833, § 13, authorizing the revocation of a will by burning, cancelling, obliterating, or destroying the same, does not include the act of testator in writing the word "obsolete" on the margin of his will, without signing the same. *Lewis v. Lewis* (Pa.) 2 Watts & S. 455, 457.

**Same—By tearing.**

Tearing is one of the modes of canceling a will. *Doe v. Perkes*, 3 B. & A. 489, 492.

**CANDIDATE.**

Any candidate, see "Any."

The term "candidates" is used to designate the person voted for at an election. *State v. Hirsch*, 24 N. E. 1062, 1063, 125 Ind. 207, 9 L. R. A. 170.

In Const. art. 8, § 9, providing that any person who shall, while a candidate for office, be guilty of bribery, fraud, or willful violation of any election law, etc., shall be punished, "candidate" means one who seeks or aspires to some office or privilege, or who offers himself for the same. "A man is a candidate for an office when he is seeking such office, and is just as much a candidate prior to his nomination as after." *Leonard v. Commonwealth*, 4 Atl. 220, 224, 112 Pa. 607.

**CANDLE.**

The origin of the expression "sale by the candle," or "by the inch of candle," arose from the use of candles as a means of measuring time. It was declared the goods would be continued to be offered to bidders for so long a time only as would suffice for the burning of one inch of candle. When the measure was wasted to that extent, the highest bidder was then declared to be the purchaser. *Crandall v. State*, 28 Ohio St. 479, 481 (citing 3 P. Cyc.).

**CANDLING.**

"Candling" is a process, by means of artificial light, for determining the quality and condition of eggs. A contract whereby the seller was to candle the eggs sold is evidence tending to show a warranty as to the condition of the eggs. *King v. C. C. Bendell Commission Co.*, 44 Pac. 377, 7 Colo. App. 507.

**CANT.**

"Cant" is synonymous with "licitation," and is a mode of dividing the estates held in common. *Hayes v. Cuny* (La.) 9 Mart. (O. S.) 87, 89.

**CANVASS.**

One of the dictionary definitions of the word "canvass" is "to apply to or address" people "with reference to prospective action," "to solicit, or go about soliciting, orders," etc. There is nothing in such definition which necessarily means traveling about or over a given territory, for, if the same result may be reached from a central point, a canvass has none the less been made. *Keene v. Frick Co.* (Iowa) 93 N. W. 582, 583.

A contract giving an agent authority to sell and "canvass" for the sale of sewing machines does not per se confer the power to purchase or hire a horse to aid the agent in locomotion. *Howe Mach. Co. v. Ashley*, 60 Ala. 496, 497.

**Election.**

"Canvass," as used in Comp. Laws, § 1489, providing that any candidate or person claiming a right to hold an office contested shall give notice thereof within 20 days after the canvassing of the votes for such election, includes all the proceedings for determining the result of an election, from the close of the polls to the formal declaration of who are elected. The word is defined by Webster, as a verb, to mean "to examine thoroughly, to search or scrutinize," and as a noun, as "a close inspection, or to know the state of," and by Bouvier as the act of examining the result of votes for public officers. *Bowler v. Eisenhood*, 48 N. W. 136, 137, 1 S. D. 577, 12 L. R. A. 705.

In the Standard Dictionary the following definitions are given of the word "canvass": "To examine searchingly; to ascertain the number or the facts concerning each; going over in detail; scrutinize; sift—as to canvass the vote in an election; canvassing votes cast; an official scrutiny as a canvass of votes at an election." Where the judges of election ascertain the number of votes cast in their township or precinct by making a tally sheet from the ballots, it is unquestionably canvassing the vote, but their canvass does not determine the result as to state, district, or county offices, the board of supervisors ascertaining the number of votes cast in the county by making the abstracts required by the statute from the returns, and thereby ascertaining the person having the greatest number of votes for any county office, and declaring who is elected; and under the statute the board of state canvassers canvass the vote from the abstracts returned

by the county board. Each of these canvasses is a "canvass of the votes," within Code 1873, § 697, requiring a statement of contest of an election to a county office to be filed within 20 days after the votes are canvassed, and the fact that the canvass of the county and state boards is made from returns renders them none the less a canvass of the votes. The proceeding of contest is by one who claims to be elected against one who has been declared elected; therefore it cannot be instituted until it is known who is the incumbent. In the case of county officers it is not until the canvass of the votes is made by the county board that the result can be officially known, and, in the case of district and state officers, not until the state board has made its canvass of the votes and declared the result. Neither canvass is any more a canvass of the votes than the other, and, having in view the purpose of the statute providing the mode of contesting elections, it is clear that the intention of the General Assembly was that the statement of contest must be filed within 20 days after the day when the canvass of the votes was made that determined the result as to the particular office in question. *Clark v. Tracy*, 64 N. W. 290, 291, 95 Iowa, 410.

A "canvass" of an election includes not only the counting of the votes by the inspectors, but the record of the count by the poll clerks upon the tally sheet, so that the tally sheet is a substantial part of a canvass. In re *Stewart*, 48 N. Y. Supp. 957, 963, 24 App. Div. 201.

A canvass is but a count of the ballots, a convenient and expeditious method of determining the choice of the people as disclosed by the ballots. As between the ballots themselves and a canvass of the ballots, the ballots are controlling. *Hudson v. Solomon*, 19 Kan. 177, 180.

"Canvass," as applied to an election, would seem to impose an obligation beyond that of merely counting the ballots and comparing the statements of the managers. "Canvassing" implies searching, scrutiny, investigation, examination. *State v. Nerland*, 7 S. C. 241, 246.

"Canvass," as applied to election returns, does not necessarily mean to count the ballots, and to give it the latter meaning would be to defeat the purpose of a statute which provides that the election shall be conducted in accordance with the general election laws of the state; and, as the ballots were under such statute to be returned to the county clerk, the canvassing board could not get possession of them to count. To "canvass the returns" and to "canvass the votes" are frequently used synonymously. *People v. Town of Sausalito*, 89 Pac. 937, 938, 106 Cal. 500.

## CANVASSER.

A canvasser is a traveling salesman who goes out on the road soliciting orders for his house, and taking with him samples of the goods or wares his house deals in. Such a person is not a "traveling vendor," within Acts 1890, No. 150, imposing a tax on traveling vendors. *Pegues v. Ray*, 23 South. 904, 905, 50 La. Ann. 574.

To "canvass" means to go about a region or district, to solicit votes, orders, subscriptions, or the like; traverse a district or region for inquiry, or in the effort to obtain something; to canvass a territory for a subscription book; and one who went from house to house in a given city, exhibiting samples and taking orders, which were then filled from a warehouse or distributing point, is a canvasser, and not a traveling salesman, within Act Ga. December 14, 1896, prohibiting municipal authorities from levying or collecting "any tax or license on any traveling salesman engaged in taking orders for the sale of goods where no delivery of goods is made at the time of taking such order." *L. B. Price Co. v. City of Atlanta*, 31 S. E. 619, 623, 105 Ga. 358.

## Of elections.

The term "canvass" implies search, scrutiny, investigation, examination; and the term "canvassers" employed to designate the duties of the commissioners would seem to impose an obligation beyond that of merely counting the ballots and comparing the statements of the managers of the election. *Ex parte Mackey*, 15 S. C. 322, 332.

County canvassers "are not a judicial or quasi judicial body. They are not a permanent body with administrative functions. They are created for a single occasion and for a single object. They have no means given them to inquire, and no right to inquire, beyond the returns of the local election boards. When they have figured up the returns exactly as handed over to them, they have completed their task and exhausted their powers." *Attorney General v. Board of County Canvassers of Iron County*, 31 N. W. 539, 540, 64 Mich. 607.

## CANVASSING BOARD.

A canvassing board is a board appointed by law for the purpose of canvassing the returns of election officers and returning and verifying the result of the election. *Wells v. Taylor*, 3 Pac. 255, 258, 5 Mont. 202.

## CANYON.

Gen. Railroad Law, § 309, provides that any railroad whose right of way extends through any canyon, pass, or defile shall not exclude any other corporation from a pas-

sage through the same upon equitable terms, and in case of disagreement, on application of either of the parties with notice to the other, the same shall be adjusted by a court of competent jurisdiction. Held, that the word "canyon" means a way or passage between steep hills or mountains, or precipitous bluffs of earth or rock, where there is only room for one right of way, or for but the construction of but one track. *Montana Cent. R. Co. v. Helena & R. M. R. Co.*, 12 Pac. 916, 919, 6 Mont. 416.

## CAPABLE.

"Capable of contracting," as used in Comp. Laws 1879, c. 67, § 3, providing that no contract of a minor can be disaffirmed where, on account of the minor's own representations as to his majority, or of his having been engaged in business as an adult, the other party had good reasons to believe the minor "capable of contracting," means legally capable of contracting, and occurs either when the party has reached the age of majority, or, being a minor, has been vested with legal capacity by an act of the Legislature, or by a judgment of a court in a proper sense, and cannot be construed as meaning mentally and physically capable of contracting. *Burgett v. Barrick*, 25 Kan. 526, 530.

Code Ga. § 2314, providing that in case of an executed trust for the benefit of a person "capable of taking and managing property" in his own right the legal title be merged immediately into the equitable interest, refers to the mental, and not to the physical, capacity. *Sargent v. Burdett*, 22 S. E. 667, 668, 96 Ga. 111.

## CAPACITY.

See "Legal Capacity"; "Mental Capacity"; "Natural Capacity to Contract"; "Testamentary Capacity."

As used in Rev. St. § 3264, requiring that every distillery, before operations are commenced, shall be surveyed for the purpose of estimating and determining its spirit "producing capacity for a day of 24 hours," is employed for the purpose of expressing with certainty and precision the exact period of duration for which the average capacity of production was to be ascertained, and nothing but the average was intended, inasmuch as no distillery has any spirit producing capacity in 24 hours. *Chicago Distilling Co. v. Stone*, 11 Sup. Ct. 862, 864, 140 U. S. 647, 35 L. Ed. 532.

### Of a canal.

Capacity of a canal is a well-understood term in engineering, and means the volume of water that it is capable of conveying, estimated on width, depth, and grade. *Wyatt*

*v. Larimer & W. Irr. Co.*, 29 Pac. 906, 913, 1 Colo. App. 480.

### Of a vessel.

Where the contract between the shipper of goods and the master of a vessel refers to the capacity of a vessel, and it appears that the shipper refused to allow an agreement to be placed in the bill of lading to the effect that part of the cargo might be carried on deck, the phrase "capacity of the vessel" refers to its underdeck capacity. *Clifton v. Sheldon*, 66 U. S. (1 Black) 494, 500, 17 L. Ed. 155.

## CAPE.

### As garment.

"Cape," as used in an indictment charging accused with the larceny of a "cape," will be construed in its popular and usual acceptance, so as to mean a shoulder wrap, the word meaning either a garment or part of a garment used for covering the shoulders of the wearer, notwithstanding the word "cape" also means a neck or narrow strip of land extending some distance into a body of water, since such formation of land cannot be the subject of larceny, and also notwithstanding that the word "cape" means the coping of a wall, and also ears of corn broken off in threshing in certain restricted localities in the northern part of England; the word will be understood in its plain, ordinary, and popular meaning in our country and among our people. *Waller v. People*, 51 N. E. 900, 175 Ill. 221.

### As point of land.

A cape as a point of land extending into a lake; projecting into the water; a head land; a piece of land jutting into the water beyond the rest of the coast line; a promontory. *United States v. McNeely* (U. S.) 28 Fed. 609, 611.

## CAPIAS.

A "capias" is a writ issued by the court or clerk, and directed to any sheriff of the state of Texas, commanding him to arrest a person accused of an offense, and bring him before that court forthwith, or on a day or at a term stated in the writ. Code Cr. Proc. Tex. 1895, art. 493.

## CAPIAS AD SATISFACIENDUM.

A *capias ad satisfaciendum*, as respects the party against whom it is taken, is a full satisfaction by force, act, and judgment of law, so that against him and his representatives there can be no other *capias* issued; for when the plaintiff has begun and chosen the body he cannot resort to another execution against the same party. It is a com-



plete satisfaction of that very suit and judgment in which it is taken. *Strong v. Linn*, 5 N. J. Law (2 Southard) 799, 803.

## CAPITAL

See "Available Capital"; "Cash Capital"; "Moneyed Capital"; "Present Capital"; "Whole Capital"; "Working Capital."

Capital in commerce, as applied to individuals, is those objects, whether consisting of money or other property, which a merchant, trader, or other person adventures in an undertaking. *Pearce v. City of Augusta*, 37 Ga. 597, 599.

As defined by Webster, "capital" is the stock in trade, in manufactories, or in any business requiring the expenditure of money with a view to profit. Capital in a mercantile sense is the money which is employed to make other sums, and a capitalist is a person who trades with capital, and is commonly denominated a "monied man." *London Encyl. tit. "Capital."* The popular sense of the term "capital" is money invested in business for the purpose of making profits thereon. *Sun Mut. Ins. Co. v. City of New York*, 8 N. Y. (4 Seld.) 241, 245.

"The word 'capital' has a well-defined meaning. It is said to be the sum which a merchant, trader, or other person or association adventures in any business requiring the expenditure of money with a view to profit." *Bouvier* defines it as "the sum of money which a merchant, bank, or trader adventures in any undertaking, or which he contributes to the common stock of a partnership." It has been defined by the Supreme Court of the United States as property taken from other investments or uses, and set apart for and invested in the special business, and in the increase, proceeds, or earnings of which property, beyond expenditures incurred in its use, consists the profits made in the business. When we speak of the capital invested in a business, we mean the money which is put into that business with the intention that it shall be used in the transaction of the business. The word "capital" is so used in Gen. Laws, c. 24, providing that nonresidents of the state doing business therein shall be taxed on the capital invested in such business as personal property. *People v. Feltner*, 67 N. Y. Supp. 893, 894, 56 App. Div. 280.

The capital of a merchant is that fund which is put up and subjected to the risks of his business as a basis of credit, and as a security to mercantile creditors against loss from the misfortunes of trade." *Webb v. Armistead* (U. S.) 20 Fed. 70, 71.

The capital of a corporation consists of its funds, securities, credits, and property, of

whatever kind, which it possesses. *Christensen v. Eno*, 12 N. E. 648, 649, 106 N. Y. 97, 60 Am. Rep. 429 (citing *Burrall v. Bushwick R. Co.*, 75 N. Y. 211, 212).

### Accumulated profits.

Where a mutual insurance company is authorized to accumulate from its profits a fund to continue liable for its losses during the term of its existence, and to issue certificates to its members setting forth their interest therein, the accumulation becomes capital, and is subject to taxation as such. *Sun Mut. Ins. Co. v. City of New York*, 8 N. Y. (4 Seld.) 241, 250.

The word "capital," as applied to money of a corporation, may refer to the money paid in by the stockholders for the use of the corporation, commonly known as the "capital stock," but in a higher and more popular sense it includes all the money and other property of the corporation used in transacting its business. So long as the profits are not withdrawn from the business, they constitute a part of the capital. *Iowa State Sav. Bank v. City Council of Burlington*, 61 N. W. 851, 852, 98 Iowa, 737.

"Capital," as used in a will directing that the executor shall allow "my present capital" to remain in a partnership business, which had been formed by written agreement, under which the testator and his partner agreed to put in a certain amount as capital, and by which each was entitled to draw out annually his share of the annual profits, but none of the capital, or any of the accrued but undivided profits, the words "my present capital" meant only the capital proper, which the testator had contributed to the business, and not also the accumulated and undivided profits which had accrued from the use of that capital. *Dean v. Dean*, 11 N. W. 239, 241, 54 Wis. 23.

"Capital," as used in Act Cong. June 30, 1864, § 79, 13 Stat. 251, providing that bankers using or employing a capital not exceeding \$50,000 should pay \$100 for each license, means the amount of capital fixed by the charter, and would not include surplus earned by the bank. *Mechanics' & Farmers' Bank v. Townsend* (U. S.) 16 Fed. Cas. 1306.

The capital of an estate, within the meaning of a direction in a will that the capital be held in trust and the income given to certain beneficiaries, includes profits of corporation stock made before testator's death, but does not include stock earnings after his death, though the benefit thereof is given to the stockholder through new stock issues. *Appeal of Earp*, 28 Pa. (4 Casey) 368, 371.

### As actual assets.

In its broadest meaning, the word "capital" signifies actual assets, whether in money or property, owned by an individual or a

corporation. It is the fund upon which a corporation transacts business, which is liable to its creditors, and in case of insolvency passes to a receiver. The capital of a bank is not composed of immovable property. *State v. Board of Assessors*, 18 South. 753, 48 La. Ann. 35.

#### **As capital stock.**

See, also, "Capital Stock."

The terms "capital" and "capital stock" are in legal intent synonymous. *New Orleans City Gaslight Co. v. Board of Assessors*, 31 La. Ann. 475, 477; *Foster v. Stevens*, 22 Atl. 78, 79, 63 Vt. 175, 13 L. R. A. 166.

The word "capital," applied to corporations, is often used interchangeably with the words "capital stock." Strictly speaking, however, the "capital stock" of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers of the stock on the initiation of the corporate enterprise. *Christensen v. Eno*, 12 N. E. 648, 649, 106 N. Y. 97, 60 Am. Rep. 429 (citing *Burrall v. Bushwick R. Co.*, 75 N. Y. 211, 212).

The word "capital," in relation to the taxation of corporations, has a well-defined meaning, for it and "capital stock" are used indiscriminately to designate the estate of the corporation. *Comstock, J.*, in *People v. Com'rs of Taxes*, 23 N. Y. 192, cited and approved in *People v. Coleman*, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762. Thus, in a statement by the corporation that its capital is worth par, and a certain amount of its capital stock has been paid in, such statement is equivalent to saying that the estate of the company is worth the amount of money paid in. *People v. Barker*, 26 N. Y. Supp. 971, 972, 75 Hun, 6.

Civ. Code, § 309, provides that the directors of a corporation must not make dividends except of the surplus profits; they must not divide, withdraw, or pay to the stockholders any part of the capital stock. Held, that the words "capital stock" mean the money and property with which the corporation carries on its corporate business, and are used synonymously with "capital." *Kohl v. Lillenthal*, 81 Cal. 378, 385, 22 Pac. 689, 6 L. R. A. 520.

A tax on shares of stock is not a tax on the capital of the corporation; the two are very different things. "Capital" or "capital stock" belongs to the corporation; the "shares" to the individuals. As used in Revenue Law 1890, § 8, subsec. 2, providing for the taxation of capital, including money, credits, or other things remaining invested, etc., it signifies the money or other thing invested, and therefore includes shares of stock in the hands of the stockholders; but

as used in section 8, subsec. 3, providing for the taxation of the value of all capital of incorporated joint-stock companies not otherwise taxed, it signifies the capital stock of the company; that is, the aggregate of the mutual subscriptions of the stockholders, paid in, as a basis of the business of the concern and which belongs to the company. *Commonwealth v. Charlottesville Perpetual Bldg. & Loan Co.*, 20 S. E. 364, 365, 90 Va. 790, 44 Am. St. Rep. 950.

"Capital," as used in Rev. St. p. 388, § 4, subd. 7, exempting from taxation the personal property of every corporate company not made liable to taxation on its capital, means only capital stock, hence a savings bank having no capital stock is not within the statute. *People v. Coleman*, 31 N. E. 1022, 135 N. Y. 231.

As used in Act Feb. 11, 1848, § 12, providing that, at any time after the expiration of 10 years from the time any railroad may be put in operation, the General Assembly may prescribe its rates for transportation, provided that no reduction shall be made unless the net profits of the company, on an average for the previous 10 years, shall amount to a sum equal to 10 per cent. per annum upon its capital, and then not so as to reduce the future probable profits below the said per cent., "capital" means the actual capital stock of the company, and not also the accumulated profits retained in its business as represented by the actual value of the property of the company. "When applied to corporations, the word 'capital' is sometimes used in the sense of 'corporate property,' and is distinguished from the 'shares' and 'certificates' of stock, which are the individual property of the stockholders, and form no part of the company; but the 'capital' of a corporation is generally understood and defined to be 'the property or means contributed by the stockholders as the fund or basis for the business or enterprise for which the corporation was formed.' The word 'stock' is sometimes added, and the phrase 'capital stock' is used convertibly with the word 'capital.'" *Iron Ry. Co. v. Lawrence Furnace Co.*, 30 N. E. 616, 620, 49 Ohio St. 102.

The word "capital" in Acts 1898, p. 14, § 25, providing a privilege tax where the capital of a cotton seed oilmill is between certain amounts, means "capital," and not "capital stock." *Hazlehurst Oilmill & Fertilizer Co. v. Decell* (Miss.) 33 South. 412.

#### **Capital stock distinguished.**

See, also, "Capital Stock."

The "capital" of a corporation is its property, while the "capital stock" of a corporation represents the interest of stockholders in the corporation, and is their property. *Wetherbee v. Baker*, 35 N. J. Eq. (8 Stew.) 501, 505.

There is a distinction between the "capital" and the "capital stock" of a corporation. The "capital" of a corporation is the property or means which the corporation owns, and it may vary in amount, while the "capital stock" is fixed, and represents the interest of the stockholders, and is their property. *Wells v. Green Bay & M. Canal Co.*, 64 N. W. 69, 72, 90 Wis. 442.

"Capital" and "capital stock" are in legal intendment synonymous, and are used in legislative acts as equivalent terms, though strictly not of the same meaning. "Capital stock" means, not shares of stock, either separately or in the aggregate, but is intended to designate the property of the corporation subject to taxation, not in separate parcels, but in a homogeneous unity. *Foster v. Stevens*, 22 Atl. 78, 79, 63 Vt. 175, 13 L. R. A. 166.

Strictly speaking, "capital stock" in a corporation or association is quite different from "capital" of either, the one referring to the tangible, and the other to rights in property, evidenced, in case of a corporation, by certificates of stock. But the terms are used interchangeably and synonymously in laws and decisions. The term "capital" as accurately described the intangible property rights of members of an unincorporated association engaged in the business of banking in the property of the association as the term "capital stock." *State v. Lewis*, 95 N. W. 388, 390, 118 Wis. 432.

#### **Bank building.**

The banking house of a bank is a part of the capital of the institution, represented by its shares of stock. Hence payment of taxes upon the par value of the shares exempt the building from further taxation under Act March 31, 1870, providing that state banks, upon the payment of 1 per cent. taxation upon all their capital, should be exempt from all other taxation upon their shares, capital, and profit. Neither would the fact that a portion of the building was rented out for other than banking purposes subject that portion of it to other taxation. *Lackawanna County v. First Nat. Bank*, 94 Pa. 221, 224.

#### **As fund contributed.**

The capital of a corporation is the property or means contributed by the stockholders as the fund or basis for the business for which the corporation was formed. *State v. Jones*, 37 N. E. 945, 950, 51 Ohio St. 492.

The capital of a bank is the fund paid by its shareholders on their capital stock. *United States v. Bank of Montreal* (U. S.) 21 Fed. 236, 240.

In determining the meaning of the term "moneyed capital," in Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502], providing that shares of stock in a national bank shall not

be taxed at a greater rate than is assessed on other moneyed capital in the hands of individuals in the state, the court said an acceptable definition of the term "capital" is found in *Bailey v. Clark*, 88 U. S. (21 Wall.) 284, 288, 22 L. Ed. 651, as follows: "When used with respect to the property of a corporation or association, the term has a settled meaning. It applies only to the property or means contributed by the stockholders as the fund or basis for the business or enterprise for which the corporation or association was formed. As to them the term does not embrace temporary loans, though the money borrowed be directly appropriated in their business or undertakings. And, when used with respect to the property of individuals in any particular business, the term has substantially the same import. It then means the property taken from other investments or uses and set apart for an investment in the special business, and the increase, proceeds, or earnings of which property, beyond expenditures incurred in its use, consists of profits made in the business. It does not, any more than when used with respect to corporations, embrace temporary loans made in the regular course of business. As very justly observed by the circuit judge, it would not satisfy the demands of common honesty if a man engaged in business of any kind being asked the amount of capital employed in his business, should include in his reply all the sums which in the conduct of his business he had borrowed and had not yet repaid." *First Nat. Bank v. Turner*, 57 N. E. 110, 112, 154 Ind. 456.

The word "capital" in Laws 1896, c. 908, § 182, authorizing the imposition of a franchise tax on corporations, to be imposed on such portion of the capital stock at par as the amount of the capital employed within the state bears to the entire capital of the corporation, means the property of the corporation contributed by its shareholders, or otherwise obtained by it to the extent required by its charter. *People v. Roberts*, 72 N. Y. Supp. 950, 952, 66 App. Div. 157.

#### **Income distinguished.**

"Capital," as used in a will creating a trust, and providing for the final disposition of the capital thereof, and which in another clause the testator speaks of as his "capital" or "principal," is to be construed as including the corpus of the residuary estate, whether consisting of real or personal property, as contradistinguished from the "income" thereof. *Penfield v. Tower*, 46 N. W. 413, 416, 1 N. D. 216.

#### **Insurance premiums.**

"Capital," as used in 1 Rev. St. c. 13, § 1, tit. 4, providing that all moneyed or stock corporations shall be taxable upon their capital, means "the fund upon which the corporation transacts its business, which would be

liable to its creditors, and in case of insolvency passes to a receiver. In this sense the court held that premiums for insurance paid or contracted to be paid in contemplation of future risks constituted capital stock subject to taxation. The word 'capital' is not used in the tax laws as a technical term, depending upon certain fixed conditions without which it cannot exist. It may be paid in as 'capital' in the strict sense of the term, and as an indispensable preliminary to the complete organization of a corporation. This is done when its dealings and business transactions are with strangers, and not with those who ipso facto become its members or corporators, or it may proceed from and be created by premiums or earnings paid by its own members." *People v. Supervisors of City and County of New York*, 16 N. Y. 424, 427.

Laws 1896, c. 908, require the capital stock of every company, together with the surplus profit or revenue fund exceeding 10 per cent. of its capital, to be assessed for taxation at its actual cash value. Held, that a fund consisting of unearned premiums held by a fidelity insurance company as a reinsurance reserve fund, as required by Insurance Law, § 22, was a part of the capital, and hence taxable. *People v. Feltner*, 31 Misc. Rep. 433, 434, 65 N. Y. Supp. 523, 525.

#### **Seat in stock exchange.**

The value of a seat in the New York Stock Exchange is not capital invested in business. A broker, in the purchase and sale of stocks and bonds, who neither receives nor delivers stocks, but merely conducts the transaction on the floor of the exchange, giving up the name of the purchaser or seller to his principal, is in the position of one rendering services, and cannot be regarded as conducting a business in which capital is invested, in the legal sense. The money that he has paid for his membership or seat is for the mere facility to transact his particular business, and to surround it with such safeguards of rectitude and honorable dealing as tend to promote both rapidity and safety in his transactions. It is apparent that the value of this seat or membership, while enabling the relator to carry on his business with facility and safety, does not fall within any of the definitions of "invested capital." *People v. Feltner*, 60 N. E. 265, 268, 167 N. Y. 1, 82 Am. St. Rep. 698.

In *Bailey v. Clark*, 88 U. S. (21 Wall.) 284, 286, 22 L. Ed. 651, the Supreme Court of the United States defined "capital" to mean property taken from other investments or uses and set apart for and invested in the special business, and in the increase, proceeds, or earnings of which property, beyond expenditures incurred in its use, consists the profits made in the business. In *Lyon v. Zimmer* (U. S.) 30 Fed. 401, 410, is found this definition: "Capital is the fund dedicat-

ed to a business to support its credit, to provide for contingencies, suffer diminution from loss, and to derive accretions from gains and profits." In 1 *Bouvier's Law Dict.* p. 283, "capital" is defined as the sum of money which a merchant, banker, or trader adventures in any undertaking, or which he contributes to the common stock of a partnership. The sum which a broker paid in order to gain admission to the floor of the New York Stock Exchange where he might meet from time to time numerous other brokers having stocks to purchase or sell, is in no proper legal sense capital. *People v. Feltner*, 60 N. E. 265, 268, 167 N. Y. 1, 82 Am. St. Rep. 698.

#### **Shares of other corporation.**

The property of a corporation is called its capital. The capital of a corporation is the same as the capital of an individual. Where a corporation holds certificates of stock in another corporation, such certificates are not taxable as capital, since the property represented by them is taxable against the corporation issuing them. *People v. Board of Assessors*, 30 N. Y. Supp. 448.

#### **As shares of stock.**

See, also, "Capital Stock"; "Share of Stock."

The capital of a corporation and the shares of its stockholders are different forms of the same thing. There is no value to the stock, independent of the property which it represents. The property of the corporation is the property of the stockholders who compose it, and the shares held by each represent his interest in the corporate assets. *Richardson v. City of St. Albans*, 47 Atl. 100, 72 Vt. 1.

The word "capital," as used in the act of the Legislature of 1836 exempting the capital of the Citizens' Bank of Louisiana, was intended to include that which represented the capital—the shares in the hands of those who had subscribed to the capital stock. This was the usual meaning of the terms employed at the time such act was passed, and before the capital was distinguished from shares of stock, and made to mean the value of the property of the corporation. *Penrose v. Chaffraix*, 30 South. 718, 720, 106 La. 250.

#### **Shares of stock distinguished.**

See, also, "Capital Stock"; "Share of Stock."

The term "capital," when applied to a bank, does not include the interests of its stockholders, and therefore shares in a bank, whether national or state, are subject to taxation against the stockholder, without regard to the fact that the capital of such bank is

vested in the bonds of the United States, declared by statutes creating them to be exempt from taxation by or under state authority. *New York v. Commissioners of Taxes of City and County of New York*, 71 U. S. (4 Wall.) 244, 258, 18 L. Ed. 344; *Wright v. Stitz*, 27 Ind. 338; *Bradley v. Illinois*, 71 U. S. (4 Wall.) 459, 462, 18 L. Ed. 433.

There is a clear and well-understood distinction between capital and shares of stock, so that, in returns by a bank of an assessment of so much money as capital, such sum will not be taken to mean the shares of stock of the bank. *Brown v. French* (U. S.) 80 Fed. 166, 168.

The capital of a bank does not include the property of a stockholder therein. The corporation is the legal owner of all the property of the bank. The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of its shares; and, upon its dissolution or termination to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest of property, held by the shareholder like any other property that may belong to him, and is not exempted by the clause of the national banking act exempting the capital of national banks from taxation by or under state authority. *Van Allen v. Assessors*, 70 U. S. (3 Wall.) 573, 583, 18 L. Ed. 229.

#### Temporary loans.

In *Bailey v. Clark*, 88 U. S. (21 Wall.) 284, 22 L. Ed. 651, it is held that the term "capital," in reference to banking, does not include money borrowed from time to time in the course of business. It applies only to the property or money of the banker set apart and manifestly invested in banking. *St. Louis, I. M. & S. Ry. Co. v. Loftin*, 30 Ark. 693, 707.

"Capital," when used with respect to the property of a corporation, has a settled meaning, and applies to the property or means contributed by the stockholders as the fund or basis for the business or enterprise for which a corporation was formed. As to them, the term does not embrace temporary loans, though the moneys borrowed be directly appropriated in their business or undertakings. When used with respect to the property of individuals in any particular business, the term has the same import, and means the property taken from other investments, or used and set apart for and invested in the special business, and in the increased proceeds or earnings of which property, beyond expenditures incurred in its use, consist the profits made in the business. *Bailey v. Clark*, 88 U. S. (21 Wall.) 284, 287, 22 L. Ed. 651.

#### CAPITAL CRIME OR OFFENSE.

A capital crime is one for which the punishment of death is inflicted. *Walker v. State*, 13 S. W. 860, 28 Tex. App. 503.

A capital offense in the sense that a person is bailable, except for a capital offense, is an offense which is punishable—that is to say, liable to punishment—by death. *Ex parte Dusenberry*, 11 S. W. 217, 97 Mo. 504.

The expression "capital offense," as used in Bill of Rights, § 11, providing that all prisoners shall be bailable by sufficient sureties, unless for capital offenses, is one for which the highest penalty is death. Murder in the first degree is therefore a capital offense. But since a person who commits murder in the first degree before he arrives at the age of 17 years cannot be punished by death, a person under the age of 17 years, charged with the commission of the crime of murder in the first degree, is entitled to bail. *Walker v. State*, 28 Tex. App. 503, 504, 13 S. W. 860.

The term includes a crime which may be punished, in the discretion of the jury, with the penalty of death; and, though the power conferred on the jury of deciding whether or not a homicide shall be punished capitally undoubtedly increases the chances of the murderer to escape capital punishment, yet, until he is tried, the offense, in law and in the eye of the Constitution, is as much capital as it was before such power was conferred on juries. *Ex parte McCrary*, 22 Ala. 65, 72.

#### CAPITAL EMPLOYED.

See, also, "Employed."

The words "capital employed" and "full sum invested," as used in Loc. Laws 1847, p. 82, § 23, providing that, when the amount of dividends declared by a railroad corporation shall amount to the full sum invested, the Legislature may fix rates, so that not more than 15 per cent. shall be divided on the capital employed, embraces only such sums as were contributed directly by those who purchased the corporate stock for the construction of the road, and the sum paid for bonds that were issued for its construction, and subsequently converted into shares of stock. It was the money put in that made profits and dividends possible. In popular sense, the "full sum invested" and "capital employed," which are clearly used as synonymous terms, usually mean an original sum placed on a venture, with a view to profits or income. *Terre Haute & I. R. Co. v. State*, 65 N. E. 401, 407, 159 Ind. 438.

#### CAPITAL INVESTED.

Money which a partner loaned to the firm, and on which he received such profits

as were earned by the firm, is capital invested, within the meaning of the transfer tax, rendering such capital subject to a tax on the death of the partner. In re Probst's Estate, 82 N. Y. Supp. 898, 897, 40 Misc. Rep. 431.

### CAPITAL STOCK.

"Capital stock," as used in Laws 1880, c. 542, as subsequently amended before 1896, requiring certain corporations to estimate and appraise the capital stock upon which no dividend has been declared, for the purposes of taxation, means the corporation's assets after deducting its liabilities and adding to the sum then remaining the value of the good will of the business, including its right of conducting it under its franchise. The contention that the liabilities of the corporation will not, in such case, be deducted from its assets, cannot be sustained. The term or phrase "capital stock" has been several times defined, and a distinction between capital stock and shares of stock held by stockholders has been pointed out, as can be seen in the cases of *Williams v. Western Union Tel. Co.*, 93 N. Y. 162, 188; *Canfield v. Morristown Fire Ass'n*, 23 N. J. Law (3 Zab.) 195, 197; *Burrall v. Bushwick R. Co.*, 75 N. Y. 211, 216; *Barry v. Merchants' Exchange Co.* (N. Y.) 1 Sandf. Ch. 280; *People v. Wemple*, 150 N. Y. 46, 51, 44 N. E. 787; *People v. Roberts*, 47 N. E. 980, 982, 154 N. Y. 101.

"An interesting description of this term 'stock,' or 'capital stock,' and what it may mean, is found in the case of *People v. Coleman*, 27 N. E. 818, 126 N. Y. 433, 12 L. R. A. 762. We make the following extract: 'The capital stock of a corporation is one thing, and that of the stockholder is another and a different thing. That of the company is simply its capital, existing in money or property, or both, while that of the stockholder is representative, not merely of that existing and tangible capital, but also of surplus, of dividend-earning power of franchise, and the good will of an established and prosperous business. \* \* \* The word 'stock' is used by legislators and by different juridical writers and courts in several different senses, and its particular meaning must generally be determined by the matter in hand, the thing in the mind of the legislator or the court, the context as well as the clause wherein it may be found.' Under Gen. St. § 4079, requiring the board of valuation to fix the value of the capital stock of a corporation, and to deduct from the amount thus fixed the assessed value of the tangible property assessed in the state or county wherein situated, and making the balance thus found the value of its corporate franchise subject to taxation, etc., the Legislature meant to include by the term "capital stock" the entire property, real and per-

sonal, tangible and intangible, assets on hand, and its franchise, as well. *Henderson Bridge Co. v. Commonwealth*, 31 S. W. 486, 489, 491, 99 Ky. 623, 17 Ky. Law Rep. 389, 394, 29 L. R. A. 73.

"Capital stock" does not mean shares of stock only, but the aggregate capital of a corporation, which includes the value of the right to use any tangible property in a special manner for purposes of gain. *Indianapolis & St. L. R. Co. v. Vance*, 96 U. S. 450, 455, 24 L. Ed. 752.

"Capital stock" of a corporation in its most comprehensive sense, includes its property, corporeal and incorporeal, and all the rights and franchises, of the corporation. A corporation may have a capital or capital stock before it confers shares in it on persons, and in such case the capital or capital stock is the legal faculty and practicability to dispose of shares of it to individuals in a proper manner for corporate purposes. *Williams v. Western Union Tel. Co.*, 48 N. Y. Super. Ct. (16 Jones & S.) 849, 368.

As a general proposition, the exemption of the capital stock of a company from taxation exempts the property in reference to which that stock exists, for the plain and simple reason that the stock, when considered independent of that property, is nothing more than a valueless piece of paper. The property is the representative of the stock; the stock, the representative of the property; and, as things of value and interest, they are the same. Yet, where the Legislature provided that the capital stock of a railroad company should be forever exempt from taxation, and that all the property of the road should be exempt for 35 years after completion, the effect of such provision is to prohibit taxation of the stock as stock of the company, but after the expiration of 35 years the property might be taxed by some other rule than by taxing its stock as stock. *Atlantic & G. R. Co. v. Allen*, 15 Fla. 637, 660.

"Capital stock," as used in Civ. Code Cal. § 809, providing that the directors of a corporation must not make dividends from the surplus profits arising from the business thereof, and for violation the directors are personally liable to the value of the capital stock so divided, means the actual property of the corporation contributed by the shareholders of the nominal capital. *Excelsior Water & Mining Co. v. Pierce*, 27 Pac. 44, 46, 90 Cal. 131.

"Capital stock" may be defined as that money or property which is put into a single corporation by those who by subscriptions thereto become members of the corporate body. When used in reference to a partnership, "capital stock" means the fund of money or property which is employed as a basis of the business, and on which and with

which the business is to be commenced and carried on. *City and County of San Francisco v. Spring Valley Waterworks*, 63 Cal. 524, 530.

The terms "capital stock" and "shares of capital stock," whenever used in the chapter relating to the revenue, shall be held to mean and include the capital stock of every association, corporation, joint-stock, or other company, the stock or capital of which is or may be divided into shares which are transferable by the owner, for the taxation of the capital stock of which association, corporation, joint-stock, or other company no special provision is made by the chapter, held by persons residing in the state, either for themselves, or as guardians, executors, administrators, trustees, or agents. *Rev. St. Mo. 1899, § 9123.*

The term "capital stock," as used in Illinois revenue act in force July 1, 1872 (section 32), requiring that companies and associations incorporated under the laws of Illinois, other than banks, shall, in addition to the other property required by the act to be listed, make out and deliver to the assessor a sworn statement of the amount of its capital stock, etc., means all the property belonging to a corporation, whether tangible or intangible, and of whatever nature or kind, and it must be valued under this designation for the purpose of taxation. *Pacific Hotel Co. v. Lieb*, 83 Ill. 602, 610.

#### **Accumulated earnings.**

A bequest of certain shares of the capital stock of a corporation to testator's wife for her use and benefit for life, with the remainder over to his children, was construed to include accumulated surplus earnings actually used in the business, and distributed among the stockholders as additional stock. Such stock is not income, and therefore belongs to the remainderman, as against the life tenant. *Chester v. Buffalo Car Mfg. Co.*, 75 N. Y. Supp. 428, 70 App. Div. 443.

The capital stock of a corporation, which is deemed a trust fund for the payment of the corporate debts, includes the entire sum agreed to be contributed towards the enterprise by the shareholders, whether actually paid in or not, but it does not include additions made from profits realized from the business. *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98, 108, 2 Am. Rep. 563.

#### **As authorized amount.**

The capital stock of a corporation is the sum fixed by the charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of the corporation, and for the benefit of the creditors of the corporation. *Cook, Stock & Stockholders*, § 3. The term is so used in Act April 18, 1884, as amended by Act March 17, 1892, authorizing the taxation of the capital stock

of corporations. *American Pig Iron Storage Co. v. State Board of Assessors*, 29 Atl. 160, 161, 56 N. J. Law (27 Vroom) 389 (quoted and approved in *Cooke v. Marshall*, 43 Atl. 314, 316, 191 Pa. 315).

Capital stock is the sum fixed by corporate charters as the amount paid for or to be paid for by the stockholders for the prosecution of the business of the corporation, and for the benefit of the corporation's creditors. Capital stock is to be clearly distinguished from the amount of property possessed by the corporation. At common law the capital stock does not vary, but remains fixed, although the actual property of the corporation may fluctuate widely in value, and may be diminished by loss or may be increased by gains. Collectively the capital stock is the property of the corporation, while the ownership of the shares is in the shareholder. Sale and disposal by the several owners is free and untrammelled, save as the laws or by-laws of the corporation may have prescribed rules. Not so the capital stock. That is a security or pledge the law exacts as a condition on which it grants the corporation franchise—the right to incur liability, in the discharge of which no responsibility rests on any special person. The capital stock is a trust fund—a trust for the benefit and security of the corporation's creditors. *Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County*, 14 South. 490, 491, 99 Ala. 1, 42 Am. St. Rep. 17.

The capital stock of a corporation is the aggregate amount of the funds of the corporation which are combined together under a charter for the attainment of some common object of public convenience or private utility. The capital stock of a corporation, like that of a limited partnership or joint-stock company, is the amount fixed on by the partners or associates as their stake in the concern. *Hightower v. Thornton*, 8 Ga. 486, 499, 52 Am. Dec. 412.

The words "stock" and "capital stock" may be defined as meaning the fund or property belonging to a firm or corporation, and used to carry on its business. This is contributed by those who embark in the business. The articles of copartnership or the charter of the corporation fix the maximum amount of stock that may be issued, and this may properly be spoken of as the proposed or authorized capital of the company. *Commonwealth v. Lehigh Ave. Ry. Co.*, 18 Atl. 498, 499, 129 Pa. 405, 5 L. R. A. 367.

#### **As amount subscribed.**

The capital stock is that money or property which is put into a single corporate fund by those who by subscription therefor become members of the corporate body. That fund becomes the property of the aggregate body alone, and the shareholder of the capital stock has a right to partake, according to the

amount put into the fund, in the surplus profits of the corporation, and ultimately on the dissolution of it, in so much of the fund thus created as remains unimpaired, and is not liable for the debts of the corporation. *Burrall v. Bushwick R. Co.*, 75 N. Y. 211, 216.

The capital stock of a corporation consists of the property and money subscribed and paid in for the purpose of carrying on its business. It constitutes a corporate fund belonging to the corporate body. *Jones v. Davis*, 35 Ohio St. 474, 476.

"The capital stock of a bank is the whole, undivided fund paid in by the stockholders, the legal right to which is vested in the corporation, to be used and managed in trust for the benefit of the members." *Union Bank v. State*, 17 Tenn. (9 Yerg.) 490, 498.

The term "capital stock" has a fixed and definite meaning, and designates the amount of capital contributed by the stockholders for the use of the company. *Belvidere Bank v. Tunis*, 23 N. J. Law (3 Zab.) 546, 548.

"Capital stock," as used in an act of incorporation, means the amount contributed or advanced by the stockholders or members of the company, and does not refer to value of the property of the company. *Canfield v. Morristown Fire Ass'n*, 28 N. J. Law (3 Zab.) 195, 197.

The term "capital stock," in a charter of a railroad company, exempting its capital stock from taxation, means the capital to be raised by stock subscriptions, and does not include the land granted by Congress to aid in the construction of the road. *St. Louis, I. M. & S. Ry. v. Loftin*, 30 Ark. 693, 707.

The capital stock of a corporation is, like that of a copartnership or joint-stock company, the amount which the partners or associates put in as their stake in the concern. To this they add, upon the credit of the company, from the means and resources of others, to such extent as their own prudence or the confidence of such other persons will permit. Such additions create debt, but do not form capital. Where the capital stock of a corporation was limited to \$1,000,000, the limitation did not restrict the corporation from laying out \$2,000,000 in the site and the erection of buildings, nor from incurring debts on its bonds and mortgages for the excess of the cost beyond the capital stock. *Barry v. Merchants' Exch. Co.* (N. Y.) 1 Sandf. Ch. 280, 307.

"Capital stock," as used in Acts 1853, c. 502, § 2, requiring the redeeming stockholders of a railroad company to pay to the purchasers or mortgagees a sum equal to such proportion of the price paid on such sale, and the costs and expenses thereof, as such stockholders having stock in said company

shall bear to the whole "capital stock" of the company, means the capital stock which has been actually subscribed for and issued, and not the amount named in the articles of association. *Pratt v. Munson* (N. Y.) 17 Hun, 475, 476.

The capital stock of a corporation is the aggregate sum subscribed and paid in, or to be paid in, by the shareholders, with the additional profits on the residue after the deduction of losses. A tax on property belonging to a company is not a tax on capital stock. *Wilmington Underwriters' Ins. Co. v. Stedman*, 41 S. E. 279, 280, 130 N. C. 221.

The capital stock of a corporation other than a mining corporation is the amount of money paid or promised to be paid for the purposes of the corporation. It is a fixed sum, not to be increased or diminished except in the mode permitted by statute. *Thompson v. Reno Sav. Bank*, 7 Pac. 68, 69, 19 Nev. 103, 3 Am. St. Rep. 797.

The capital stock of a corporation consists of the sums due by virtue of the subscriptions, or collected from the subscribers and invested for the corporation's benefit. *State v. Norwich & W. R. Co.*, 30 Conn. 290, 296.

#### As assets.

The capital stock of a corporation, within the rule that such capital stock is a trust fund for the benefit of the general creditors, must mean the assets of the corporation, unless it be confined to the unpaid subscriptions to the capital stock, since all actual payments on account of capital stock do at once mingle with the other moneys of the company, and lose all earmarks and distinction in the mass of general assets. *Landis v. Sea Isle City Hotel Co.* (N. J.) 31 Atl. 755, 764.

The word "capital," used as measuring a figurative ownership of the stockholders in the property of a corporation, means that part of the company's assets which would be divided among the shareholders in case of dissolution; that is to say, the assets representing the amount of the original capital and profits in excess of existing debts. In *re Batterson*, 44 Atl. 548, 547, 72 Conn. 374.

#### Bank building.

The capital stock of a bank is all the property of every kind, whether in the form of money, bills of exchange, or any other property in possession, or anything into which the money originally contributed has been changed, or which it has produced. Hence, where the capital stock of a bank was exempted from taxation by its charter, its banking house was equally exempt, with every other part of its capital; and even though, in violation of its charter, the bank erected a building not needed for banking purposes, the building was not for that rea-



son liable to taxation, though the bank might be proceeded against by the state for violation of its charter. *Town of New Haven v. City Bank of New Haven*, 31 Conn. 106, 111.

The capital stock of a corporation is usually the representative of its property, and the property the representative of the capital stock. Nevertheless the charter of a bank, providing that the payment of a tax of a certain per cent. on each share of its capital stock should be in lieu of all other taxes, did not exempt the bank from the payment of a tax on a portion of its banking house used otherwise than as its place of business, or on other real estate held by it in excess of that which the charter permitted it to hold. *Bank of Commerce v. McGowan*, 74 Tenn. (6 Lea) 703, 706.

#### **Bank stock distinguished.**

See "Bank Stock."

#### **As capital.**

See, also, "Capital."

As used in Acts 1853, § 13, speaking of capital stock, and forbidding its withdrawal by or payment to the stockholders, it includes the capital of the corporation, on which it transacts business, where such capital consists of money, property, or other valuable commodities. *Martin v. Zellerbach*, 38 Cal. 300, 309, 99 Am. Dec. 365, 366 (approved in *City and County of San Francisco v. Spring Valley Waterworks*, 63 Cal. 524, 531).

#### **Capital distinguished.**

See, also, "Capital."

The capital stock of a corporation, strictly speaking, is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers of the stock on the initiation of the corporate enterprise. "Capital stock" is often used interchangeably with the word "capital" to express the true meaning of that word, to wit, the property and assets of the corporation; but the word "capital" is a more extensive term than "capital stock," including all of the funds, securities, credits, and property of whatever kind possessed by a corporation. *Christensen v. Eno*, 12 N. E. 648, 649, 106 N. Y. 97, 60 Am. Rep. 429.

Strictly speaking, capital stock in a corporation or association is quite different from capital of either, the one referring to the tangible, and the other to rights in property evidenced, in case of a corporation, by certificates of stock. But the terms are used interchangeably and synonymously in laws and decisions. The term "capital" as accurately described the intangible property rights of members of an unincorporated association engaged in the business of banking in the property of the association as the term "cap-

ital stock." *State v. Lewis*, 95 N. W. 388, 390, 118 Wis. 432.

There is a distinction between the capital and the capital stock of a corporation. The capital of a corporation is the property or means which the corporation owns, and it may vary in amount, while the capital stock is fixed, and represents the interest of the stockholders, and is their property. *Wells v. Green Bay & M. Canal Co.*, 64 N. W. 69, 72, 90 Wis. 442.

"Capital" and "capital stock" are, in legal intentment, synonymous, and are used in legislative acts as equivalent terms, though strictly not of the same meaning. "Capital stock" means not shares of stock, either separately or in the aggregate, but is intended to designate the property of the corporation subject to taxation, not in separate parcels, but in a homogeneous unity. *Foster v. Stevens*, 22 Atl. 78, 79, 63 Vt. 175, 13 L. R. A. 166.

Act Dec. 11, 1845, providing that the capital stock of a certain railroad company shall be forever exempt from taxation, is to be construed as meaning the stock issued by the corporation, which, "when subscribed and paid for, furnished the corporation with capital to build its road." It is distinguished from capital, and the statute does not exempt the capital of the road from taxation. *Tennessee v. Whitworth*, 6 Sup. Ct. 645, 649, 117 U. S. 129, 29 L. Ed. 830.

"Capital stock" is synonymous with "capital," and is part of the property vesting in the corporation in its corporate capacity. A fund consisting of unearned premiums held by a fidelity insurance company as a reinsurance reserve fund is a part of its capital, and is taxable under Laws 1896, § 908, providing for the taxation of the capital stock of every company. *People v. Feltner*, 65 N. Y. Supp. 523, 524, 31 Misc. Rep. 433.

"Capital stock" and "capital" are synonymous terms. In this general sense, it is money invested in business operations, whether that business be conducted by a single individual, a partnership, a corporation, or a government; and it makes no difference how the money is obtained—whether by labor, by borrowing, or otherwise. If the money is borrowed, it is represented in the hands of the lender by bonds, notes, or other papers; with the government, by governmental securities, sometimes called "stocks." But in such cases the lender is not a stockholder in the business. So far as the party himself is concerned, if the money borrowed or otherwise obtained is invested in his business, it is capital or stock in trade. This is the general meaning of the term. But when it is used in connection with a chartered or joint stock company made up of individuals, it has a somewhat more limited signification. It means then the money advanced by the

corporators or members as the capital, which is usually, for convenience, divided into equal amounts, called "shares," for which each member is entitled to a certificate showing the number of shares which he has in the company, or, in other words, the amount of money he has furnished to the common stock, which certificate is the evidence of his being a stockholder. *State v. Cheraw & C. R. Co.*, 16 S. C. 524, 528.

"Capital stock," as used in Civ. Code, § 309, providing that the directors of corporations must not make dividends, except from the surplus profits arising from the business, and must not divide or pay to the stockholders any part of the capital stock, is frequently otherwise and as well expressed by the simple word "capital," and means the money and property with which the company carries on its corporate business. *Kohl v. Lillenthal*, 22 Pac. 689, 691, 81 Cal. 378, 6 L. R. A. 520.

The word "capital," in relation to the taxation of corporations, has a well-defined meaning, for it and capital stock are used indiscriminately to designate the estate of the corporation. *Comstock, J.*, in *People v. Com'rs of Taxes*, 23 N. Y. 192, cited and approved in *People v. Coleman*, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762. Thus, in a statement by the corporation that its capital is worth par, and a certain amount of its capital stock has been paid in, such statement is equivalent to saying that the estate of the company is worth the amount of money paid in. *People v. Barker*, 28 N. Y. Supp. 971, 972, 75 Hun, 6.

The phrase "capital stock of a corporation" is sometimes used to mean the company's capital existing in money or property or both, and sometimes to mean the shareholders' stock, which is representative not merely of the existing and tangible property of the company, but also of its surplus, its dividend earning power, and its franchise and good will, as an established business. Within the tax law taxing the capital stock of corporations, it is used in the first sense. *People v. Pond*, 57 N. Y. Supp. 490, 493, 37 App. Div. 330.

#### As capital paid in.

"Capital," as employed in the charter of a railroad company which provided that, when the dividends exceeded 6 per cent. per annum on the capital stock, 6 per cent. of the dividends should be paid to a city, meant the capital paid in, and not the authorized capital. *City of Philadelphia v. Philadelphia & G. F. Pass. Ry. Co.*, 52 Pa. (2 P. F. Smith) 177, 180.

"Capital stock," as used in a statute which requires a certain per cent. to be paid annually on the capital stock of a bank, in lieu of any other taxation, is the amount of

funds paid in by the stockholders to be used by the banking association for banking purposes. *State Bank v. City of Milwaukee*, 18 Wis. 281, 284.

The words "stock" and "capital stock" may be defined as meaning the fund or property belonging to a firm or corporation, and used to carry on its business, whether it be for the purpose of adjusting and paying dividends to stockholders, or of regulating the amount of taxes, or of incurring a liability upon the basis of its capital stock, as authorized by law. The rights of the corporation must be measured not by nominal or authorized capital, but by the actual amount of capital paid in. *Appeal of Commonwealth*, 24 Wkly. Notes Cas. 530, 533, 129 Pa. 405, 18 Atl. 498, 5 L. R. A. 367.

The capital stock of a bank consists originally of the money paid in by the subscribers to the stock of the bank. This money changes its form, and is represented by notes of other persons; but it is held that in this form it is still capital stock, and therefore is to be exempt from taxation under a provision of the charter that the capital stock of the bank is not taxable for municipal purposes. *Town of Connersville v. Bank of State*, 16 Ind. 105.

"Capital stock," as used in Act Assem. March, 1872, entitled an "Act relating to the Ridge Avenue Railway Company" (section 3), providing that the company shall annually pay into the treasury of the city of Philadelphia, for the use of the city, a tax of 6 per cent. upon so much of any dividend declared which may exceed 6 per cent. upon their capital stock, means the capital stock which has been paid in, and not the capital stock subscribed for. *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 102 Pa. 190, 193.

#### Franchises.

The term "capital stock," as used in the statute providing for the taxation of the capital stock of a corporation, is, as has been said, a business photograph of all the corporate possessions and possibilities, and represents its business opportunities and capabilities, as well as its tangible assets that enter into and go to make up the value of the stock. It is well settled that franchises, although neither visible nor tangible, are property, which may be taxed the same as any other property. *State v. Duluth Gas & Water Co.*, 78 N. W. 1032, 1033, 76 Minn. 96, 57 L. R. A. 63.

The capital stock of a corporation represents not only the tangible property, but also the intangible, including therein all corporate franchises and all contract privileges and good will of the concern. *Henderson Bridge Co. v. Negley*, 63 S. W. 989, 990, 23 Ky. Law Rep. 746 (citing *Henderson Bridge Co. v.*

Commonwealth, 31 S. W. 486, 99 Ky. 623, 17 Ky. Law Rep. 389, 29 L. R. A. 73).

#### **Furniture and rental of office.**

The rental of an office and the value of office furniture of a manufacturing corporation do not constitute capital stock separate from that used in the business of manufacturing, as such office and furniture are merely incidents to such business, and the amount so used, therefore, was not taxable as capital stock. *People ex rel. Standard Wood Co. v. Roberts*, 47 N. Y. Supp. 122, 123, 20 App. Div. 514.

#### **As property belonging to corporation.**

In *Pacific Hotel Co. v. Lieb*, 83 Ill. 602, the court say: "The words 'capital stock,' as used in the revenue law, we have held, in *Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill. 561, and in other subsequent cases where the question has been before us, mean the property belonging to the corporation; and we have also held in those cases that it was designed by the law that all that belongs to the corporation as its property, whether tangible or intangible, of whatever nature or kind, should be valued, under this designation, for the purpose of taxation. *State Board of Equalization v. People*, 61 N. E. 339, 346, 191 Ill. 523, 58 L. R. A. 518.

The words "capital stock," in a law taxing a capital stock of a corporation, are intended to include all of the property of the corporation, and to have all of the property valued as an entirety. *Western Union Tel. Co. v. Norman* (U. S.) 77 Fed. 13, 22.

Within the provisions of Laws 1857, c. 456, § 3, providing that the capital stock of every company shall be assessed at its actual value, etc., the term "capital stock" denotes property owned by the corporation, and not the par or actual value of the shares issued to or held by its stockholders. *People v. Coleman*, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762. Neither par nor the actual value of all the shares issued by the corporation is necessarily the measure of the actual value of its capital—that is, property—but such value is to be ascertained by evidence and inquiry. *People v. Barker*, 25 N. Y. Supp. 340, 342, 72 Hun, 126.

Capital stock is the sum fixed by the corporate charter as the amount paid in or to be paid for by the stockholders for the prosecution of the business of the corporation, and for the benefit of the corporate creditors. The capital stock is to be clearly distinguished from the amount of property possessed by the corporation. While occasionally it happens that, under the terms of statutes pertaining to taxation, which have been drawn without regard to the technical meaning of the words, the court will construe all the actual property of the corporation to be capital stock, it is for the purpose of carrying

out the intention of the statute, and is not the real meaning of the terms. At common law the capital stock does not vary, but remains firm, although the actual property of the corporation may fluctuate widely in value, and may be diminished by loss or increased by gains; hence the term "capital stock paid in" means the entire capital and available assets of a company. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 32 S. W. 1097, 1101, 95 Tenn. (11 Pickle) 634, 31 L. R. A. 593, 49 Am. St. Rep. 943.

"'Capital stock' does not mean the identical lands, chattels, or other articles of property possessed by a corporation, nor shares of stock either separately or in the aggregate, but is intended to designate the property of the corporation subject to taxation, not in separate parcels, but as a homogeneous unit, partaking of the nature of personalty, and subject to the burdens imposed upon it at the domicile of the owner." *Quincy R. Bridge Co. v. Adams County*, 88 Ill. 615, 621.

The word "stock" has various significations, but, as applied to joint-stock companies or corporations, it means the property and franchises of the company. It is sometimes used to designate the certificate or scrip issued to the stockholders, but this is an inappropriate use of the word. *Williams v. Western Union Tel. Co.*, 48 N. Y. Super. Ct. (18 Jones & S.) 349, 367.

The phrase "capital stock," within the meaning of Rev. St. § 2746, providing that no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company, embraces the entire corporate property. If any part of the corporate property is not taxed within the state, the owners of shares of its stock who are residents of this state are not exempt by virtue of the provisions of that section from listing those shares for taxation in this state and paying taxes thereon; the exemption applying only in cases where the capital stock, i. e. all the corporate property, has been taxed within this state. *Hubbard v. Brush*, 55 N. E. 829, 830, 61 Ohio St. 252 (citing *Lee v. Sturges*, 46 Ohio St. 153, 19 N. E. 560, 2 L. R. A. 556; *Sturges v. Carter*, 114 U. S. 511, 512, 5 Sup. Ct. 1014, 29 L. Ed. 240).

"The term 'capital stock' means all the property and rights of the corporation, of every kind and nature, wherever located." *Ohio & M. R. Co. v. Weber*, 96 Ill. 443, 448.

#### **Real estate.**

In the case of a bank, which can be the owner of real estate only in a few cases, which are enumerated in its charter, any such real estate that it may thus own must be a part of its capital stock. Any property of

the company, whether it be land or promissory notes or specie, which they acquire and hold under the authority of their charter, is a part of their stock; and where the law provides for the taxation of a bank by the levy of the tax on the capital stock, an additional tax levied on its real estate is void. *State Bank v. Breckenridge* (Ind.) 7 Blackf. 395, 397.

Real estate within the state, purchased by a foreign corporation with surplus earnings, and not occupied by it, but leased, is not a portion of its capital stock employed within the state, the basis for taxation of a foreign corporation under Laws 1880, c. 542. *People v. Wemple*, 44 N. E. 787, 150 N. Y. 46.

#### As shares of stock.

See, also, "Capital"; "Share of Stock."

The words "capital stock," in Laws 1896, c. 908, § 182, authorizing the imposition of a franchise tax on such portion of the capital stock at par of the corporations as the amount of the capital employed within the state bears to the entire capital of the corporation, means share stock. *People v. Roberts*, 72 N. Y. Supp. 950, 952, 68 App. Div. 157.

"Capital stock," within the meaning of the exemption from taxation to a railroad corporation of its capital stock, covers the individual interest therein of the stockholders, and therefore a subsequent law imposing a tax on the shares owned by them impairs an obligation on the contract created by the charter giving the exemption. *Tennessee v. Whitworth* (U. S.) 22 Fed. 75, 76.

"Capital stock" means all the capital of a corporation, including both its shares of stock and its corporeal property. *People v. Chicago Gas Trust Co.*, 22 N. E. 798, 803, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319.

"Capital stock," as used in the articles of incorporation of a gas company, giving it power to purchase, hold, or sell the capital stock of any other company or companies, should be construed to include shares of stock, though there is a distinction, under certain circumstances and for certain purposes, between capital stock and shares of stock; capital stock meaning the entire property owned by the corporation, while a share in the stock is the right to partake, according to the amount put into the fund, of the surplus profit obtained for the use and disposal of the capital stock of the company to those purposes for which the company is constituted. The capital stock of a corporation is that which consists of, or may be divided into, shares; hence the capital stock of any gas company may be regarded as the aggregate of all the shares of such stock. *People v. Chicago Gas Trust Co.*, 22 N. E.

798, 799, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319.

"Capital stock," as used in the Revised Laws of Kentucky, providing for the taxation of capital stock of banks and other corporations, means the value of the shares of its capital stock. *First Nat. Bank v. Stone* (U. S.) 88 Fed. 409, 411.

The term "capital stock," when applied to a national bank, is sometimes used to designate the aggregate of the shares of stock issued by the bank. It is a different thing from the moneyed capital of the bank, held and owned by the corporation. *First Nat. Bank v. Kentucky*, 76 U. S. (9 Wall.) 353, 359, 19 L. Ed. 701.

The phrase "capital stock" is used in various senses. Strictly, it is the authorized capital actually subscribed; loosely, it is the fund paid in; still more loosely, it is the capital of the corporation, whether in money or property; and again, popularly, it is the aggregate of the stock made up of the shares of the stockholders. And where by charter a railroad's capital stock is forever exempted from taxation, and the road, with its fixtures, appurtenances, etc., became liable to taxation upon the expiration of 20 years, it being evident that the terms there used did not include the property of the road, it would seem that it was used in the sense of the aggregate of stock made up of the shares of the stockholders. *Memphis & C. R. Co. v. Gaines*, 3 Tenn. Ch. 604, 616.

The words "capital stock," as used in section 182 of the tax law, providing for a tax on the capital stock of corporations, refer to the capital or property of the corporation, and not to the share stock. In the case of a domestic corporation, the purpose is to tax that intangible property belonging to it, which is frequently of great value, and rests wholly in its right to exist and carry on business. *People v. Knight*, 77 N. Y. Supp. 398, 399, 75 App. Div. 164.

#### Shares of stock distinguished.

See, also, "Capital"; "Share of Stock."

The capital stock and the shares of the capital stock of a corporation are distinct things. The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the corporation, and the means of conducting its operations. It represents whatever it may be invested in. The shares of the capital stock are usually represented by certificates. Every holder is a cestui que trust, to the extent of his ownership. The shares are held and may be bought and sold and taxed like other property. Each share represents an aliquot part of the capital stock, but the holder cannot touch a dollar of the principal. The capital stock and the shares may both be taxed.

and it is not double taxation. *Farrington v. Tennessee*, 95 U. S. 679, 686, 24 L. Ed. 558.

The capital stock of a bank is a different thing from the bank stock or stock owned by individuals in the bank, and therefore an exemption from taxation of the capital stock does not exempt the stock owned by individuals. "Bank stock" means the individual interest in the dividends, as they are declared, of the stockholders, and a right to pro rata distribution of the effects on hand at the expiration of the charter. The capital stock of the bank is the whole undivided fund paid in by the stockholders, the legal right to which is vested in the corporation, to be used and managed in the trust for the benefit of the members. *Public Treasurer v. Petway*, 55 N. C. 396, 406.

The capital stock of a corporation is the amount subscribed, and very different from the shares of the capital stock, which are the integral parts of such stock, and owned by the members in proportion to the respective amounts subscribed. *Worth v. Petersburg R. Co.*, 89 N. C. 301, 305.

The capital stock of a corporation is a company's actual capital, paid in and possessed, which is used by it in the transaction and furtherance of its business. It is not at all or in any sense the share stock. *People v. Coleman*, 27 N. E. 818, 819, 126 N. Y. 433, 12 L. R. A. 762.

"Capital stock" means, not shares of stock, either separately or in the aggregate, but is intended to designate the property of the corporation subject to taxation, not in separate parcels, but in a homogeneous unity. *Foster v. Stevens*, 22 Atl. 78, 79, 63 Vt. 175, 13 L. R. A. 166.

"Capital stock," as used in Rev. St. c. 18, tit. 4, § 2, making it unlawful for the directors of a corporation to withdraw or in any way pay to the stockholders any part of the capital stock without the consent of the Legislature, does not mean share stock, but means the property of the corporation contributed by its stockholders, or otherwise obtained by it, to the extent required by its charter. *Skinner v. Smith*, 10 N. Y. Supp. 81, 86, 56 Hun. 437.

"Capital stock" is not synonymous with "shares of stock," but is a different thing, and forms a different subject of taxation. A tax on the one is not a tax on the other, nor is an exemption on the one an exemption on the other. *State v. Home Ins. Co.*, 19 S. W. 1042, 1043, 91 Tenn. (7 Pickle) 558.

"Capital stock" means, as used in the Illinois revenue law, providing that the capital stock of corporations shall be valued at its fair cash value, not the individual shares of stock, or blocks of such shares, but the stock as an entirety—the beneficial ownership of everything that enters into the prop-

erty of the corporation. The object of the statute is to reach, for the purposes of taxation, the property, tangible or intangible, of each corporation—if it be a railroad, its tracks, station houses, terminal facilities, real estate, and rolling stock, as also the opportunities, inherent in the corporation and its franchise, of creating earnings, such as the region it taps, the tonnage such region affords, the market it reaches, the advantages of its terminals, its capacities and prospects; in short, every consideration that gives it an inherent present or prospective value. *Chicago Union Transfer Co. v. State Board of Equalization* (U. S.) 112 Fed. 607, 611.

The term "capital stock," as used in the provisions of the statute relating to the appraisal of capital stock of a corporation for taxation, does not mean share stock, but it means the property of a corporation, contributed by its stockholders or otherwise obtained by it, to the extent required by its charter. *People v. Wemple*, 29 N. Y. Supp. 92, 94, 78 Hun. 63.

Capital stock and shares of stock are different things, and form different subjects of taxation. A tax upon the one is not a tax upon the other, nor is the exemption of one an exemption of the other. Thus an ad valorem tax may be levied upon the shares of stock of an insurance company, although its capital stock is exempt from taxation. *State v. Home Ins. Co.*, 19 S. W. 1042, 1043, 91 Tenn. (7 Pickle) 558.

The capital stock of a corporation, and the shares of stock into which the stock of the corporation may be divided, and held by individual shareholders, are two distinct pieces of property; and the surplus belonging to a bank is also distinct from the capital stock, for the very word "surplus" implies difference—that is, there is a capital stock, and there is a surplus over and beyond the capital stock, which surplus is the property of the bank until it is divided among the stockholders. *Bank of Commerce v. Tennessee*, 16 Sup. Ct. 456, 460, 161 U. S. 134, 40 L. Ed. 645.

The phrase "capital stock," as used in a statute providing for the taxation of the capital stock of corporations, means actual, tangible property, and not its share stock, which is to be assessed at its actual value. *People v. Dederick*, 55 N. E. 927, 929, 161 N. Y. 195.

#### **Surplus distinguished.**

See "Surplus."

#### **As trust fund for creditors.**

"The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be

managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. Equally unsound is the opinion that the obligation of a subscriber to pay his subscriptions may be released or surrendered to him by the trustees of a company. The capital stock paid in and promised to be paid in is a fund which the trustees cannot squander or give away. They are bound to collect what is unpaid, and carefully to husband it when received." *Bouton v. Dement*, 14 N. E. 62, 65, 123 Ill. 142.

The capital stock of a corporation is the amount contributed or agreed to be contributed by its stockholders, and, as to creditors, is, in equity, deemed a trust fund charged with the payment of the debts of the corporation, and must be treated as such by the corporation. *Farnsworth v. Robbins*, 31 N. W. 349, 350, 36 Minn. 369.

The capital of a corporation is that fund to which creditors look for payment of their claims. *Appeal of Cornell*, 6 Atl. 258, 260, 114 Pa. 153.

"The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships." *Sanger v. Upton*, 91 U. S. 56, 60, 23 L. Ed. 220.

#### CAPITAL STOCK TAX.

A capital stock tax is a property tax, but the property of a corporation for the purpose of taxation is reached through the tax imposed directly on the stock, the value of which is ascertained in the first instance as directed by the act authorizing the tax. *Commonwealth v. Pennsylvania Coal Co.*, 47 Atl. 740, 741, 197 Pa. 551.

#### CAPITATION TAX.

A capitation tax is one upon the person, simply, without any reference to his property, real or personal, or to any business in which he may be engaged, or to any employment which he may follow. It is rightfully imposed because of the protection which the government affords to the person, independent of the connection or relation of the person to anything else. *Gardner v. Hall*, 61 N. C. 21, 22.

A poll or capitation tax is one imposed on a person without regard to his property, business, or other circumstances. But the liability to work on highways, as imposed by statute on all able-bodied men and citizens between the ages of 21 and 50 years, is in the nature of military and jury service, rather than of a poll tax. *Leedy v. Incorporated Town of Bourbon*, 40 N. E. 640, 641, 12 Ind. App. 486.

A capitation tax is a tax on the poll, without regard to property, business, or other circumstances. The *Head-Money Cases* (U. S.) 18 Fed. 135, 139.

#### CAPTAIN OF THE WATCH.

The captain of the watch on a vessel is a kind of foreman or overseer, who, under the supervision of the mate, has charge of one of the two watches into which the crew is divided for the convenience of work. He calls them out and in, and directs them where to store freight, which packages to move, when to go or come ashore and generally directs their work, and is an officer, within the meaning of Rev. St. U. S. § 347, providing for the punishment of every master or other officer of any American vessel who beats, wounds, etc. *United States v. Trice* (U. S.) 30 Fed. 490, 491.

#### CAPTATION.

"Captation" is a term of the civil law, usually defined as the act of one who succeeds in controlling the will of another so as to become master of it. Captation takes place by those administrations of attachment and friendship, in whatever form evidenced, which one person uses to render himself agreeable to another and secure his good will. *Zerega v. Percival*, 15 South. 476, 480, 46 La. Ann. 590.

#### CAPTION.

Caption or otherwise, see "Otherwise."

##### Of indictment.

The caption of an indictment is its style, preamble, or commencement, and should describe the court before which it was found. *State v. Sutton*, 5 N. C. 281, 282.

The caption of an indictment was originally only a copy of the style of the court at which the indictment was found. By the strictest rule of the common law, the caption was deemed sufficient if it described with reasonable certainty the court before which the indictment was found, the time and place where it was found, and the jurors by whom it was found. Both the caption and the commencement are purely formal, and they may be amended, if faulty, by the record, in the proper manner. *Beebe v. United States*, 11 N. W. 506, 509, 2 Dak. 292.

The caption is no part of an indictment proper, but is merely the ministerial act of the clerk or prosecuting officer. It is therefore amendable by reference to the records of the court in which it was found. *State v. Mowry*, 43 Atl. 871, 873, 21 R. I. 376.

The caption of an indictment is no part of the indictment itself, since it is not pre-

sented by, or does it receive the sanction of, the grand jury, or the signature of their foreman. It is merely a history of the proceeding previous to the finding of the indictment, and sets forth the style of the court, the time and place of its session, by whom held, and their title and authority, by whom they are to inquire, the names of the grand jurors, their qualifications, whether sworn or affirmed, and, if affirmed, the reason of it, and also their presentment. *State v. Jones*, 9 N. J. Law (4 Halst.) 357, 365, 17 Am. Dec. 483; *People v. Bennett*, 37 N. Y. 117, 122, 93 Am. Dec. 551; *State v. Brickell*, 8 N. C. 354, 355; *Mitchell v. State*, 16 Tenn. (8 Yerg.) 514, 528; *Ex parte Bain*, 121 U. S. 1, 7, 7 Sup. Ct. 781, 785, 30 L. Ed. 849; *United States v. Thompson* (U. S.) 28 Fed. Cas. 98, 100; *Taylor v. Smith* (Tenn.) 86 S. W. 970, 976.

#### Of statute.

"Caption," as used in Const. art. 2, § 17, requiring all acts which amend former laws to recite in their caption or otherwise the title of the act amended, is synonymous with "title." *State v. Runnels*, 21 S. W. 665, 666, 92 Tenn. (8 Pickle) 320; *Shelton v. State*, 32 S. W. 967, 968, 96 Tenn. (12 Pickle) 521; *State v. Yardley*, 32 S. W. 481, 483, 95 Tenn. (11 Pickle) 540, 34 L. R. A. 656; *Memphis St. R. Co. v. State*, 75 S. W. 730, 733, 110 Tenn. 598 (citing *State v. Runnels*, 21 S. W. 665, 92 Tenn. [8 Pickle] 320).

## CAPTURE.

#### See "Lawful Capture."

A capture is a seizure of a vessel as prize, with the intention or expectation of obtaining a condemnation. *Richardson v. Maine Fire & Marine Ins. Co.*, 6 Mass. 102, 109, 4 Am. Dec. 92.

"Capture" is a term specially applicable to a taking by man-of-war or by privateers, and it matters not if the vessel be carried into port and condemned as a prize. *Fifield v. Insurance Co.*, 47 Pa. (11 Wright) 166, 187, 86 Am. Dec. 523.

A capture is the taking of property by one belligerent from another. Capture is a belligerent right attached to a state of hostility, and cannot exist when hostilities have terminated. In re *Whitfield*, 11 Ct. Cl. 444, 456.

A capture is a taking of a vessel or cargo by the enemy as a prize in time of open war or by way of reprisal, with intent to deprive the owner of it; but usage and the course of decisions by the courts have very much widened this meaning, and it may now embrace the taking of a neutral ship and cargo by a belligerent *jure belli*; also the forcible taking of a vessel by a friendly power in time of peace, and even by the gov-

ernment itself to which the assured belongs. *Mauran v. Alliance Ins. Co.*, 73 U. S. (6 Wall.) 1, 10, 18 L. Ed. 836.

The capture by a privateer, in commission under the government of the so-called Confederate States, of an insured vessel, does not render the insurers liable upon the policy, wherein liability for "loss by seizure, capture, or detention or the consequences of any attempt thereat," was excepted. *Fifield v. Insurance Co.*, 47 Pa. (11 Wright) 166, 176, 86 Am. Dec. 523.

A capture is when a vessel is taken as a prize of war, in a spirit of depredation, with a design to deprive the owner of it. The taking may be either by way of reprisals, or by pirates, and, by the weight of authority, a capture is broad enough to include a taking by pirates. *Marsh. Ins.* 422. *Dole v. New England Mut. Marine Ins. Co.* (U. S.) 7 Fed. Cas. 837, 852. See, also, *Dole v. New England Mut. Marine Ins. Co.*, 88 Mass. (6 Allen) 373, 387; *Dole v. Merchants' Mut. Marine Ins. Co.*, 51 Me. 465, 476.

In point of law, nothing more is necessary, to constitute a capture, than an intention to capture, followed up by an actual or constructive possession of the property. Force and violence or physical support are not required. It is sufficient that there be a *dedito* or submission on the one side, and an asserted possession on the other. *The Alexander* (U. S.) 1 Fed. Cas. 357, 360.

The terms "prize" and "capture" as used in Act Cong. Aug. 16, 1861, declaring private property used in promoting insurrections to be the lawful subject of prize and capture, were not employed in their technical sense of property taken at sea, but property found on shore, or even land, might be condemned under the act. *United States v. Athens Armory* (U. S.) 24 Fed. Cas. 878, 880; *Union Ins. Co. v. United States*, 73 U. S. (6 Wall.) 759, 763, 18 L. Ed. 879.

"Capture" and "prize" are not convertible terms, and, for the subject of capture to be made prize for the benefit of the captors, the taking must meet the conditions imposed by the United States statute entitled "Prize." *United States v. Dewey*, 23 Sup. Ct. 415, 417, 188 U. S. 254, 47 L. Ed. 463.

The word "capture," in the law of marine insurance, means a seizure as prize, with the intent or expectation of obtaining a condemnation. *Richardson v. Maine Fire & Marine Ins. Co.*, 6 Mass. 102, 106, 4 Am. Dec. 92.

A policy of marine insurance provided that, in case of capture or detention, the assured should not have a right to abandon therefor until proof was exhibited of a condemnation, or of a continuance of the detention by capture or other arrest at least 90 days. The vessel was seized while on an

illicit voyage. Held, that the words "capture," "detention," etc., meant illegal arrest, seizure, etc., and could not be extended to recover the loss sued for; the law being clearly settled that an insurance does not cover an illegal voyage unless by the terms of the contract the intention to do so is expressed, or unless the voyage insured is known to the insurer to be illegal at the time when he makes the contract. *Archibald v. Mercantile Ins. Co.*, 20 Mass. (8 Pick.) 70, 74.

#### **As peril of the sea.**

See "Peril of the Sea."

#### **Seizure distinguished.**

A "capture," in technical language, is a taking by military power, while a seizure is a taking by civil authority. *United States v. Athens Armory* (U. S.) 24 Fed. Cas. 878, 880.

### **CAR.**

See "Box Car"; "Freight Car"; "Hand Car"; "Passenger Car"; "Railroad Car"; "Refrigerator Car"; "Street Railway Cars"; "Trading Car"; "Trailer."

Other cars, see "Other."

The term "car" is generally used in this country for any wheeled vehicle used for carrying goods or passengers on a railroad, whether the road be a tramway over the streets of the city to be operated by horses, or a more extended road to be worked by steam. *State v. Lang*, 14 Mo. App. 247, 249.

#### **As carriage.**

See "Carriage."

#### **Coach synonymous.**

A street railroad franchise was granted on condition of the payment of an annual license fee for each car now allowed by law. At that time license fees were required, by an old ordinance, for each accommodation coach or stagecoach, and it was held that the word "car" in the franchise and the word "coach" in the ordinance both referred to a conveyance to accommodate travel, and that the city was entitled to the same license fee on a car as was fixed by the old ordinance on a coach. The court said, in definition, a "car" or "coach," or "stage," or a "stagecoach" is the same. They are vehicles that turn or that run by turning on wheels. Place boards over or between wheels, and we have a platform car adapted to freight. Place benches or chairs upon the platform, and we still have a car, but adapted to passengers, and then easily termed a "carriage." Instead of benches or chairs, put on the platform the body of a stagecoach, and we have such a railroad car as served at the inaugura-

tion of the earliest railroad in our state. It is plain that by adaptation and improvement the modern railway car has been evolved from the old-fashioned stagecoach. In common language, a railroad carriage designed for passengers is called indifferently a "coach" or "car." In every collection of words arranged according to the ideas which they express, these and others, we think, will be found classed together as having the same signification. Neither the words "coach," "stage," nor "car" can be said to be words of art, or to have any legal or fixed meaning distinguishing one from the other, or any one of them from several other terms implying a vehicle or conveyance. *City of New York v. Third Ave. R. Co.*, 22 N. E. 755, 117 N. Y. 404, 646.

#### **Engine and tender.**

A railroad engine and its tender are one and inseparable, and, while both may properly be classed as "cars" in the construction of some statutes, it does not necessarily follow that they should be so classed in the construction of all statutes, and an engine is not a "car" within the statute providing that railroad companies shall not, under certain conditions, put in use any car not equipped with automatic couplers. *Bryce v. Burlington, C. R. & N. R. Co.*, 93 N. W. 275, 119 Iowa, 274.

The tender of a locomotive engine engaged in interstate commerce is a "car" within the scope of the act of Congress requiring cars engaged in interstate commerce to be equipped with automatic couplers. A tender is not a locomotive engine or component part thereof, but is a small car carrying water and fuel for the engine, and to which the first passenger or freight car of the train is usually coupled. *Winkler v. Philadelphia & R. R. Co. (Del.)* 53 Atl. 90, 92.

#### **Express car.**

An express car is a railroad car within Rev. St. § 4410, punishing the breaking and entering a railroad car with intent to commit a felony. *Nicholls v. State*, 68 Wis. 416, 423, 32 N. W. 543, 60 Am. Rep. 870.

#### **Hand car.**

"Car," as used in Code 1886, § 2590, subd. 5, allowing an employé to recover from his employer for personal injuries received in the employment by reason of the negligence of a co-employé having charge of the car, locomotive, etc., includes a hand car. "It is argued that, as the word 'car' is used in connection with the words 'locomotive,' 'engine,' and 'train,' it was intended to mean a vehicle used on the railway for the transportation of passengers or freight, which is propelled by a locomotive or engine, and forms a part of a train. It is true that, in determining the true sense of a word which has a variety of



meanings, regard is to be had to the other words with which it is associated, and subject-matter in relation to which it is used. As the clause of the statute which is here under consideration has reference to injuries received in railway service, it seems plain that the word 'car,' as here used, does not include such vehicles moved on wheels as are not in use on railways, though there are such vehicles that properly may be called cars, and it is not difficult to select from the several definitions of the word 'car,' as found in the dictionaries, one which is applicable to the word as used in the statute. The Century Dictionary gives, among other definitions, a vehicle running upon rails. One of Webster's definitions is a vehicle adapted to the rails of a railroad." *Kansas City, M. & B. R. Co. v. Crocker*, 11 South. 262, 264, 95 Ala. 412.

Within the provision of a Code rendering railroad companies liable for injuries done by the running of cars, hand cars are included, as well as those propelled by steam. *Thomas v. Georgia R. & Banking Co.*, 38 Ga. 222, 224.

*Sayles' Ann. Civ. St. art. 4560f*, provides that every railroad corporation shall be liable for all damages sustained by any employé thereof, while engaged in operating its cars, by reason of the negligence of any other employé, irrespective of the fact that such employés were fellow servants. In discussing the meaning of the word "car" in this statute, the court says that in common acceptance, and under the definitions, the word "car" signifies any vehicle adapted to the rails of a railroad, and would embrace in its meaning a hand car as well as a freight or passenger car, and holds that the legal representatives of a workman injured by the negligent operation of a hand car were entitled to recover. *Perez v. San Antonio & A. P. Ry. Co.*, 67 S. W. 137, 139, 28 Tex. Civ. App. 255.

#### **Push car.**

A push car eight or ten feet long and three or four feet high, used for transporting rock down an inclined plane to a rock crusher, is a car, within Rev. St. art. 4560f, providing for recovery of damages for injuries to railroad employés while engaged in operating cars. *Texas & P. R. Co. v. Webb*, 72 S. W. 1044, 1045, 31 Tex. Civ. App. 498 (citing *Perez v. San Antonio & A. P. Ry. Co.*, 67 S. W. 137, 28 Tex. Civ. App. 255).

#### **CAR LOAD.**

The meaning of the term "car load," in a contract for a certain number of car loads of brewer's rice, is to be determined in fixing the quantity of rice to be delivered by the custom of trade, in the absence of any agreement as to the quantity necessary to make a car load. *Bullock v. Finley* (U. S.) 28 Fed. 514, 515.

A bill of lading for lumber, describing it as a "car load," does not state the quantity of lumber, as required by Rev. St. 1879, art. 280, imposing a penalty on common carriers for refusing to give, when demanded, a bill of lading, stating the quantity of goods received for transportation. A car load of lumber is an indefinite quantity. Webster defines "quantity" as that which answers the description how much. It has the attribute of being so much, and not more or less. *Texas & P. Ry. Co. v. Cuteman* (Tex.) 14 S. W. 1069, 1070.

"Car loads," as used in a contract for delivery of wood, means car full; and the fact that cars vary in sizes, so that different amounts of wood would be carried on different cars, does not create such an element of uncertainty in the amount as to render the contract void for indefiniteness. *Indianapolis Cabinet Co. v. Herrmann*, 34 N. E. 579, 581, 7 Ind. App. 462.

#### **As ten tons.**

The term "car load," by the custom of shippers and by usage among railroads, has come to be defined as an amount of freight weighing 20,000 pounds; and hence, where a contract of shipment by rail does not define what shall constitute a car load, such general custom among railroad men and shippers will govern the contract. *Goode v. Chicago R. I. & P. Ry. Co.*, 60 N. W. 631, 92 Iowa, 371.

According to the construction placed upon the term "car load" by the Railroad Commissioners of Missouri, acting under Rev. St. 1879, § 833, providing for the appointment of railroad commissioners, empowered to fix maximum rates at so much per "car load," it means 10 tons. *Ross v. Kansas City, St. J. & C. B. R. Co.*, 19 S. W. 541, 543, 111 Mo. 18; *Pugh v. Kansas City, St. J. & C. B. R. Co.*, 24 S. W. 440, 118 Mo. 506.

A corporation commission fixed railroad freight rates for fertilizers, declaring that 20 per cent. higher rates than those fixed might be charged for shipments less than a car load, and that 10 tons should be regarded as the minimum car load. The court held that the commission's order was not ultra vires, on the ground that the commission had no power to regulate the amount of merchandise which should constitute a transportation car load, since the provisions of the order should be construed merely as determining what should amount to a car load, in determining the rate to be charged, and not as an attempt to regulate the mode of transportation, or prohibit the shipment of more than 10 tons in a car, and, in passing upon the question, said that it is common knowledge that an actual car load (that is, a car filled with one shipment) can be more cheaply and conveniently transported than one containing several shipments consigned to different per-

sons, and perhaps at different stations. There is less handling and less risk of mistake or loss. It is probable that originally an actual car load fixed the car-load rate, but when cars became larger, and their capacity greater than the average wholesale shipment, it was deemed just and proper to fix upon an arbitrary car load as the standard of rates, in order to prevent what would otherwise amount to a large average increase. *Corporation Commission v. Seaboard Air Line System*, 87 S. E. 266, 268, 127 N. C. 283.

#### CAR PULLER.

A car puller is a device used to pull cars by means of a rope attachment hitched to cars, and operated by means of a drum or spool, around which the rope winds and unwinds; the power being supplied by machinery attached to the engine. *Decatur Cereal Mill Co. v. Gogerty*, 80 Ill. App. 632, 635.

#### CAR SERVICE.

Car service is a demurrage charge made by railroad companies of \$1 per day on each car detained over 48 hours in unloading. *Everingham v. Halsey*, 78 N. W. 220, 221, 108 Iowa, 709.

#### CARBON.

Electric carbon sticks of various lengths, to be cut to required lengths, and finished for use in electric lighting, should be assessed as carbon not specially provided for, under Tariff Act 1897, p. 97. *R. F. Downing & Co. v. United States (U. S.)* 120 Fed. 1014.

#### CARBONACEOUS ANODE.

A carbonaceous anode includes anodes made partly of carbon and partly of some other substance, and covers an anode made entirely of carbon. *Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co. (U. S.)* 55 Fed. 301, 307.

#### CARBONATE OF BARYTA.

Commercial carbonate of baryta is exempt from duty under Tariff Act July 24, 1897, § 2, exempting from duty baryta, carbonate of, or witherite. *Gabriel & Schall v. United States (U. S.)* 121 Fed. 208.

#### CARCASS.

Webster defines "carcass" to be the body of an animal when dead. *Whitson v. Culbertson*, 7 Ind. 195, 196.

#### CARDINAL POINTS.

"Cardinal points," as used in an agreement that land should be surveyed in squares,

to be cardinal points, should be construed in its popular meaning, as the cardinal points indicated by the magnetic needle, and not by the true meridian, which is, strictly and technically speaking, the meaning of that expression. *Finnie v. Clay*, 5 Ky. (2 Bibb) 351, 352.

#### CARDS.

Within the meaning of a statute prohibiting the "playing of games of chance or any gambling device whatever," games of chance with cards are included. "Cards" are as much a gambling device as any device yet invented. *Eubanks v. State*, 5 Mo. 450, 451.

#### CARE.

See "Adequate Care"; "All Possible Care, Skill, or Foresight"; "Due Care"; "Extraordinary Care"; "Great Care or Diligence"; "Highest Degree of Care and Diligence"; "Human Care and Foresight"; "Ordinary Care"; "Reasonable Care"; "Special Care and Diligence"; "Take Care of"; "Utmost Care"; "Want of Care."

Especial care, see "Especial."

The words "care of American Express Co.," appearing on the goods alone, and not being mentioned in the receipt given by the company, indicated merely that, if the consignee could not be found, they might be delivered into the care of the express company. *Chicago & N. W. R. Co. v. Merrill*, 48 Ill. 425, 427.

Where a package is sent by express to the care of another, a delivery to such other is a compliance with the contract. *Ela v. American Merchants' Union Exp. Co.*, 29 Wis. 611, 615, 9 Am. Rep. 619.

A bill of lading issued by defendants required the goods to be delivered as "addressed on the margin," and the margin contained the words, "G. F. W., Providence, R. I., care A. T. Co., Buffalo." Defendants contended that the words "care A. T. Co., Buffalo," which was the end of defendant's line, defined the end of their transportation contract, and that they were therefore not liable for a loss occurring in the further transportation of the goods. Held, that the address in the margin referred to required defendants to deliver the goods at Providence, R. I., and to complete the contract in connection with the A. T. Co. from Buffalo, in whose care the goods were shipped from that point, and that the contract was therefore a through contract, not limiting the carrier's liability for loss occurring on its own line. *Wahl v. Holt*, 26 Wis. 703, 707.

The use of the words, "In care of F. K.," in a letter directed to A., indicate that

the letter is to be delivered through K. to A. *United States v. Hilbury* (U. S.) 29 Fed. 705.

#### **As custody.**

"Care," as used in Cr. Code, § 75, making it criminal for any employé, etc., to embezzle funds under his care and in his possession by virtue of his employment, is the equivalent of "custody," and may mean charge, safe-keeping, preservation, or security. *Ker v. People*, 110 Ill. 627, 649, 51 Am. Rep. 706.

A plea alleging that plaintiff had the "care, direction, and management" of a ship, which defendant was charged with having neglected to load according to contract, was construed to mean the actual care, direction, and management, and not merely the legal care, direction, and management. It is equivalent to a charge of actual bad care, direction, and management, which included such conduct on the part of the master and crew. *Taylor v. Clay*, 9 Q. B. 713, 723.

The "care, management, or control of any billiard table," within the meaning of a statute prohibiting any person having the care, management, and control of any billiard table from allowing minors to congregate in his place, is not shown in an indictment describing defendant as having the control and management of "said saloon, in which were kept billiard tables." *Hanrahan v. State*, 57 Ind. 527, 528.

#### **As diligence.**

Diligence synonymous, see "Diligence."

"Care" is undoubtedly a relative term, or, rather, conveys a relative idea as to the degree necessary to be observed under circumstances. It is different, certainly, where there is reason to apprehend danger, from that degree to be exercised when it is not to be apprehended. *Pennsylvania R. Co. v. Ogier*, 35 Pa. (11 Casey) 60, 66, 78 Am. Dec. 322.

"Care," like its correlative term, "negligence," is a relative term, and is to be judged by the circumstances as they exist, not as they might have existed under other and different conditions. *Fox v. Oakland Consol. St. Ry.*, 50 Pac. 25, 47, 118 Cal. 55, 62 Am. St. Rep. 216.

"Care" is undoubtedly a relative term, or, rather, conveys a relative idea as to the degree necessary to be observed under circumstances. *Smith v. Day* (U. S.) 86 Fed. 62, 64 (citing *Pennsylvania R. Co. v. Ogier*, 35 Pa. 60, 78 Am. Dec. 322).

"Care," as used with reference to liability for personal injuries, means such care as a man of ordinary prudence and caution would exercise under similar circumstances. "Care" and "negligence" are terms entirely relative, varying in degree with every pos-

sible change of circumstances. "Ordinary care" may mean very slight care in one state of circumstances, and comparatively very great care in another. One may drive a vehicle over a country road at a rapid rate of speed, and yet be free from every imputation of negligence, while, if he drive at the same rate through the streets of a populous city, he would be guilty of the grossest want of care, yet the measure of his legal duty in each case would be the exercise of ordinary care, graduated to suit the hazards of each changing exigency. So the ordinary care which is exacted from one person in the custody of a valuable jewel is the same in legal principle as, though different in degree from, the ordinary care required from another as the custodian of a grindstone. In the one case it is the care usually taken by prudent custodians of jewels; in the other, that usually taken by prudent custodians of grindstones. *Mattson v. Maupin*, 75 Ala. 312, 313.

"Care," as used in reference to the rule that whoever uses a highly destructive agency is held to a correspondingly high degree of care, means more than mere mechanical skill. It includes circumspection and foresight with regard to reasonable, probable contingencies. *Anderson v. Jersey City Electric Light Co.*, 43 Atl. 654, 655, 63 N. J. Law, 387.

"Negligence," "care," and "diligence" are more or less relative terms. They cannot always be defined arbitrarily, applicable indifferently to every state of facts. They cannot always be determined abstractly. Care and diligence must necessarily be judged of by the nature of the work to be done, the instrument to be used, the hazard and danger to life and limb from the character of the service to be performed. *Carter v. Kansas City Cable Ry. Co.* (U. S.) 42 Fed. 37, 38.

Care is said to be divided into three degrees: (1) Slight care; (2) ordinary care; (3) great care. *Gulf, C. & S. F. Ry. Co. v. Smith*, 28 S. W. 520, 522, 87 Tex. 348.

#### **Duty to repair implied.**

The duty of the "care and keeping" of the schoolhouse and other property belonging to the district, imposed by statute on the school board, not merely authorizes, but requires, the board to preserve and care for the schoolhouse. This duty is not, like that of a janitor, one of personal attention and manual labor, but, like that of a trustee, one of supervision. They are not personally to sweep and dust and clean, or bring wood and make fires, but to see that it is done, and to that end, may employ assistants, and bind the district for their pay. "Care and keeping," when used in connection with a trust like this, imply the right to preserve the building in the condition in which it is placed

in their custody, and make good the waste and injury to which all buildings, and especially public buildings like a schoolhouse, are subject—in other words, to repair. It may not imply the right to remodel and improve, but it implies the right to do all that may come fairly and strictly within the term "repair." *Conklin v. School Dist. No. 37*, 22 Kan. 521, 525.

#### As maintenance.

"Care," as used in a bequest of a legacy for the care of a person, is substantially the same as the maintenance of such person. *Kelly v. Jefferis* (Del.) 50 Atl. 215, 216, 3 Pennewill, 286.

Within the meaning of a will providing for a gift of property to a person who may take care of testator's wife the word "care" means attention, as well as moneys, maintenance, and necessities of life. *Christy v. Pulliam*, 17 Ill. (7 Peck) 59, 61.

A divorce in which the "care and custody" of a child were decreed to the wife, without charging its maintenance to either spouse, does not change the duty of support from the husband to the wife. *Keller v. City of St. Louis*, 54 S. W. 438, 152 Mo. 596, 47 L. R. A. 391.

#### As protection.

"Care," as used in the title of an act to provide for the branding, herding, and care of stock, is synonymous with the word "protection," and therefore sufficiently expressed an object. *In re Pratt*, 84 Pac. 680, 681, 19 Colo. 138.

#### CARE TAKER.

"A care taker is defined as one employed in a building or on an estate during the absence of the owner, to look after goods or property of any kind (Cent. Dict. 823), or as one employed to watch over or keep in order property, as a house, in the absence of the family" (Stand. Dict.). *Hill v. Coates*, 69 N. Y. Supp. 964, 965, 34 Misc. Rep. 535.

#### CAREFUL.

The word "careful," within the meaning of a statement that an obvious danger arising from defective appliances may be avoided by the operator being careful, means additional or more than ordinary care. *Lasch v. Stratton*, 42 S. W. 756, 763, 101 Ky. 672.

#### CARELESS.

"Careless" means without exercising that degree of care which a person of ordinary common sense and prudence, under like circumstances and in the performance of a like act, would have exercised. *Flesh v. Lind-*

*say*, 21 S. W. 907, 909, 115 Mo. 1, 37 Am. St. Rep. 374.

"Careless," as used in a finding stating that plaintiff was careless in working near the shaft without removing his coat or protecting his garments, is equivalent to "negligent," since negligence is the failure to exercise such care as the circumstances require. *Norfolk Beet Sugar Co. v. Preuner*, 75 N. W. 1097, 1098, 55 Neb. 656.

The use of the words "careless manner" in a publication by a newspaper that plaintiff had been discharged for his general careless manner in attending to business, does not necessarily imply unskilled and incompetent, and therefore the publication is not libelous, and cannot be made so by innuendo. On the contrary, such words are entirely consistent with the fact that the plaintiff is fitted, skilled, and competent. *Ratzel v. New York News Pub. Co.*, 73 N. Y. Supp. 849, 851, 67 App. Div. 598.

An allegation and proof that persons are "negligent and careless" is not allegation or proof that they were incompetent. A competent person may be careless, and an incompetent person may, as far as his knowledge or skill goes, be careful. *Kelly v. Cable Co.*, 84 Pac. 611, 613, 13 Mont. 411.

In an action against a railroad company for wrongful ejection from its train, an instruction that whenever an element of malice or oppression, or a reckless disregard of the rights of others, enters into a transaction, and when the act is done on the strict line of duty of the conductor, but done under a state of facts not justifying the act done, and in a wrongful or perhaps careless manner, the law authorizes exemplary damages, was not erroneous because of the use of the expression "careless manner"; the word "careless" being used in the sense of "reckless." *Choctaw, O. & G. R. Co. v. Hill*, 75 S. W. 963, 965, 110 Tenn. 396.

The words "reckless" and "careless" do not impute willfulness or intention. They mean nothing more than simple negligence. Hence it is held that where a complaint in an action for injuries averred that the injuries occurred through the reckless, careless, and negligent acts of defendant in striking plaintiff with a pistol, which was discharged, and there was no allegation that the shooting was intentional, instructions authorizing a recovery on proof showing a willful and intentional shooting were erroneous. *Greathouse v. Croan* (Ind. T.) 76 S. W. 273, 275.

#### CARELESSNESS.

"Carelessness" means lack of ordinary care; that is, lack of such care as a man of ordinary care would exercise under the particular circumstances of the case. *Lago v. Walsh*, 74 N. W. 212, 214, 98 Wis. 348.

In usual parlance, "misconduct" means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand; and carelessness, negligence, and unskillfulness are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness, an abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. *Citizens' Ins. Co. v. Marsh*, 41 Pa. 386, 394.

The terms "carelessness" and "negligence," in law, are synonyms. *Bindbeutel v. Street Ry. Co.*, 43 Mo. App. 463, 470.

The words "carelessness or negligence," which are used in the statute rendering counties liable for injuries to private property in consequence of a riot, when such injuries are not occasioned by the carelessness or negligence of the owner, mean, according to their normal usage, heedlessness or inattention, and apply to an omission to do something which operates approximately to bring about a result which will not occur if such carelessness or negligence does not exist. In respect to property which has been injured or destroyed by a mob, the idea of the Legislature was that the party should not recover if he omitted some obvious precaution, or failed to exercise some care, which, if it had been timely bestowed, in view of the threatened or apprehended danger, would have averted the calamity. *Blodgett v. City of Syracuse*, 36 Barb. 526, 531.

"Carelessness" and "negligence," as used in Rev. St. art. 2899, making the proprietor or owner of a railroad liable for injuries arising from the "carelessness or negligence" of his servants, are synonymous, since negligence is but the omission of care, and carelessness is etymologically the same thing. *Turner v. Cross*, 18 S. W. 578, 579, 83 Tex. 218, 15 L. R. A. 262.

## CARET.

See "Signs."

## CARGO.

See "Full and Complete Cargo"; "With Cargo."

The word "cargo," *ex vi termini*, means the goods on board of the vessel. *Seamans v. Loring* (U. S.) 21 Fed. Cas. 920, 924.

A charter party requiring a ship of 261 tons to load a "full and complete cargo" requires the ship to put on board as much goods as she is capable of carrying with safety—not necessarily 261 tons. *Hunter v. Fry*, 2 Barn. & Ald. 421, 426.

"A cargo is the lading of a ship or other vessel, the bulk or dimension of which is to be ascertained from the capacity of the ship or vessel; and, where the name of the ship or vessel is in the contract, her capacity for carrying or the bulk of her cargo need not be stated, for the word 'cargo' embraces all that the vessel is capable of carrying." *Flanagan v. Demarest*, 26 N. Y. Super. Ct. (3 Rob.) 173, 181.

Cargo is a lading of a vessel, and means everything that is put aboard the vessel for carriage. *Phile v. The Anna* (Pa.) 1 Dall. 197, 206, 1 L. Ed. 98; *Sargent v. Reed*, 2 Strange, 1228.

Generally speaking, a cargo means the entire load of the ship which carries it, and it may be assumed that, when one man undertakes to sell and another to buy a cargo, the subject-matter of the contract is to be the entire load of the vessel. *Pinckney v. Dambmann*, 19 Atl. 450, 452, 72 Md. 173.

As used in a policy of insurance: "\$10,000, namely: \$2,326 on the cargo, \$1,860 on the freight, \$5,814 on the profits on board of the brig Dick, freight valued at \$30,000 and profits at \$25,000"—the word "cargo" means, not the property on board exclusively belonging to the shipowner, but all the property constituting the ship's lading—all the property on which freight and profits were to accrue. *Bayard v. Massachusetts Fire & Marine Ins. Co.* (U. S.) 2 Fed. Cas. 1065, 1068.

A charter party providing that "the owner shall have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage," etc., means the cargo from time to time put on board the vessel. *Gilkison v. Middleton*, 2 C. B. (N. S.) 134, 154.

### Animals on deck.

The word "cargo" does not apply exclusively to goods, but may be applied to steerage passengers, but by American writers the term has been construed as applying to goods only. 1 Phil. Ins. 185. According to Postlethwaite, "cargo" signifies all the merchandise and effects which are laden and brought on ship, exclusive of the soldiers, crew, rigging, ammunition, provisions, etc., but mules on deck cannot be protected as cargo, because they are exposed to a greater risk. *Wolcott v. Eagle Ins. Co.*, 21 Mass. (4 Pick.) 429, 435.

"Cargo," as used in a marine policy, refers only to the goods below hatches, and not to those stored on deck. "The word 'cargo,' in an order for insurance, does not ordinarily cover live stock; but, if live stock constitutes the only article of exportation from the port from which the vessel carrying the insured property is to sail to the port to which she is destined, or if, according to the mercantile usage of the place, the word

'cargo' is understood to cover live stock, then the insurance under that general denomination will cover live stock." *Allegre's Adm'r's v. Maryland Ins. Co. (Md.)* 2 Gill & J. 186, 162, 20 Am. Dec. 424.

#### **Ballast.**

While canal boats are employed in carrying ballast to or from a vessel, that ballast is to be construed as their cargo. *Endner v. Greco (U. S.)* 3 Fed. 411, 413.

#### **Blubber, oil, and casks.**

"Cargo" is a word of large import, and means the lading of a ship, of whatever it consists, and covers the outfit as well as the "catchings," which is a technical word denoting the blubber taken on board, the oil, and the casks. *Macy v. Whaling Ins. Co.,* 50 Mass. (9 Metc.) 854, 866.

Oil and other articles which are the ordinary products of a whaling voyage, and the procuring of which constitutes its direct object, are a part of the cargo. *Paddock v. Franklin Ins. Co.,* 28 Mass. (11 Pick.) 227, 230.

#### **Coin.**

The terms "cargo" and "freight" include coin, and the freight of it, put on board by the owner of the ship to be invested by the master in merchandise. *Wolcott v. Eagle Ins. Co.,* 21 Mass. (4 Pick.) 429, 432.

#### **Household furniture.**

The term "cargo" has been held not to include household furniture. *Vasse v. Ball (Pa.)* 2 Dall. 270, 276, 1 L. Ed. 377.

#### **Passengers.**

The words "cargo" and "freight," *prima facie* and in their ordinary and natural meaning, refer to goods only; and, where the words "cabin passengers" and "passage money" appear in the same charter party with the words "cargo" and "freight," the latter do not include passengers and passage money of any description. *Lewis v. Marshall,* 7 Man. & G. 729, 745.

#### **Raft in tow.**

The word "cargo" may be used in speaking of the cargo of a tugboat, to designate a raft of logs which the tug is towing to the sawmill. *Moores v. Louisville Underwriters (U. S.)* 14 Fed. 226, 236.

#### **Rigging, provisions, etc.**

"Cargo" signifies all the merchandise and effects which are laden on board a ship, exclusive of the rigging, provisions, etc. *Thwing v. Great Western Ins. Co.,* 103 Mass. 401, 406, 4 Am. Rep. 567.

The term "cargo" applies to the provisions, clothing, stores, casks, and whaling

gear which an outward bound whaling vessel on a long voyage must of necessity carry. *Paddock v. Franklin Ins. Co.,* 28 Mass. (11 Pick.) 227, 230.

#### **CARGO SALE OR TRANSACTION.**

The essential features of a cargo transaction, as relating to sales of grain, is that the whole purchase must go in one vessel, which carries no other freight, in order that the whole purchase may be handled without any complications by the purchaser. The vessel is consigned to some convenient port, which need not be a grain market—as, for instance, Cork "for orders." On arrival at this port the vessel finds orders from the purchaser to proceed to some defined port and unload. *Heyworth v. Miller Grain & Elevator Co.,* 73 S. W. 498, 499, 174 Mo. 171.

#### **CARNAL ABUSE.**

See "Abuse of Female Child."

#### **CARNAL KNOWLEDGE.**

See, also, "Sexual Intercourse."

"From very early times in the law, as in common speech, the meaning of the words, 'carnal knowledge of a woman by a man' has been sexual bodily connection." *Commonwealth v. Squires,* 97 Mass. 59, 61.

The term "carnal knowledge" is synonymous with "sexual intercourse." *Noble v. State,* 22 Ohio St. 541, 545.

The words "carnal knowledge," as used in Pen. Code, art. 528, defining rape as the carnal knowledge of a woman, etc., means sexual intercourse. *Burk v. State,* 8 Tex. App. 336, 342.

The term "carnal knowledge" implies sexual intercourse, and is included in the term "seduce and debauch," as used in an indictment for seduction. *State v. Whalen,* 68 N. W. 554, 555, 98 Iowa, 662 (citing *State v. Curran,* 51 Iowa, 112, 49 N. W. 1006).

#### **Penetration.**

Carnal knowledge carries with it the idea of sexual intercourse, and this, as understood in common parlance, means a completed act of coition. *Lujano v. State,* 24 S. W. 97, 32 Tex. Cr. R. 414 (citing *Burk v. State,* 8 Tex. App. 336, and *McMath v. State,* 55 Ga. 303).

In a prosecution for rape, an instruction that, to amount to a sufficient carnal knowledge of the female to render the crime complete, there must be a penetration of the female organ by the whole organ of the male, was held to correctly give the law. *Osgood v. State,* 25 N. W. 529, 530, 64 Wis. 472.

Carnal knowledge is the insertion of the male organ of a male to some extent—however slightly—into the female organ of a female. *Maxey v. State*, 52 S. W. 2, 3, 66 Ark. 523.

### CARNALLY KNOW.

The word "ravish," as used in indictments for rape, presupposes force in carnal knowledge, but the term "carnally know" does not charge force; and, where an indictment alleges that the accused did "ravish and carnally know" a party under 15 years of age, the prosecution can be successfully maintained by proving force, or not, according to the proof of the case. *McAvoy v. State*, 51 S. W. 928, 929, 41 Tex. Cr. R. 56.

An indictment for rape is not duplicitous in using the words "ravish" and "carnally know" in connection with the allegation of the age of the female as being under 15 years, as they charge two separate and distinct kinds of rape—that with force and that without force. *Buchanan v. State*, 52 S. W. 769, 41 Tex. Cr. R. 127.

The words "carnally knowing" and "abusing unlawfully," do not contemplate actual force or the absence of the will, but that, although no force be used, and the female yield her consent, yet, being under the age of puberty, she is incapable of consenting. *Charles v. State*, 11 Ark. 389, 406.

### CARPENTER.

See "Ship's Carpenter or Builder."

What is prohibited by the term "carpenters," within a provision in an insurance policy against using the premises insured for hazardous purposes, including in such term breweries, barns, stables, and carpenters, is the use of insured premises for the purpose of carrying on the work or business of a carpenter, or converting the premises into a carpenter shop; and that, at the time of the fire, carpenters were at work on the roof of one of the buildings, was insufficient to show any violation of the policy. *Washington Fire Ins. Co. v. Davidson*, 80 Md. 91, 103.

A carpenter is one who works in timber—a framer or builder of houses—and the term does not include a plasterer, who over-lays work with plaster. *Fox v. Rucker*, 30 Ga. 525, 527.

A statute giving masons and carpenters a mechanic's lien for work and materials furnished by them in building and repairing houses cannot be construed as including the owners of mills who furnished lumber, but is confined to actual masons or carpenters. *Pitts v. Bomar*, 33 Ga. 90, 97.

### CARPENTER'S RISK.

The term "carpenter's risk," as used in an insurance policy, providing that "a carpenter's risk" was granted during the term of the policy, means the extraordinary risk consequent on making repairs in the insured building. *Alkan v. New Hampshire Ins. Co.*, 10 N. W. 91, 94, 53 Wis. 136.

### CARRIAGE.

See "Pleasure Carriage."

"Carriages," as used in an ordinance providing that no one shall keep or hire out any carriages without a license, refers only to vehicles used for the conveyance of persons, and not those used in the transportation of property. *Snyder v. City of North Lawrence*, 8 Kan. 82, 84.

"Carriage," as used in the statute providing for the recovery of damages against a town for injuries done to the plaintiff's carriage by the insufficiency of a highway, means whatever carries the load, whether on wheels or runners, and also that which is carried, whether on wheels or runners or on horseback. *Conway v. Town of Jefferson*, 46 N. H. 521, 520.

Rev. St. c. 30, § 3, prohibiting a person from recovering damages for injuries sustained because of the breaking down of a tollbridge, if the weight of the load which he was transporting exceeded a certain amount, exclusive of the "team and carriage," should be construed as not including the weight of the driver seated upon the load. *Dexter v. Canton Tollbridge Co.*, 12 Atl. 547, 548, 79 Me. 563.

The term "carriage," as used in the road act, shall be construed to include stage-coaches, wagons, carts, sleighs, sleds, and every other carriage or vehicle used for the transportation of passengers and goods, or either of them. *Cobbey's Ann. St. Neb. 1903*, § 6064.

### Bicycle.

A carriage is a contrivance which is used for carrying or transporting, especially along or over a solid surface; a wheeled vehicle for the conveyance of persons. The term is sufficiently extensive to include a bicycle. *Davis v. Petrinovich*, 21 South. 344, 112 Ala. 654, 36 L. R. A. 615; *Jones v. City of Williamsburg*, 34 S. E. 883, 97 Va. 722, 47 L. R. A. 294; *Swift v. City of Topeka*, 23 Pac. 1075, 48 Kan. 671, 8 L. R. A. 772; *Shadewald v. Phillips*, 75 N. W. 717, 718, 72 Minn. 520.

In cases involving the use of streets, or sidewalks, the payment of tolls, and liability for negligence, bicycles are uniformly

held to be vehicles or carriages. *State ex rel. Bettis v. Missouri Pac. Ry. Co.*, 71 Mo. App. 385, 390 (citing *Mercer v. Corbin*, 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221, 10 Am. St. Rep. 76; *Thompson v. Dodge*, 58 Minn. 555, 60 N. W. 545, 28 L. R. A. 608, 49 Am. St. Rep. 533; *Geiger v. Perkiomen & R. Turnpike Road*, 167 Pa. 582, 31 Atl. 918, 28 L. R. A. 458; *Commonwealth v. Forrest*, 170 Pa. 40, 32 Atl. 652, 29 L. R. A. 305; *Twilley v. Perkins*, 77 Md. 252, 26 Atl. 286, 19 L. R. A. 632, 30 Am. St. Rep. 408, and notes). This consensus of authority establishes that the locomotive machine known as a "bicycle" belongs to the genus vehicle or carriage. See, also, *Swift v. City of Topeka*, 23 Pac. 1075, 43 Kan. 671, 8 L. R. A. 772; *Gagnier v. City of Fargo*, 88 N. W. 1030, 1031, 11 N. D. 73, 95 Am. St. Rep. 705; *Jones v. City of Williamsburg*, 34 S. E. 883, 97 Va. 722, 47 L. R. A. 294; *Davis v. Petrinovich*, 21 South. 344, 112 Ala. 654, 36 L. R. A. 615; *Lacy v. Winn*, 4 Pa. Dist. R. 409, 412; *Laredo Electric & Ry. Co. v. Hamilton*, 58 S. W. 998, 1000, 23 Tex. Civ. App. 480; *Mercer v. Corbin*, 20 N. E. 132, 134, 117 Ind. 450, 3 L. R. A. 221, 10 Am. St. Rep. 76; *State v. Collins*, 17 Atl. 131, 16 R. I. 371, 3 L. R. A. 394; *Taylor v. Goodwin*, 27 Wkly. Rep. 489, 490; *Id.*, 4 Q. B. Div. 228, 229; *Holland v. Bartch*, 22 N. E. 83, 85, 120 Ind. 46, 16 Am. St. Rep. 307; *Geiger v. Perkiomen & R. Turnpike Road*, 31 Atl. 918, 920, 167 Pa. 582, 28 L. R. A. 458.

A bicycle comes within the term "other vehicle," as used in Code 1897, § 4008, exempting a team or wagon or other vehicle, to the head of a family, from execution, where such bicycle is used daily by the laborer in connection with his work. *Roberts v. Parker*, 90 N. W. 744, 117 Iowa, 389, 57 L. R. A. 764, 94 Am. St. Rep. 316.

A bicycle is not a wagon or carriage, within the meaning of the statute exempting from debt a wagon and carriage used by the defendant. *Shadewald v. Phillips*, 75 N. W. 717, 718, 72 Minn. 520.

A bicycle is a vehicle, and governed by the same rules as that governing the use of vehicles. *Myers v. Hinds*, 68 N. W. 156, 157, 110 Mich. 300, 33 L. R. A. 356, 64 Am. St. Rep. 345.

"Carriage," as used in Pub. St. c. 52, § 1, enacting that highways shall be kept in repair, so that the same may be reasonably safe and convenient for travelers, with their horses, teams, and carriages, at all seasons of the year, does not include a bicycle, so as to entitle one injured by being thrown from his bicycle because of a depression in the highway to recover for the injury. *Richardson v. Inhabitants of Town of Danvers*, 57 N. E. 688, 176 Mass. 413, 50 L. R. A. 127, 79 Am. St. Rep. 320.

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### Coach.

"Carriage," as used in the charter of a tollroad, fixing a certain toll rate for every coach, chariot, "or other four-wheeled carriage," does not include coaches. *Cincinnati, L. & S. Turnpike Co. v. Nell*, 9 Ohio, 11, 18.

A vehicle on four wheels, drawn by four horses, constructed and used like an ordinary stagecoach, is a four-wheeled pleasure carriage, within the charter of a turnpike company regulating the tolls. *Talcott Mountain Turnpike Co. v. Marshall*, 11 Conn. 185, 190.

### Railroad or street car.

In the charter of a city, authorizing it to adopt ordinances to prevent the incumbering of streets with carriages, etc., "carriage" is to be construed as including railroad cars. *City of Duluth v. Mallett*, 45 N. W. 154, 43 Minn. 204.

"Carriage" does not convey the idea of a railroad car or of a street railroad car, nor does it even convey the idea of a wheeled vehicle used for the transportation of merchandise or products used in ordinary business. The idea conveyed is a vehicle used for the transportation of persons either for pleasure or business, and drawn by horses or other draught animals over the ordinary streets and highways of the country, and not cars used exclusively upon railroads or street railroads expressly constructed for the use of such cars. *Cream City R. Co. v. Chicago, M. & St. P. Ry. Co.*, 23 N. W. 425, 427, 63 Wis. 93, 53 Am. Rep. 267.

1 Rev. St. p. 696, § 6, providing that the owners of carriages running on the highway for the conveyance of passengers shall be liable for all injuries done by the driver while driving such carriage, does not include street railroad cars; and the conductor of a street railway car is not the driver of a carriage, within the meaning of the act. *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122, 124, 7 Am. Rep. 418.

Under an act authorizing the taking of tolls for every carriage or other wheeled vehicle of whatever description, street cars are not included. A street car certainly is a wheeled vehicle, in the general sense of the term. It is a vehicle in the same sense as an ordinary railroad car is a vehicle, but both are vehicles of some extraordinary character in this sense: that they can only be used as a means of conveyance on a permanent, continuous, and connected track. The vehicles specified in the act are of that class which require no such special appliances to permit their passage; and it is reasonable to suppose that the general phrase "other wheeled vehicles of whatever description," used in immediate connection therewith, referred to vehicles of the same general class



or kind as those particularly specified. *Monongahela Bridge Co. v. Pittsburgh & B. Ry. Co.*, 8 Atl. 233, 236, 114 Pa. 478.

#### **Single-horse buggy.**

"Carriage," as used in a city ordinance providing for a license for each hack, carriage, coach, or omnibus, the word "carriage" is sufficiently comprehensive to include single-horse buggies. *City of Burlington v. Unterkircher*, 68 N. W. 795, 797, 99 Iowa, 401.

#### **Wagon.**

As wagon, see "Wagon."

"Carriage" is a general term, and will include a wagon. It is so used in a statute relating to persons using wagons or other carriage on a turnpike. *Pardee v. Blanchard*, 19 Johns. 442, 444.

#### **CARRIAGE HIRE.**

Code 1873, § 3820, declares that every person who shall arrest any person, and be required to convey him from a distant place to the county jail, shall be entitled to receive, beside the fees allowed by law, whatever sums such person shall actually and necessarily pay for carriage hire in so conveying such person to jail. Held, that the words "carriage hire," as there used, did not include railroad fare, so as to authorize a constable to recover the amount paid for the railroad fare of himself and prisoner in conveying the prisoner from the place where he was arrested to the county jail. *Wheeler v. Clinton County*, 60 N. W. 207, 208, 92 Iowa, 44.

#### **CARRIAGE OF GOODS.**

See "Ballment"; "Contract of Carriage."

#### **CARRIER.**

See "Initial Carrier"; "Marine Carrier"; "Private Carrier."

Any person undertaking to transport goods to another place for compensation is a carrier. *Civ. Code Ga.* 1895, § 2263.

A carrier embraces one who receives goods under an agreement to forward them to the place of destination, the charge for freight for the whole distance being stipulated for in the agreement. It does not include one who simply engages to forward goods marked for a particular destination, as the latter is merely a forwarder. *Krender v. Wolcott*, 1 Hilt. 223-227.

#### **CARRIER OF THE MAIL.**

As laborer, see "Laborer."

In *Rev. St. U. S.* § 3980 [*U. S. Comp. St.* 1901, p. 2690], directing any carrier of the

mail to receive any mail matter presented to him, etc., the words "carrier of the mail" include a city letter carrier employed under section 3865. *Wynen v. Schappert* (N. Y.) 6 Daly, 558, 560.

#### **CARRIER OF PASSENGERS.**

See "Common Carrier of Passenger."

A "carrier of passengers" is one who undertakes to carry persons from place to place gratuitously or for hire. *Simmons v. Oregon R. Co.*, 89 Pac. 1022, 1023, 41 Or. 151.

#### **CARRY.**

##### **As on board.**

In a policy of insurance for a certain amount on prepaid freight on board a certain boat, the freight valued at a certain sum "carried or not carried," such words apply only to the valuation of the freight, and may well signify that the insured would be entitled to recover the whole sum insured, though he might not take on board all the goods which entitled him to the entire amount which had been advanced to him. The words are equivalent to "on board or not on board," and do not import that the subject of insurance relates to goods or cargo, and not to freight, in the ordinary meaning of that word. *Minturn v. Warren Ins. Co.*, 84 Mass. (2 Allen) 86, 91.

##### **As carry away.**

See, also, "Carry Away."

The word "carry," as used in an indictment for larceny, has not the same meaning as the words "carry away." No single word in our language expresses the meaning of "exportavit"; hence the word "away" must be subjoined to the word "carry" to modify its general signification and give it a special and distinctive meaning. *Commonwealth v. Adams*, 73 Mass. (7 Gray) 43, 45.

"Carry," in an indictment for larceny, is insufficient to charge the crime, where the word "away" is either accidentally or by design omitted, so that the charge against the defendant was that he did feloniously steal, take, and carry certain property. *Commonwealth v. Pratt*, 132 Mass. 246, 247.

##### **As transport.**

"Carried," as applied to the carriage of goods by a carrier, is equivalent to "transported." *Dunbar v. Port Royal & A. Ry. Co.*, 15 S. E. 357, 358, 36 S. C. 110, 31 Am. St. Rep. 860.

##### **Carry bill.**

An indorsement on a bill of exchange to "carry this bill to the credit of A." has been held to be a restrictive indorsement, which operates to put an end to the negotiability

of the paper. *Lee v. Chillicothe Branch State Bank* (U. S.) 15 Fed. Cas. 151, 153.

#### **Carry insurance.**

The word "carry," as applied to insurance, means possess or hold, and hence it is held that a question in an application for life insurance as to what amount of insurance the insured now carries on his life does not refer to a paid-up policy which has ceased to be a burden to the insured. *Dimick v. Metropolitan Life Ins. Co.*, 55 Atl. 291, 293, 69 N. J. Law, 384, 62 L. R. A. 774.

#### **Carry stock.**

To carry stock means to provide funds or credit for its payment for the period agreed upon from the date of purchase. *Saltus v. Genin*, 16 N. Y. Super. Ct. (3 Bosw.) 250, 260.

#### **CARRY AWAY.**

Carry as, see "Carry."

A grant to carry away the spent bark of a tannery does not involve the right to lodge it on the land of the grantor and obstruct the natural flow of a stream of water. *Winchester v. Osborne*, 61 N. Y. 555, 563.

"Take and carry away," in an indictment under a statute making it a felony to take and carry away a negro by force and violence, was insufficient, as such words do not of themselves imply force and violence. *Hamilton v. Commonwealth (Pa.)* 3 Pen. & W. 142, 146.

#### **In larceny.**

See "Larceny."

See, also, "Away."

A "carrying away," as the term is understood in the law of larceny, is sufficiently shown by taking wheat from its place in the granary, filling it into sacks, and tying the sacks. *State v. Hecox*, 83 Mo. 531, 536.

A carrying away, within the meaning of the rule that there must be a carrying away of the stolen property, to constitute larceny, is shown by the fact of shooting a cow in the woods, and in taking possession and handling the carcass so as to progress halfway in skinning it, and leaving the carcass only when frightened by the bark of a dog and the approach of men. *Lundy v. State*, 60 Ga. 143.

The least removal of property from a place where it is found by the proof is a "carrying away" of it, within the criminal law. *Gettinger v. State*, 14 N. W. 403, 404, 13 Neb. 308.

An instruction that defendant is guilty of grand larceny if she stole, took, and carried away the property is bad, in failing to state the nature of the taking, as the words

"stole, took, and carried away" are not as particular as the words used in a statute which requires that a taking must be wrongful and with a felonious intent in order to constitute a sufficient indictment. *State v. Campbell*, 18 S. W. 1109, 108 Mo. 611.

A charge that another has carried away a book is not per se actionable, as meaning stealing, but can be made to appear actionable in a pleading by a colloquium showing that by carrying away was clearly meant stealing. *Nye v. Otis*, 8 Mass. 122, 125, 5 Am. Dec. 79.

The words "carry away or unlawfully appropriate with intent to steal," as used in Crimes Act, § 162, providing for the punishment of any persons who shall carry away or unlawfully appropriate with intent to steal any domestic fowl, are not equivalent to the word "steal," as used in section 158 of the act, providing for the punishment of any person who shall steal the money or personal goods of another. *State v. Shutta*, 54 Atl. 235, 237, 69 N. J. Law, 206.

#### **CARRY ON BUSINESS.**

See "Doing Business"; "Transacting Business."

Engaged in business, see "Engage."

The meaning of the phrase "to carry on," when applied to business, is well settled. In Worcester's Dictionary the definition is "to prosecute; to help forward; to continue; as, to carry on business, etc." *Florsheim Bros. Dry Goods Co. v. Lester*, 29 S. W. 34, 35, 60 Ark. 120, 27 L. R. A. 505, 46 Am. St. Rep. 162 (citing *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137).

The constant daily repetition by a person of the same act, each act bringing with it a money return, is the "carrying on" by the person of a business in that particular line. A person who opens an office, advertises that he has money to lend on application, and makes daily and hourly loans at interest, particularly for short periods, on so extensive a scale as to necessitate the employment of clerks, carries on the business of money lending, and is subject to a license, though the money loaned be his own. *State v. Tolman*, 31 South. 320, 322, 106 La. 662.

The phrase "power to carry on the business," in a will giving the executrix full power to conduct the business in which testator was engaged, was construed to imply, in the absence of anything in the will to the contrary, the right in the executrix to appropriate sufficient assets of the estate to accomplish the object, and therefore that she was authorized to carry on all business interests, and in so doing was not limited to capital invested in the business. *Furst v. Armstrong*, 51 Atl. 996, 997, 202 Pa. 348, 90 Am. St. Rep. 653.

**By or through agents.**

One who resides in Scotland and carries on business in London by means of an agent does not "dwell or carry on his business" within the city of London, within the meaning of 10 & 11 Vict. c. 71, requiring such dweller to sue in the city small-debt court for a debt not exceeding £20. *Sheils v. Rait*, 7 C. B. 116.

One who systematically has agents in a prohibited district, soliciting and executing orders for wine, is "carrying on the business of a wine merchant," within the meaning of a contract of sale by which he had agreed to abstain from such business, and it was not material how he brought the wine to his customers—whether from stores within or without the district. *Turner v. Evans*, 2 El. & Bl. 512, 519.

Where a foreign corporation appoints agents in Tennessee for the purpose of working up a loan business and inducing people to effect loans with the corporation, who do effect loans, it carries on business in Tennessee, in the sense of the foreign corporation laws. *United States Savings & Loan Co. v. Miller (Tenn.)* 47 S. W. 17.

**Continuous operation.**

"Carry on business," as used in Act 1869, providing that whenever any married woman shall carry on business, and shall incur any debt on account of the same, she shall be liable therefor, means that the business must be pursued as a continuous and substantial employment; and the mere renting of a few rooms by a married woman in the house in which she lived with her husband was not carrying on a business, within the meaning of the statute. *Holmes v. Holmes*, 40 Conn. 117, 120.

"Carry on," as used in a city ordinance providing that any person who shall carry on a business for which a license is required, without first taking out such license, shall, on conviction, be fined, etc., implies a continuous operation, so that a person alleged to have carried on a business without a license for some length of time was only guilty of a single offense, and not a separate offense for each day during which the business was carried on. *Nashville, C. & St. L. R. Co. v. City of Attalla*, 24 South. 450, 451, 118 Ala. 362.

In Comp. St. §§ 1356, 1366, requiring every person who shall carry on any lottery business to pay a license, and providing that any persons who shall transact any business requiring a license, without first obtaining the same, shall be guilty of a misdemeanor, the words "carry on business" and "transact business" mean the same thing. They are convertible terms, and are so used in the statute, and the distinction cannot be made that the first may refer to a single act, while the latter means a pursuit or occu-

pation in which a person engages for the purpose of a livelihood or as a source of profit. *Territory v. Harris*, 19 Pac. 286, 288, 8 Mont. 140.

**Employment.**

9 & 10 Vict. c. 95, § 60, enacts that summons may issue in any district in which the defendant or one of the defendants shall dwell or carry on his business at the time of the action brought. Held, that the term "carry on business" implies some continuous and permanent occupation of a person, and hence does not mean a mere service from which one may be discharged. *Sangster v. Kay*, 5 Exch. 386, 387.

A clerk in the admiralty, who attends daily at an office in the city of London, is not a person who carries on his business there, within Act 10 & 11 Vict. c. 71, § 40, providing that a debtor who shall dwell or "carry on his business" within the city of London may be sued therein. *Buckley v. Hann*, 5 Exch. 43, 45.

A person rendering services to others employed in the ice business is not "carrying on" the business, within a covenant binding him not so to do. *Grimm v. Warner*, 45 Iowa, 106.

**Fixed place.**

"Carries on his business," as used in 9 & 10 Vict. c. 95, § 128, providing that process must be served where the defendant dwells or carries on his business, contemplates some fixed place at which the party's business is carried on, at least for a certain time. *Rolfe v. Learmonth*, 14 Adol. & El. (N. S.) 196, 199.

**Issuance of policies in another state.**

See "Doing Business"; "Insurance Business"; "Transacting Business."

"Carrying on business," as used in a statute providing that, when a foreign corporation carries on its corporate business in this state by means of an agent, it impliedly assents to be sued here in the person of such agent, does not include writing insurance by correspondence in a state where a foreign corporation had no office or agent. The courts of England, in endeavoring to determine the meaning of the term "carrying on business," have stated that it depends largely on the nature of the home and foreign business, and that there must be a managing control or governmental business done by the corporation in England; that is, a sort of a branch of the foreign company. *Hazeltine v. Mississippi Valley Fire Ins. Co. (U. S.)* 55 Fed. 743, 749.

Where a statute (Acts Ark. 1887, p. 234) provided that, before any foreign corporation shall carry on any business within the state, it shall file a certificate in the office of the Secretary of State, etc., and that in de-

fault thereof the contracts of such foreign corporations with citizens of the state should be void, the term "carry on business" related only to the making of contracts within the state, and did not include the issuance of policies of insurance by a foreign insurance corporation to citizens of the state, where the contracts were made in the state of the corporation's residence. *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* (U. S.) 41 Fed. 643, 653.

"Carrying on business," within the meaning of the statute in reference to licensing insurance agents to carry on business in the state, etc., does not apply to the issuing of policies in another state, or the act of an agent in examining a single house in the state. *Jackson v. State*, 50 Ala. 141.

A Pennsylvania insurance company wrote four accident policies on risks in Wisconsin, all of which were negotiated by correspondence with the company, and not through the medium of any agent located in the state, or going into it for the purpose, and were issued and the premiums thereon paid at the office in Pennsylvania. Held that, even if such transactions could be considered a doing of business within the state at the time by the company, such business did not continue after the policies had been issued, merely by reason of the fact that they were held by persons in the state; nor did the collection of a renewal premium on one of such policies through the cashier of a local bank, at the suggestion and for the supposed accommodation of the policy holder, constitute the doing of business within the state, so as to render the company subject to the jurisdiction of its courts. *Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co.* (U. S.) 124 Fed. 259, 264.

#### **For profit or livelihood.**

"Carry on any business," as used in Revenue Law 1868, declaring it unlawful for any person to engage in or "carry on any business" thereafter mentioned, without first having obtained a license therefor, means to carry on a business for profit or as a means of livelihood, and it is not necessary that it should be the sole or exclusive business. *Harris v. State*, 50 Ala. 127, 130. It may be pursued while engaged in another business, or in connection with another, and the true inquiry is, what was the intent of the party? If it was the intention of the party to derive a profit or a means of livelihood from engaging in the business, he was guilty of violating the statute, whether he derived any profit from it or not. *Weil v. State*, 52 Ala. 19, 21.

#### **Single transaction.**

The sending of a note by a resident of Alabama to Tennessee for discount in that state by a Memphis company is not a car-

rying on of business in Alabama by such company, within Const. Ala. art. 14, and Acts 1886-87, pp. 102-104, imposing certain prerequisites upon the carrying on of business in that state by a foreign corporation. *Bamberger v. Schoolfield*, 16 Sup. Ct. 225, 230, 160 U. S. 149, 40 L. Ed. 374.

The phrase "carry on business," as used in the statute requiring a foreign corporation to file its charter or take out a license or pay a franchise tax before it can carry on business, is construed so that a solitary act of business, not indicating a purpose to carry on business, is not within the statute. *Oakland Sugarmill Co. v. Wolf Co.* (U. S.) 118 Fed. 239, 245.

The making in one state by a foreign corporation of one contract by which it agreed to build and deliver in another state certain machinery, and the other party to pay for it, does not constitute a carrying on of business in the first state. "The meaning of the phrase 'to carry on,' when applied to business, is well settled. In Worcester's Dictionary the definition is: 'To prosecute; to help forward or continue, as carry on business.' The definition given to the same phrase in Webster's Dictionary is 'to continue, as to carry on a design; to manage or prosecute, as to carry on husbandry or trade.'" *Cooper Mfg. Co. v. Ferguson*, 5 Sup. Ct. 739, 742, 113 U. S. 727, 28 L. Ed. 1137.

Rev. St. tit. 12, c. 7, which requires foreign corporations carrying on business within the territory to file articles with the Secretary of State and county recorder, does not include a single business transaction within the territory by a foreign company. *Babbitt v. Field* (Ariz.) 52 Pac. 775, 776.

Selling an occasional drink out of a bottle is not carrying on the business of a retail liquor dealer. *United States v. Jackson* (U. S.) 26 Fed. Cas. 556.

To sell whisky on a few separate occasions within 12 months is not carrying on the business of a liquor dealer in the business of selling whisky. *Espy v. State*, 47 Ala. 533, 538.

Carrying on business, within the meaning of the statute making it criminal to carry on the business of retail liquor dealer without a license, is not shown by proof of a single sale of liquor. *Lawson v. State*, 55 Ala. 118, 119.

To "carry on business" has been uniformly construed as signifying that which occupies the time, attention, and labor of men for the purpose of livelihood or profit. It has been held that the doing of a single act pertaining to a particular business will not be considered engaging in or carrying on the business, though a series of such acts would be so considered. One act may be sufficient to constitute a carrying on of business, ac-

cording to the intent with which the act is done. *Abel v. State*, 90 Ala. 631, 633, 8 South. 760.

The words "carrying on business" or the "plying of a vocation" necessarily involve the idea of successive acts—continuity of habit—and proof of a single act of hiring or soliciting a laborer to be employed beyond the state limit could not constitute the offense of carrying on the business of an emigrant agent. *State v. Napier*, 41 S. E. 13, 15, 63 S. C. 60.

#### **Of brewer or distiller.**

A person who distills spirits or brews beer, though not for sale, carries on the business of a brewer or distiller, though, in ordinary speech, one who distills for his own use, merely, would not be said to carry on the business. *United States v. Wittig* (U. S.) 28 Fed. Cas. 744.

Carrying on a brewery is a manufacture of beer. *State v. Weckerling*, 38 La. Ann. 36, 38.

#### **Of manufacturing.**

Tax Law 1884, exempting manufacturing companies carrying on business in this state from taxation, means the establishment of a factory, the bringing of raw material thereto, and converting it into wares. *State v. American Glucose Co.*, 5 Atl. 803, 43 N. J. Eq. (16 Stew.) 280.

"Manufacturing corporations carrying on manufacture within this state," in a statute providing that all foreign corporations doing business in New York shall be taxed, except manufacturing corporations carrying on manufacture within this state, include a foreign corporation which does some of its manufacturing in New York, although the greater portion is done in another state. *People v. Wemple*, 31 N. E. 238, 133 N. Y. 323.

"Carrying on manufacturing," as used in Laws 1880, c. 542, § 3, exempting "corporations carrying on manufacturing" within the state from taxation, does not include a foreign manufacturing corporation bringing wire from its factory into New York, and there fitting it with hooks and loops to adapt it for sale. *People v. Wemple*, 34 N. E. 380, 387, 138 N. Y. 582.

The phrase "carrying on business in this state," in the statute exempting from taxation manufacturing companies carrying on business in this state, imports that such companies must actually locate and begin work under their charter, in order to be entitled to such exemption. *Norton Naval Construction & Shipbuilding Co. v. State Board of Assessors*, 22 Atl. 352, 53 N. J. Law (24 Vroom) 564.

#### **Of railroad company.**

A railroad company does not carry on business, within the meaning of 9 & 10 Vict.

§ 128, providing that the service of summons shall be made where the defendant shall carry on business, etc., at a receiving house or booking office kept by an agent for the receipt and the booking of parcels and packages for all the railways generally. *Minor v. London & N. W. Ry. Co.*, 1 C. B. 325, 331.

A railroad can only carry on business, within the meaning of the eleventh section of the bankruptcy act of 1867, providing that corporations may take the benefit of the bankruptcy law by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for six months, etc., at the place where the railroad is or is to be constructed, maintained, and operated, and hence a district court in the Southern District of New York has no jurisdiction to adjudge an Alabama railroad corporation a bankrupt. *In re Alabama & C. R. Co.* (U. S.) 1 Fed. Cas. 271, 272.

"Carrying on business," within the meaning of the bankrupt act, looks to the scheme and purpose to which the transactions tend, and not to the incidental transactions themselves. Thus the business of a railroad corporation is, by its charter, the construction, maintenance, and operation of a railroad. In aid thereof, it may be necessary or expedient to employ agents and agencies in other places than those in which its business of constructing, maintaining, and operating the road can be done, but the transactions of such agents are only incidental. They do not in a just sense constitute the business of the railroad company. That business cannot be removed. The company itself cannot do it, and the fact that a railroad corporation created in Alabama for the purpose of maintaining a railroad there has its principal office and domicile in the city of New York, at which place it has transacted the ordinary commercial and financial business of a railroad corporation, is not a carrying on of business in such place. *In re Alabama & C. R. Co.* (U. S.) 1 Fed. Cas. 271, 272.

#### **Of surgeon.**

A statute giving jurisdiction where the cause of action did not arise within the jurisdiction of the court within which the defendant dwells or "carries on his business" at the time the action was brought would include the case of a surgeon having a fixed residence, but attending on his patients at their houses in several parishes within the jurisdiction of the court. *Mitchell v. Hender*, 26 Eng. Law & Eq. 194, 196.

#### **Of theater.**

A statute imposing a license tax on any person "engaging in or carrying on the business of keeping a theater" meant an actual use or management of a theater, and hence one who had a hall, which he intended to use as a theater, but in which no per-

formance had ever been given, was not within the statute. *Gillman v. State*, 55 Ala. 248, 250.

### CARRY ON MILL.

Hauling quartz through a quartzmill is performing labor for carrying on a mill, within the meaning of a statute giving a laborer's lien for performing labor for carrying on any mill. *In re Hope Min. Co.* (U. S.) 12 Fed. Cas. 487; *Gould v. Wise*, 3 Pac. 30, 34, 18 Nev. 253.

### CARRY OVER.

A provision in a contract between a lessor and a retailer of machinery requiring the lessor to "carry over all machinery left unsold at the end of the season" is somewhat equivocal and obscure, and resort may be had to the well-defined and known usage of trade as an aid in reaching a true interpretation of the words. *South Bend Ironworks v. Cottrell* (U. S.) 31 Fed. 254, 255.

### CARRY OUT.

"Carried out," as used in a proposition submitted by creditors to their debtor, by which, in consideration of the execution of a mortgage, they agreed to accept a certain percentage in full of their claims, which was to be "carried out" within a certain time, means the performance of the contract within the time limited, by executing the notes and mortgage for which provision was made, and not assent. "To assent is one thing; to perform is another. Assent to a proposition creates, but does not carry out, a contract. Without assent there is no contract, but assent is not performance. Until assent, there is no contract to be performed. To carry out a contract is more than the signing and delivery. Carrying out comes after the execution of the contract. It is performance." *Cartmel v. Newton*, 79 Ind. 1, 2.

### CARRY TO SELL.

Where a servant of a licensed tea dealer was sent through the neighborhood to solicit orders for tea, and was subsequently sent to deliver small parcels in pursuance of such orders, this was not a "carrying to sell," within the meaning of 50 Geo. III, c. 51, relating to hawkers and peddlers, and requiring a license. *King v. McKnight*, 10 Barn. & C. 734.

### CARRY WITH IT.

Act Cong. June 3, 1864, § 30, providing that national banks receiving a greater rate of interest than allowed by the state where the bank is located shall forfeit the entire

interest which the note "carries with it" means any interest that the note may carry by operation of law, without reference to any agreement. *Cassell v. Lexington, H. & P. Turnpike Road Co.* (Ky.) 9 S. W. 502, 506.

### CARRYING ARMS OR WEAPONS.

To constitute the offense of carrying arms, within the meaning of Act 1870, c. 13, prohibiting the carrying of arms, the weapons must be carried as arms. The intent with which the weapon is carried must be that of going armed or being armed. *Page v. State*, 50 Tenn. (3 Heisk.) 198, 200, note.

### CARRYING CONCEALED WEAPONS.

See "Carrying Arms or Weapons"; "Habitually Carrying Concealed Weapons."

Carrying weapons about the person, see "About the Person."

A carrying of concealed weapons, within the meaning of the statute prohibiting such an act, is shown by the mere fact of having a weapon upon the person. *State v. Carter*, 36 Tex. 89, 90.

The term "carrying concealed weapons," in the meaning of a statute prohibiting the carrying of such weapons, is to be construed as meaning carrying concealed weapons for the purpose of use, and therefore the carrying of a pistol, not for use as a weapon, but only for the purpose of delivering it to the owner, is not criminal. *State v. Roberts*, 39 Mo. App. 47, 48.

Carrying concealed weapons, within the meaning of the statute making such act criminal, means a carrying for use, and does not embrace a mere carrying for the purpose of sport. *State v. Murray*, 39 Mo. App. 127, 128.

A person who purchased two pistols in a town, and, for the purpose of obtaining balls for the pistols, was carrying them from the store where he purchased them to one or more places where ammunition was sold, and from thence to his home, some miles distant, was not "carrying a pistol," within the meaning of Act April 12, 1871, prohibiting the carrying of pistols on the person. *Waddell v. State*, 37 Tex. 354, 355.

A statute prohibiting the carrying of arms means carrying arms with a view of being armed and ready for offense or defense in case of a conflict with another, and hence, where one borrowed a pistol for the purpose of joining in a chase after a bear, and returned the pistol soon after the return from the chase, he was not going armed, in the sense of the statute. *Moorefield v. State*, 73 Tenn. (5 Lea) 348.

Carrying a pistol is not within the statute, where a person buys it on one side of a public street, and carries it to his residence, on the other. *Christian v. State*, 37 Tex. 475, 476.

A carrying of concealed weapons, within the meaning of the statute prohibiting such an act, is not shown by evidence that defendant found a pistol, and carried it to his home concealed in his pocket. *Mangun v. State*, 15 Tex. App. 362, 363.

Where a merchant purchases a pistol with a view to trade, and carries it from one store in a town to another for the purpose of having it packed with other goods, he is not guilty of carrying concealed weapons, though he thoughtlessly puts it in his pocket. *State v. Gilbert*, 87 N. C. 527, 529, 42 Am. Rep. 518.

There is a carrying of concealed weapons, within the meaning of the statute prohibiting such a carrying, in carrying a broken and inefficient pistol for the purpose of having it repaired; and certainly this is so if, on his way to or from the shop, the individual superadds to his original purpose and intention a resolution to produce the pistol suddenly and use it in making a hostile demonstration against one whom he happens to encounter while he has his pistol concealed. *Crawford v. State*, 21 S. E. 992, 94 Ga. 772.

Act April 12, 1871, prohibiting the carrying of a pistol, refers to all cases where a pistol is carried under circumstances not expressly excepted by the language of the act, and the fact that the accused considered it necessary to carry a pistol for his convenience or protection is no defense. *Reynolds v. State*, 1 Tex. App. 616, 618.

One who, after arriving at a public gathering, comes into the possession of a pistol, does not render himself liable to prosecution under Pen. Code, § 342, prohibiting any one, except certain designated officers of the law, from carrying a pistol about his person to any public gathering in this state. *Modesette v. State*, 115 Ga. 582, 584, 41 S. E. 992.

The word "carries," as used in Code, § 3274, providing that any one who carries concealed about his person a pistol or firearm shall be fined, etc., is synonymous with "bears," and hence one who has in a vest pocket a pistol is carrying the arm, within the sense of the statute. *Owen v. State*, 31 Ala. 387, 389.

## CART.

"Cart," as used in a statute exempting from execution one horse, one ox, and cart, means a carriage in general, though in its primary and ordinary acceptation it signifies

a carriage with two wheels. *Favers v. Glass*, 22 Ala. 621, 624, 58 Am. Dec. 272.

Within the statute exempting a cart or truck wagon, a cart does not include a peddler's wagon, to be used in trade from place to place, with a body hung on springs, with a drawer behind and doors at the sides, and a railing around the top, and a dasher in front. *Smith v. Chase*, 71 Me. 164, 165.

## CARTAGE.

Cartage is a charge made for the expense of delivering goods from a car when the purchaser did not take them on the track. *Everingham v. Halsey*, 78 N. W. 220, 221, 108 Iowa, 709.

## CARTEL VESSEL.

A cartel vessel is a vessel commissioned in time of war to exchange the prisoners of two hostile powers, or to carry any particular proposal from one to carry. She is a neutral licensed vessel, and all persons concerned in her navigation, on the particular service in which both belligerents have employed her, are neutral in respect to both, and under the protection of both. She cannot carry on commerce under the protection of her flag, because this was not the business for which she was employed, and for which the immunities of that flag of truce were granted to her. All contracts made for the equipping and fitting out of a cartel vessel are to be considered as contracts made between friends, and hence enforceable in the tribunals of either belligerent having jurisdiction of the subject. *Crawford v. The William Penn* (U. S.) 6 Fed. Cas. 778, 780.

## CARTON.

The carton in which gloves and hosiery are placed is a box or cover in which the goods are contained, within the meaning of Act March 3, 1883, § 7, repealing the law imposing a duty on the usual box or covering of imported goods. *Oberteuffer v. Robertson*, 6 Sup. Ct. 462, 470, 116 U. S. 499, 29 L. Ed. 706.

## CARTWAY.

A "cartway" is as distinct as possible from a public highway. Indeed, it is a way established by law for a person who has not the benefit of a public highway, and for that reason alone; and where an indictment charges the obstruction of a common and public highway, and the proof is that the way obstructed was a private cartway, there was a fatal variance. *State v. Purify*, 86 N. C. 681, 682.

In a new country the highways alone were of much importance. These were laid

off and established by order of court, and kept up at the public charge. To the highways were added cartways for persons who occupied land to which there was no public highway. These were also laid out and established by order of the court, and when established were for public use, as well as for the use of the individuals at whose instance they were ordered. *Boyden v. Achenback*, 79 N. C. 539, 541.

## CASE.

### As contents of case or package.

Defendant was convicted under an indictment charging him with receiving stolen property, and described the property as two cases of cigars; but the evidence showed that he received loose cigars after the cases of cigars had been stolen and those he received taken out of the cases by other parties. It was held that the word "case," as used here, was not shown to have a recognized meaning, as denoting packages containing a certain number or quantity of cigars, and, even if it had such meaning, it should still be construed as descriptive of a case containing cigars, and not of a certain number of cigars, without reference to their packing, and hence the charge in the indictment was not sustained by the proof. *Gabriel v. State* (Fla.) 32 South. 779, 780.

### As covering, box, or sheath.

The word "case," as used in a claim for a patent, reciting that it was for the apparatus therein described, for drying gravel and sand, consisting of the fire chamber, flues, heating pipes, and case, all constructed and arranged substantially as set forth, means, as defined by Webster, "a covering, box, or sheath." A screen in the bottom of the box or frame in which the wet sand or gravel was placed to be dried, which was not a covering or sheath for the apparatus, was not a part of the case, so as to be included within the claim. *Bradley v. Dull* (U. S.) 19 Fed. 913, 914.

## CASE (In Practice).

See "Agreed Case"; "Cause (In Practice)"; "Civil Action—Case—Suit—etc."; "Claim Cases"; "Criminal Case or Cause"; "Divorce Case"; "Equity Cases"; "Extraordinary Case"; "In Case"; "In Case of Death"; "Moot Case"; "Remedial Cases"; "Special Case."

All cases, see "All."

Any case, see "Any."

Other cases, see "Other."

A case is a contested question before a court of justice; a suit or action; a cause. It is defined by Webster to be a state of facts involving a question for discussion or deci-

sion—especially a cause or a suit in court. *Smith v. City of Waterbury*, 7 Atl. 17, 19, 54 Conn. 174; *Southwick v. Southwick*, 49 N. Y. 510, 517; *Ex parte Towles*, 48 Tex. 413, 433; *Slaven v. Wheeler*, 58 Tex. 23, 25; *Home Ins. Co. v. Northwestern Packet Co.*, 32 Iowa, 223, 236, 7 Am. Rep. 183.

A case "is a question contested before a court of justice in an action or suit at law or in equity. The primary meaning of the word, according to the lexicographers, is cause. When applied to legal proceedings, it imports a state of facts which furnish occasion for the exercise of the jurisdiction of a court of justice. In this, its generic sense, the word includes all cases, special or otherwise." *Buell v. Dodge*, 63 Cal. 553, 554; *Kundolf v. Thalheimer*, 12 N. Y. (2 Kern.) 593, 596.

The word "case," as used in Code 1873, § 2529, providing a time in which to bring actions for relief on grounds of fraud in cases heretofore solely cognizable in a court of chancery, means a contested question in a court of justice, and does not refer to the action, or to the form thereof, but to the questions and rights involved. *Gebhard v. Sattler*, 40 Iowa, 152, 156.

The term "cases," as used in Const. art. 3, § 2, providing that federal courts shall have jurisdiction of cases arising under the Constitution or laws of the United States, "is not limited in its meaning to a case in which a party comes into court to demand something conferred on him by the Constitution or law, but is used in its more extended sense, as meaning a right of one party as well as of the other, and may be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264, 378, 5 L. Ed. 257.

Under the Constitution of the United States, declaring that the judicial power of the federal courts shall extend to all "cases in law and equity" arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority, this clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It is then a case. *Osborn v. United States Bank*, 22 U. S. (9 Wheat.) 738, 822, 6 L. Ed. 204.

Under Const. U. S. art. 3, § 2, providing that the judicial power shall extend to all "cases in law and equity" arising under the Constitution or laws of the United States,



and treaties made or which shall be made under their authority, etc., the words mean all cases in law and equity in any court within the United States, whether state or federal, in which a right of action or a defense arises or is claimed under the Constitution, laws, or treaties of the United States. A case in law or equity consists of the right of one party as well as of the other, and may be truly said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either. *Ableman v. Booth*, 11 Wis. 498, 508.

A case is a suit in law or equity instituted according to the regular course of judicial proceedings; and when it involves any question arising under the Constitution, laws, or treaties of the United States, it is within the judicial power confided to the Union under Const. U. S. art. 8, § 2. *Pacific Steam Whaling Co. v. United States*, 23 Sup. Ct. 154, 155, 187 U. S. 447, 47 L. Ed. 253 (citing *Osborn v. Bank of United States*, 22 U. S. [9 Wheat.] 738, 6 L. Ed. 204).

A "case," in ordinary parlance, is that which falls, comes, or happens; an event; also a state of things involving a question for discussion; and an offense committed by a party while in the naval service is a case arising in the naval forces, within the meaning of those terms as used in the fifth amendment to the Constitution, and Congress has power to authorize the trial of such an offense by a court-martial under such amendment. *In re Bogart* (U. S.) 3 Fed. Cas. 796, 799.

The term "cases and controversies," as used in the Constitution of the United States, embraces claims or contentions of litigants brought before the court for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 475, 14 Sup. Ct. 1125, 38 L. Ed. 1047; *Smith v. Adams*, 9 Sup. Ct. 566, 568, 130 U. S. 167, 32 L. Ed. 895. Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy. *Smith v. Adams*, 9 Sup. Ct. 566, 568, 130 U. S. 167, 32 L. Ed. 895.

A "case" arises, within the meaning of the Constitution giving the federal courts jurisdiction, as well when defendant seeks protection under a law of Congress as when a plaintiff goes into court to demand some right conferred by law. *Jones v. Seward* (N. Y.) 26 How. Prac. 433, 435.

Where there is a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court, there is a "case," within the meaning of that term as defined by ju-

dicial decisions. *United States v. Lee*, 1 Sup. Ct. 240, 260, 106 U. S. 196, 27 L. Ed. 171.

Where a sale of land was absolutely void for fraud, so that those claiming under it could not maintain an action to recover the property, the sale and deed executed thereon would amount to no sufficient defense to the recovery of the property in an action at law by plaintiffs; hence their rights and the questions involved therein are not solely cognizable in a court of chancery, within Code 1873, § 2529, subd. 4, providing that actions for relief on the ground of fraud in cases heretofore solely cognizable in a court of equity are barred in five years, and section 2530, providing that in actions for relief on the ground of fraud the cause of action shall not be deemed to have accrued until the fraud complained of shall have been discovered by the party aggrieved. The word "case" here means a contested question in a court of justice. *Bouv. Law Dict.* It does not refer to the action, or the form thereof, or the character it may assume on account of the forum in which it is prosecuted, but to the questions and rights involved. *Gebhard v. Sattler*, 40 Iowa, 152, 155.

#### As action, cause, or suit.

"Case" and "cause" are used as synonyms in statutes and judicial decisions, each meaning a proceeding in court; a suit; an action. *Blyew v. United States*, 80 U. S. (13 Wall.) 581, 595, 20 L. Ed. 638; *Theisen v. Johns*, 72 Mich. 285, 293, 40 N. W. 727, 730; *Erwin v. United States* (U. S.) 37 Fed. 470, 479, 2 L. R. A. 229.

"Cases" primarily means or includes "causes." Cases arising in justice court are causes—mostly common-law causes. *Benson v. Cromwell* (N. Y.) 26 Barb. 218, 221.

The word "cases," as used in Const. art. 6, § 14, giving the county court jurisdiction in cases arising in justices' courts and in special cases, but no original civil jurisdiction, except in such special cases, "was a more appropriate word than 'causes,' for it includes not only causes, but special proceedings, and is more commonly used as including equity as well as common-law actions than the word 'causes' is. 'Cases in equity' is a more familiar phrase than 'causes in equity.'" *Benson v. Cromwell* (N. Y.) 26 Barb. 218, 222.

There is no distinction between the term "action," as usually employed by the members of the profession and writers on law, and the word "case," in Rev. Code, c. 106, § 12, providing that it shall not be necessary to set forth in any manner the place in which an act is done, unless from the nature of the case the place may be material. A "case," as here referred to, and the word employed imports, means a civil action of some form and nature between two or more parties in a

court of law, either decided or still pending, which may be of different kinds, but the first and most prominent distinction between them, when they differ from each other, is the form and legal nature of the action in which the case is instituted, and the best general indication of this distinction in the nature of these different cases in courts of law is the different forms of action in which they are commenced. The pleadings also vary very considerably in these various actions and cases at common law, with the several forms of action appropriately adapted to them, and with the issues of fact as well as law joined and presented in the pleadings; but, whatever may be the form of the action, or the difference of the pleadings in it from those in any other action, each is alike usually termed a "case" or an "action at law," and they usually import one and the same thing. *Parvis v. Truax* (Del.) 32 Atl. 1050, 1051, 7 Houst. 575.

"Case," in the Revised Statutes, is indisputably used as synonymous with "cause" or "action," and is not to be construed as meaning merely a special proceeding, and not as embracing actions. *Beecher v. Allen* (N. Y.) 5 Barb. 169, 173.

Though in its more ordinary signification meaning a state of facts involving a question for discussion and decision, when used in an order of court transferring a case to another tribunal, the word "case" means an action or cause in court. *Wingate v. Haywood*, 40 N. H. 437, 445.

A case is a suit or action—a cause—but though a proceeding to set aside the probate of a will is called, in Civ. Code Proc. § 1314, a "case," yet such proceeding is not an action, as defined in the Code. In *re Joseph's Estate*, 50 Pac. 768, 118 Cal. 660.

The Constitution, requiring the Court of Appeals to file an opinion in writing in every case, contemplated some action by the tribunal which should be effective and binding on the parties on both sides of a cause brought there by appeal or writ of error. *State v. Shields*, 49 Md. 301, 304.

"Case" and "suit" mean the same thing, and an affidavit that a party has a just defense on the merits of the case means a just defense on the merits of the suit. *New Brunswick Steamboat & Canal Transp. Co. v. Baldwin*, 14 N. J. Law (2 J. S. Green) 440, 443.

In court a "case" is philologically a suit in court. Suits are remedies by which wrongs are redressed or rights recovered. *City of Baltimore v. Ritchie*, 51 Md. 233, 245.

The word "case" is more comprehensive in meaning in common parlance than either "suit" or "action," and includes applications for divorce, and for establishment of highways, applications for support of rela-

tives, and other special proceedings unknown to the common law. *Gold v. Vermont Cent. R. Co.*, 19 Vt. 478, 484.

The word "cases" in the proviso in the act of Congress creating judicial districts in Indian Territory, and providing that, in all criminal cases where courts outside of the territory shall have acquired jurisdiction, they shall retain jurisdiction, means actions. This appears not only from its immediate context, but from a comparison of the proviso wherein the word occurs with the preceding clause, wherein occurs the word "offenses." *United States v. Lee* (U. S.) 84 Fed. 626, 630.

The word "case," in Code Civ. Proc. § 14, providing that an action on a bond given in an attachment case, injunction case, or any case whatever, required by statute, etc., is used, not in a technical sense of "cause," but, rather, in the sense of "instance." The words "attachment" and "injunction," as used here, are not adjectives. They are used in the same way that we speak of replevin or mandamus, and it is not necessary to employ the phrase "a replevin case" or "a mandamus case." *Crum v. Johnson* (Neb.) 92 N. W. 1054, 1055.

The words "in any case," in Code, c. 50, § 91, providing that " \* \* \* no more than one new trial shall be granted by a justice in any case, mean that no more than one new trial shall be granted either party in any suit. By giving to the words "in any case," its phraseological, combined with its technical, meaning, rather than its technical legal meaning, results in the double purpose of allowing one new trial, and only one, to either party in any suit, whether tried by the justice or a jury. On the other hand, by restricting it to its technical legal meaning, it is rendered possible in the trial of every case before a justice, for the existence of two opposite verdicts. *Dickey v. Smith*, 42 W. Va. 805, 809, 26 S. E. 373, 375.

The word "case," as used in How. Ann. St. § 2268, providing that any person selling liquor to a minor under the age of 18 years shall be liable for actual and exemplary damages to the parent in such sum, not less than \$50 in each case, as the court or jury shall determine, is synonymous with "cause," and it cannot be said that the Legislature, in fixing the minimum of the recovery, intended to make the penalty for each sale the sum of \$50. *Theisen v. Johns*, 72 Mich. 285, 298, 40 N. W. 727.

#### As allegations and facts.

Code Cr. Proc. art. 677, requiring that the charge of the court shall distinctly set forth the law applicable to the case, means the case as made by the evidence. *Chamberlain v. State*, 8 S. W. 474, 475, 25 Tex. App. 398; *Cooper v. State*, 3 S. W. 334, 335, 22 Tex. App. 419.

Within a statute requiring the court to give to the jury, by proper instructions, the law applicable to the case, the case is that which is charged in the indictment and supported by the evidence. *Serio v. State*, 3 S. W. 784, 785, 22 Tex. App. 633.

An affidavit that defendant has fully stated the facts of the case to his counsel means that he has fully and fairly stated the case to his counsel. *Jordan v. Garrison* (N. Y.) 6 How. Prac. 6, 8.

Where a rule provides that the affidavit of merits must state that the party deposing "has fully and fairly stated the case to his counsel," it is not complied with by an affidavit that he has made a full and fair statement of all the facts of the case to his counsel. *Brown v. St. John* (N. Y.) 19 Wend. 617, 619.

#### **All proceedings in action included.**

A case "is a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice. To the existence of such a case parties are necessary; also pleadings and proceedings, trials, orders, judgments," etc. *Calderwood v. Peyser*, 42 Cal. 110, 115; *Comstock Mill & Min. Co. v. Allen*, 31 Pac. 434, 435, 21 Nev. 325. The term "case" embraces everything from the filing of the complaint to the entry of satisfaction of the judgment. They are all steps in, or parts of, the same case. *Comstock Mill & Min. Co. v. Allen*, 31 Pac. 434, 21 Nev. 325.

The word "cases," as used in Const. art. 5, § 3, declaring that each circuit court shall consist of a president and two associate judges, and providing that in the absence of certain judges the others shall be competent to hold a court, except in capital cases, should be construed to embrace all the stages of criminal proceedings from the impaneling of the grand jury to the execution of the final sentence, and is not synonymous with prosecution, so as to exclude the proceedings prior to the indictment. *Cook v. State* (Ind.) 7 Blackf. 165.

Judiciary Act 1789, c. 20, § 84, providing that the laws of the several states, except where the Constitution, treaties, or statutes shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply, will not be construed to apply to judgments. The statute is to be construed "as furnishing a rule to guide in the formation of its judgment, and not one for carrying that judgment into execution. It is a rule of decision, and the proceedings after judgment are merely ministerial." *Wayman v. Southard*, 23 U. S. (10 Wheat.) 1, 22, 6 L. Ed. 253.

The term "case," as used in Rev. St. § 838 [U. S. Comp. St. 1901, p. 644], providing

that for the expenses incurred and services rendered in all cases, where it was decided not to bring suit, the district attorney shall receive and be paid from the treasury such sum as the Secretary shall deem just and reasonable, upon a certificate of the judge before whom such cases are tried or disposed of, should be construed to include all complaints reported by revenue officers to the district attorney which might be the subject of the final determination of the court by trial or another action therein. In re Account of District Attorney (U. S.) 23 Fed. 26, 27.

#### **Application to judge at chambers.**

An application addressed to the judge at chambers was not a case, within the constitutional provision that equity cases shall be tried in the county where the defendant resides against whom substantial relief is prayed. *Heath v. Miller*, 44 S. E. 13, 16, 117 Ga. 854.

#### **As case on appeal.**

The "case," as used in a statute mentioning the papers which may constitute a part of the judgment roll, refers to the case to be prepared on an application for a new trial addressed to the court below, and not to the case prepared for appeal. If the word was considered to mean the case prepared for argument on appeal, it would be impossible for the clerk to comply with the requirement, in view of the time given the appellant to prepare and serve the case for appeal; but if the word "case" was considered to mean, as we think it is clear it should be, the case prepared for motion for a new trial addressed to the trial court, there will be nothing to prevent the clerk from complying with the requirement. *Tribble v. Poore*, 6 S. E. 577, 579, 28 S. C. 565.

The word "case," as used in Rev. St. 1887, § 3130, providing that when in any such case the judgment of the district court is affirmed there shall be taxed as part of the costs in the case, a reasonable attorney's fee, the word refers to a proceeding in error from the district court to the Supreme Court. *Syndicate Imp. Co. v. Bradley*, 44 Pac. 60, 61, 6 Wyo. 171.

#### **As cause of action.**

Under the provision of the Code permitting the plaintiff to set up in his supplemental bill facts material to the "case" it is said that the case is the cause of action set up in his complaint. Another and entirely distinct cause of action does not constitute a case. *Swedish American Nat. Bank v. Dickinson Co.*, 69 N. W. 455, 459, 6 N. D. 222, 49 L. R. A. 285.

The word "case," as used in the Code, allowing an amendment by inserting "other allegations material to the case," means the

facts stated in the pleading, as constituting the cause of action or defense; and the allegations proposed to be inserted by amendment must therefore be material to the case already made, and not merely material to another and wholly different case. *Woodruff v. Dickie* (N. Y.) 81 How. Prac. 164, 167.

#### **Contempt proceedings.**

"'Case' is synonymous with 'cause,' and means any question, civil or criminal, contested before a court of justice. An attachment against a defaulting witness or juror for contempt of court is an independent suit and a cause. In proceedings for contempts or failure to obey orders or writs of a court, the parties have a right to be heard, and to clear themselves of the charge of contempt, if they can. Such a proceeding is commenced by a regular process of the court, and there is a question to be contested and decided." *Erwin v. United States* (U. S.) 37 Fed. 470, 480, 2 L. R. A. 229

An order of a probate court committing an administrator for contempt of court is a final determination in a criminal proceeding, and such procedure presents a case which may be revived by writ of error both at common law and under the Constitution, in the absence of a statute authorizing an appeal. *Haines v. People*, 97 Ill. 161, 176.

#### **Controversy or question distinguished.**

In construing the provision of the Constitution giving United States courts jurisdiction of cases in law and equity, cases in admiralty and maritime jurisdiction, controversies to which the United States shall be a party, and controversies between two or more states, or between citizens of one state and another state, etc., the Supreme Court, in *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264, 5 L. Ed. 257, determined that the word "suit" is not so broad as the word "controversy," because it determined that a writ of error could be maintained, though it was not a suit, and yet it could not be denied that it was a controversy. Mr. Justice Iredell, in *Chisholm v. Georgia*, 2 U. S. (2 Dall.) 419, 431, 432, 1 L. Ed. 440, distinguished between the word "controversies" and the word "cases" in this connection, by confining the former to such as are of a civil nature; but this change in language from the word "cases" to the word "controversies" will be found to have been a mere matter of style, and to have no relation to any limitation or extension of the class of questions to be adjudicated. So long as this section of the Constitution speaks especially with reference to the nature of the questions involved, it uses the word "cases," but, when it considers more particularly proceedings having relation to the existence of parties, it uses the word "controversies," probably because, when parties are speaking of a raid against each

other, the literary style suggested the change. Under such construction, a writ of habeas corpus, being a suit, is a controversy, within the provisions of the Constitution. *King v. McLean Asylum of the Massachusetts General Hospital* (U. S.) 64 Fed. 331, 336, 12 C. C. A. 145.

The Constitution of the United States gives jurisdiction to the courts of the United States over "cases in law and equity, cases of admiralty and maritime jurisdiction, controversies between two or more states, and controversies between citizens of different states." This language makes a distinction between cases or suits, on the one hand, and controversies, on the other, and the Supreme Court has repeatedly and explicitly recognized the distinction thus made. The doctrine has been settled in various decisions of that court that if a suit embraces but one controversy, and the parties to it on either side are not wholly residents, respectively, of different states, the suit cannot be removed, yet, if in the suit there is a separable controversy, the parties to which, actually interested in the decision of it, are on each side wholly citizens of different states, then the suit may, on the petition of one or more such parties to the separable controversy, be removed into the federal court. *Snow v. Smith* (U. S.) 88 Fed. 657, 658 (citing *Blake v. McKim*, 103 U. S. 336, 26 L. Ed. 563; *Barney v. Lathan*, 108 U. S. 205, 26 L. Ed. 514).

There is a clear distinction between a "case arising under the patent laws" and a "question arising under the patent laws." The former arises when the plaintiff in his opening pleading, be it a bill, complaint, or declaration, sets up a right under the patent laws as ground for a recovery; the latter may appear in the plea or answer, or in the testimony. The determination of such question is not beyond the competency of the state tribunals. *Carleton v. Bird*, 47 Atl. 154, 156, 94 Me. 182.

#### **Decision of judge as arbitrator.**

Civ. Code, § 5527, provides that either party in a civil case, and the defendant in a criminal proceeding, may except to any sentence, judgment, or decision or decree of the court or judge thereof. Held, that the Supreme Court has no power to review a decision by a judge unless the same was rendered in a civil cause or criminal proceeding, and hence cannot review a decision of a judge acting merely as an arbitrator. *Banigan v. Nelms*, 106 Ga. 441, 32 S. E. 337.

#### **Election contests.**

In considering the validity of Rev. St. 1845, § 224, making the decision of a circuit court on an appeal thereto in an election case final, it was held that Const. art. 5, § 5, providing for the original jurisdiction of the Supreme Court in certain cases, and that such court shall have appellate jurisdic-

tion in all other cases, had no application, the court saying: "Whether this clause of the Constitution was designed to give to this court appellate jurisdiction in all cases except those specified in which it is given original jurisdiction, not subject to any legislative restrictions or limitations in that regard, or merely to define the general character of its jurisdiction as being appellate only, except in the cases specified, it is not necessary here to consider, as the proceeding to contest an election under our statute is not a 'case,' within the meaning of that section of the Constitution. This is merely a statutory proceeding for canvassing the votes cast at an election, in which the illegal votes may be registered, and those which are legal may be counted, and the result ascertained; and the finding of that result is not a 'judgment,' in the sense in which that term is used in the law giving the right to prosecute a writ of error, nor is the proceeding by means of which that result is reached a 'case,' within the meaning of the Constitution. That term would refer more properly to an action at law or a suit in chancery, but this proceeding is neither one nor the other." *Moore v. Mayfield*, 47 Ill. 167, 169.

An election contest is not a "case," within the meaning of Const. art. 6, § 12, providing that the circuit courts shall have original jurisdiction of all cases in law and equity. *Douglas v. Hutchison*, 55 N. E. 628, 629, 183 Ill. 323.

The word "case," in Rev. St. p. 27, giving an appeal from the circuit court in civil and criminal cases, does not include an election contest. *French v. Lighty*, 9 Ind. 475, 476.

While each state has the power to prescribe qualifications of its officers and the manner in which they shall be chosen and the title to the offices shall be tried, whether in judicial courts or otherwise, when the trial is in the courts it is a "case," and, if a defense is interposed under the Constitution or laws of the United States, the Supreme Court of the United States has jurisdiction. *Boyd v. State*, 12 Sup. Ct. 375, 382, 143 U. S. 135, 38 L. Ed. 103.

#### **Mandamus.**

The term, "cases cognizable at common law," as used in Act Cong. April 7, 1874, providing for the practice in territorial courts, and declaring that no party shall be provided a right of trial by jury in cases cognizable at common law, does not include proceedings in mandamus. *Chumasero v. Potts*, 2 Mont. 242, 259.

#### **As each party.**

The word "case" has various meanings. In a legal sense it means suit, but in its ordinary usage it means event, result, happening, side, or party. In Code, c. 50, §

91, providing for the granting of a new trial in the case on certain grounds, and providing that in such case he shall appoint a time for a new trial and issue a venire facias, but no more than one trial shall be granted by a justice in any case, it is used in three senses. The first one denotes the suit, the second one denotes the event, and the third one will be held to denote the party. This construction in the last case gives to each of the litigants equal opportunity to be heard once, but after the case has been decided twice one way it becomes a conclusive finality. It is not a case on trial, but a case of a party asking for a new trial, that is indicated. *Dickey v. Smith*, 26 S. E. 373, 375, 42 W. Va. 805.

Code 1897, § 5314, provides that an attorney appointed to defend a person indicted for a felony other than homicide shall receive from the county the sum of \$10 in full for his services, and that only one attorney in any one case shall receive such compensation. It was held that where an attorney was appointed to defend two defendants, jointly indicted and tried, he was entitled to a statutory fee for each, there being in legal effect two appointments; the word "case" meaning an indictment against any one person, for though the indictment may be joint, the pleas may be the same, or they may not. The issues are as to each, and each makes his personal defense. One may be convicted and the other acquitted, the judgment in its co-operation is as to each so far as punishment or penalty is concerned. Separate trials may be awarded and had. If both are convicted, there are two convictions. *Clark v. Osceola County*, 78 N. W. 198, 199, 107 Iowa, 502.

#### **As pending suit.**

Code 1891, c. 127, § 4, provides that at any stage of any case an execution may be issued out for or against the assignee or beneficiary party to show cause why the suit should not proceed in his name. Held, that the word "case," as well as the word "suit," means a pending suit. *Wells v. Graham*, 39 W. Va. 605, 606, 20 S. E. 576.

#### **Probate proceedings.**

A proceeding in the Supreme Court of the District of Columbia, involving the validity of the probate of a will, and another involving the validity as a will of a paper offered for probate, are each a "case," within Rev. St. D. C. § 772, authorizing the review of the final judgment or decree of that court in any "case" involving a specified amount. On the determination of each depends rights of property, and in each are adversary parties. There can be no reason why Congress should extend the jurisdiction of the Supreme Court to proceedings involving the probate of wills, and not to proceedings involving the validity of an instrument offered for pro-

bate as a will. *Ormsby v. Webb*, 10 Sup. Ct. 478, 482, 134 U. S. 47, 33 L. Ed. 805.

The term "case" is applied by the Code of Civil Procedure to proceedings of distinct inquiry and determination by the court in matters of probate as well as the matters of more formal litigation, and is used in a much broader and less technical sense than the term "action." In *re McFarland's Estate*, 26 Pac. 185, 189, 10 Mont. 445.

The word "case," as used in the Probate Code, refers to a subject-matter which by the provisions of the Code is cognizable in a county court, and includes every proceeding therein maintained in relation to the same matter or estate. Rev. Codes N. D. 1899, § 6168.

#### Special proceedings.

The word "cases," as used in Gen. St. §§ 2425-2428, allowing the prevailing party costs on appeal to the Supreme Court in all classes of cases, legal and equitable, means special proceedings, as contradistinguished from actions. *Sease v. Dobson*, 15 S. E. 703, 704, 38 S. C. 554.

In common parlance the word "case" has a more extended meaning than the word "suit" or "action," and includes an application for divorce, applications for the establishment of highways, applications for orders of support of relatives, and other special proceedings. *Gold v. Vermont Cent. R. Co.*, 19 Vt. 478, 484.

The word "case," in section 40 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3436]) providing that referees shall receive for their services a certain sum for each case, is not used in a technical, restrictive, legal meaning, and it is apparent that the act recognized separate estates, and intended that each petition, set of schedules, and estate should in the bankruptcy court constitute separate cases. Thus where a partnership applies for the benefit of the bankruptcy law, and files a petition for the adjudication of the firm as such, and also separate petitions for the adjudication of the several partners, each petition with the accompanying schedules constitutes a separate and distinct case. In *re Barden* (U. S.) 101 Fed. 553, 556.

In Code, § 173, designating what issues shall be tried before a jury and what not, the words "in other cases" refer to other civil actions or suits, not to special proceedings created and regulated by statute. *Clough v. Clough*, 51 Pac. 513, 515, 10 Colo. App. 433.

A proceeding before a United States commissioner is a "case," within a statute providing that a commissioner shall receive a fee for hearing and deciding the case of any person charged with crime. *Van Duzee v. United States* (U. S.) 41 Fed. 571, 575.

The issue made before the Circuit Court on the application of the Civil Service Commission for an order to compel the giving of testimony or the production of books and papers is a "case," or "controversy," within the meaning of the federal Constitution. *People v. Kipley*, 49 N. E. 229, 237, 171 Ill. 44, 41 L. R. A. 775 (citing *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047).

A statute making it perjury to swear to a falsehood in a "case in which the law authorizes an oath to be administered" is not to be confined to suits or proceedings strictly in court, but includes any instance where the law authorizes the making of an oath. *United States v. Volz* (U. S.) 28 Fed. Cas. 384, 385.

#### Tax proceedings.

The definition of a "case" is wider than that of a suit or criminal prosecution or a proceeding in rem, although in law it usually applies to one of them. It may embrace, however, any state of facts involving matters for decision, and such has been the common practice. Hence, under the Constitution, providing that the circuit court shall have jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which may not be vested in some other court, the court has jurisdiction to determine the sufficiency of the sureties of the bond of a collector of taxes. *Oliver v. Martin*, 36 Ark. 134, 139.

A proceeding for the assessment of taxes is not a "case," within a clause giving a writ of error in a civil case where the matter is of greater value than \$100. *Mackin v. Taylor County Court*, 38 W. Va. 338, 343, 18 S. E. 632.

#### CASE (Action of).

Actions for trespass on the case have been abbreviated so as to be called simply "case"; so that under a statute providing that all actions at law whatsoever, save and except actions on the case for slander or libel, or trespass for injuries done to the person, shall survive, actions for personal injury, which would have been actions of trespass on the case at common law, do not survive. *Munal v. Brown* (U. S.) 71 Fed. 967, 968.

The action of "case" is the proper remedy for an injury which is a consequence or the collateral effect of an unlawful act, and it is distinguished from trespass *vi et armis* in that the latter is a remedy for the direct consequence of the wrongful act. *Legaux v. Feasor*, 1 Yeates (Pa.) 586, 587; *Taylor v. Rainbow* (Va.) 2 Hen. & M. 423, 438; *Harrington v. Heath*, 15 Ohio, 483, 485; *Leame v. Bray*, 3 East, 593, 597; *Percival v. Hickey* (N. Y.) 18 Johns. 257, 285, 9 Am. Dec. 210.

In *Leame v. Bray*, 3 East, 593, *Le Blanc, J.*, says that the distinction between trespass

and case is that, where the injury is immediate on the act done, trespass lies, but where it is not immediate, but consequential, then the remedy is in case. *Percival v. Hickey* (N. Y.) 18 Johns. 257, 285, 9 Am. Dec. 210.

Case is the appropriate remedy where the injury proceeds from mere negligence or is not the immediate consequence of the tort, and hence an action against a sheriff for failure to permit plaintiff to obtain bail is in case. *Taylor v. Smith*, 16 South. 629, 631, 104 Ala. 537.

"Where the term 'case' is adopted in a statute or otherwise, an action for a tort in form *ex delicto* is generally intended, and not an action in form *ex contractu*;" and hence an action in *assumpsit*, though originating under the statute of Westminster, and thus, strictly speaking, an action on the case, is not generally so designated. *State v. Harmon*, 15 W. Va. 115, 124.

In a statute limiting the time for commencing an action on the case to three years, the term "case" is a generic term embracing many different species of actions. "There are two, however, of more prominent use than any other form whatever." These are "*assumpsit*" and "*trover*." *Steph.* Pl. 18. Such term, as used in such statute, includes an action against the stockholders of an insolvent bank to recover on their statutory liability for the debts of the bank. *Carrol v. Green*, 92 U. S. 509, 513, 23 L. Ed. 738.

#### CASE (Action on).

See "Trespass on the Case."

The history of the "action on the case," or "special action on the case," as it was originally called, is well known to the profession. It is not one of the original common-law writs. In the progress of judicial contestation, it was discovered that there was a mass of tortious wrongs, unattended by direct and immediate force, or where the force, though direct, was not expended on an existing right of present enjoyment for which the then known forms of actions furnished no redress. The action on the case was instituted to meet this want. It may then be styled a suppletory, personal action, *ex delicto*. It was designed to be residuary in its scope, but is always classed among the actions in tort. *Mobile Life Ins. Co. v. Randall*, 74 Ala. 170, 176.

"Actions on the case" are founded on common law or upon acts of Parliament, and lie generally to recover damages for torts not committed with force, actual or implied. 1 Chit. Pl. 133. Mr. Stevens says that an action on the case lies where a party sues for damages for any wrong to which trespass will not apply. Judge Bliss says that where the injury is not the direct result of force, but grows out of the wrongful act of defendant, the action is trespass on the case, often called "the case." Bliss, Code

Pl. § 9, subd. 2. The right of action against the directors of a national bank for violation of the provisions of the national bank act, given by Rev. St. § 5239 [U. S. Comp. St. 1901, p. 3515], is for a tort, and comes within the common-law definition of actions on the case. *Cockrill v. Butler* (U. S.) 78 Fed. 679, 682.

An action on the case is a well-known action in form *ex delicto*. It is brought for a tort, and is distinguished from a trespass, which is also an action *ex delicto* and brought for a tort, but which is for those committed by force and immediately, while the action on the case is for those not committed with force and not immediately; and such is its use in a statute providing that damages for infringement of any patent may be recovered by action on the case. *Cramer v. Fry* (U. S.) 68 Fed. 201, 205.

An action on the case is not founded on any debt, but on the mere justice and conscience of the plaintiff's right to recover. It is in the nature of a bill in equity, and, in general, whatever will in equity and in conscience preclude the plaintiff's right of recovery may be given in evidence into the general issue. *Hynson v. Taylor*, 3 Ark. (3 Pike) 552, 556.

The term "action on the case" comprehends a great variety of suits. "Such action may be brought upon a statute as well as for fraud or breach of warranty." *Sharp v. Curtiss*, 15 Conn. 528, 532.

If an injury be forcible and occasioned immediately, but by act of the defendant, trespass *vi et armis* is the proper remedy, but if the injury be not in legal contemplation forcible, or not direct or immediate, or the act done be of consequence, then the remedy is by action on the case. 1 Chit. Pl. 122. W. had cut wood on land belonging to J. with J.'s approbation, and left the wood lying on J.'s land. J., for the purpose of clearing up another part of this land, and with no intention to burn W.'s wood, set fire to the brush on this other part of his land. The fire escaped from the control of J., and passed onto the land where W.'s wood was, consuming it. Held, that trespass *vi et armis* would lie for injury. *Jordan v. Wyatt* (Va.) 4 Grat. 151, 153, 47 Am. Dec. 720.

The action on the case "is an action in which the special circumstances in the case itself are set forth in the complaint or declaration in writing filed in the cause by the complainant or plaintiff, and upon which he claims that he is entitled to recover for such damages as were the natural result of, or were occasioned by, the default of the defendant in the omission or neglect on his part of some duty which the law had cast upon him at the time the circumstances happened. The gist of the complaint, therefore, is defendant's negligence. These actions are based upon the public duty of a defendant—one with which the law charges

him." *Wallace v. Wilmington & N. R. Co. (Del.)* 18 Atl. 818, 819, 8 Houst. 529.

An action on the case is an action on the plaintiff's case, wherein in his declaration he sets out the particular circumstances of the injury he received, and claims damages for that injury. An action for injuries sustained by a person employed to clean street cars, and who was standing near a car for that purpose, by being hit by a wagon driven by an employé of defendant, is an action on the case. *Ford v. Charles Warner Co. (Del.)* 37 Atl. 39, 40, 1 Marv. 88.

An action on the case lies for a tort not committed with force, actual or implied; for a tort committed forcibly, when the matter affected was not tangible, as for an injury to a right of way or to a franchise; for an injury to a relative right; for an injury resulting from negligence; for a wrongful act done under legal process regularly issued from a court of competent jurisdiction; for a wrongful act committed by defendant's servant without his order and for which he is responsible; for an infringement of a right given by statute; for an injury done to property of which the plaintiff has the reversion only. *Emrick v. Little Rock Traction Co.*, 70 S. W. 1035, 1037, 71 Ark. 71 (citing And. Law Dict.).

#### **CASE (On Appeal).**

In *Smith v. Grant*, 15 N. Y. 590, it is said that a case is now, in substance, very nearly, if not identically, what a bill of exceptions always was in legal practice, except as to the formal statement of facts which is now required to be inserted. In *Bissel v. Hamlin*, 20 N. Y. 519, it is said the office of a case is simply to present the questions which are to be examined in the appellate court. It should present those questions with legal and logical precision. *Griggs v. Day*, 45 N. Y. Supp. 309, 319.

Case on appeal is that which shows in substance the whole evidence, enabling the court to review the finding of the jury as well as the rulings of the judge, together with the bill of exceptions. *St. Croix Lumber Co. v. Pennington*, 11 N. W. 497, 501, 2 Dak. 467.

The term "case" is used in three distinct senses. It is used in the most general sense as the equivalent merely of "cause" or "suit," as describing the subject-matter of a proceeding in a court of justice. It is used again in a technical sense, as signifying a statement of the proceedings on the trial of an issue of fact. In appellate procedure it is used in still another sense, as meaning the paper book made up for the use of the Supreme Court, containing all the proceedings in the court below necessary to the understanding of a matter to be submitted to the judgment of the Supreme Court, and the proceedings taken by way of appeal to bring the case into the Supreme Court. *Sullivan v. Thomas*, 3 S. C. (3 Rich.) 531, 546.

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"The term 'case' is, according to familiar legal usage, applicable either to a suit or other remedial proceeding in a court of justice, or to matters brought into an appellate court by means of a writ of error and assignments of errors or other similar proceeding. When used to designate a suit or proceeding in a court of original jurisdiction, it embraces the idea of parties and a subject-matter in controversy between them, its character and description for jurisdictional purposes being determined by the nature of demand by the party seeking the court for relief. When applied to a writ of error and assignments of errors, it covers the idea of certain alleged errors in a legal judgment consisting in failure to apply the proper law of the case to its adjudication. Every error assigned is a case in substance and effect, as it would separately and independently support a writ of error as such." *State v. Davis*, 12 S. C. 528, 540.

Laws 1849, p. 90, providing that on the trial of a question of fact by the court its decision shall be given in writing, and that the facts shall be first stated, and then the conclusions of law on them, and that either party desiring a review of the evidence appearing on the trial, either on a question of law or of fact, may appeal to the court, and "make a case" containing so much of the evidence as may be material to the question to be raised, means the bringing up of so much of the evidence as is material to the question involved; and it is immaterial, for the purposes of review, whether the application, instead of being called a "case-made," is termed "a motion for a new trial and application for review." *Smith v. Harris*, 43 Mo. 557, 565.

A statement of the case is a statement, in writing, setting forth or showing particularly one or more of the rulings, decisions, or acts excepted to in an action or proceeding, together with the facts and circumstances of the ruling, decision, or act, and the exception thereto, and settled, certified, and filed as provided in this article. The office of a statement of the case is to make such parts of the proceedings or of the evidence in an action appear of record as otherwise would not so appear. Rev. Codes N. D. 1899, §§ 8256, 8257.

A statement of the evidence, or a part thereof, settled by the court for the purpose of reviewing either errors of law or the sufficiency of the evidence or both, is designated in this Code [Code Civ. Proc.] a "statement of the case." Rev. Codes N. D. 1899, § 5464.

#### **CASE AFFECTING AMBASSADORS, ETC.**

See "Affecting."

#### **CASE AT LAW.**

Const. art. 6, § 4, providing that the Supreme Court shall have jurisdiction in all



cases at law which involve a title or possession of real estate, or the legality of any tax imposed in an assessment, toll, or municipal fine, refers only to civil cases as distinguished from criminal cases. *People v. Johnson*, 30 Cal. 98, 104.

The expression "case at law" has been invariably construed by the Supreme Court of Minnesota as referring to ordinary common-law actions, as distinguished from suits in equity or admiralty, and special proceedings, and what are called "remedial cases." Hence proceedings upon information in the nature of quo warranto, being of that class designated "remedial cases," are not included in that class denominated "cases at law," within article 1, § 4, of the Constitution, giving a right of trial by jury in such cases. *State v. Minnesota Thresher Mfg. Co.*, 41 N. W. 1020, 1021, 40 Minn. 213, 3 L. R. A. 510.

A proceeding under the insolvent act to determine the insolvency of the debtor, and upon the petition of the creditors for the appointment of a receiver, is not a "case at law," within the provisions of the Constitution authorizing or providing for a trial by jury in such cases. *In re Howes*, 38 N. W. 104, 106, 38 Minn. 403.

Const. art. 6, § 4, conferring appellate jurisdiction on the Supreme Court in all cases at law which involve the title or possession of real estate, or the legality of any tax imposed, assessments, toll, or municipal fine, does not include proceedings for opening, grading, extending, paving, and altering streets, and the assessment of damages caused by such proceedings have always been considered special proceedings. *Appeal of Houghton*, 42 Cal. 35, 55.

Const. art. 1, § 5, declaring that the right of trial by jury shall remain inviolate and shall extend to all cases at law, is to be construed as not including proceedings for the appointment of a guardian. "This clause provides, in substance, that the right of trial by jury shall remain inviolate and shall extend to all cases at law. We think that 'cases at law,' as these words are used in the Constitution, are not cases of this description. Cases at law are properly controversies between parties, and not the appointment of guardians for minors or insane persons." *Gaston v. Babcock*, 6 Wis. 503, 506.

#### CASE BETWEEN PARTIES IN DIFFERENT STATES.

The phrase "cases between parties in different states," in the judiciary act giving the federal courts concurrent jurisdiction of cases at law or in equity between parties of different states, is held not to include proceedings to probate a will, as in such proceeding there are no parties or all the world are parties, so that it cannot be said to be

a controversy between parties of different states. *Gaines v. Fuentes*, 92 U. S. 10, 21, 23 L. Ed. 524.

#### CASE OF BOUNDARY.

See "Boundary Case."

#### CASES OF QUASI CRIMINAL NATURE

See "Quasi Criminal."

#### CASE STATED.

A case stated or a special case is an agreed statement of an actual controversy which the parties mutually submit to the court. The parties, where a real contest exists, may enter an action by amicable agreement, and in that action, or in one brought by process issued, may agree to state certain facts for the opinion of the court; and if they desire to have the benefit of a writ of error, may insert in their agreement that it shall be in the nature of a special verdict. *Deihl v. Ihrie* (Pa.) 3 Whart. 143, 148.

A case stated is a substitute for a special verdict, adopted for convenience to save the labor and expense of finding the same facts by the jury in the form of a special verdict. It is, therefore, but a reasonable construction of the agreement that it shall be attended with the same effects, and liable to the same incidents. *Whitesides v. Russell*, 8 Watts & S. 44, 47.

A case stated is a substitute for a verdict resorted to for convenience and to save the expense of a trial, its purpose not being to make evidence for a jury, but to supersede the action of the jury altogether by imparting to facts ascertained by consent the judicial certainty necessary to enable the court to pass upon the law and give judgment on the whole. *McLughan v. Bovard* (Pa.) 4 Watts, 308, 312.

Where parties submit their case to arbitrators, who make a report in writing for the opinion of the court below, the case stands on the same footing as a case stated. *Fuller v. Trevoir* (Pa.) 8 Serg. & R. 529.

#### CASH.

The descriptive word "Cash," affixed to the name of the payee of a note, indicates that he was acting in a representative capacity, and that it was in such capacity that the note was made payable to him. *Nave v. Hadley*, 74 Ind. 155, 157.

#### CASH.

Cash means money at command, ready money. A sale by a sheriff under an order of court for the highest cash price means a

sale for money in hand. *Dazet v. Landry*, 30 Pac. 1064, 1066, 21 Nev. 291.

The common meaning of the word "cash" is money. Sometimes it means ready money. *Hooper v. Flood*, 54 Cal. 218, 221.

A voucher in an action on a money claim, stating the amount of the claim as so much "cash," does not inform the defendant as to the real nature and character of the plaintiff's claim. Cash simply means that the defendant owes the plaintiff the sum of money named, but on what account—whether for goods sold or money loaned, or otherwise—the account entirely fails to show. *Burk v. Tinsley*, 30 Atl. 604, 605, 80 Md. 98.

Cash is money at command, ready money, money on hand which a merchant has to do business with. To receive a check as cash is to receive it as money. *Blair v. Wilson* (Va.) 28 Grat. 165, 175.

Where a special partner is to contribute an amount of capital agreed upon "in cash," a payment in goods is not a compliance with the agreement. *Haviland v. Chace*, 39 Barb. 283, 284.

#### **Bank notes and current bills.**

Cash includes bank notes. *Miller v. Race*, 1 Burrow, 452, 459.

Notes of a bank are not "cash," and cannot be tendered as cash, nor can they be brought into court as such. *State Bank at Trenton v. Cox*, 8 N. J. Law (3 Halst.) 172, 14 Am. Dec. 417.

Bank paper, in conformity with common usage and common understanding, is regarded as cash. *Keith v. Jones* (N. Y.) 9 Johns. 120.

"Cash" has two meanings; one a payment in current bills, the other in specie. The first is the popular, the latter the legal, meaning. The former has in common parlance entirely supplanted the latter. An advertisement that the sale by a sheriff would be for cash would be understood by every one to be for current bills. A sale for specie under such a notice would not be fair. *Farr v. Sims* (S. O.) Rich. Eq. Cas. 122, 131, 24 Am. Dec. 396.

#### **Checks and foreign bills.**

Cash means specie or its equivalent in current bills of specie-paying banks, and does not include indorsed checks. *Crocker v. Crane*, 21 Wend. 211, 219, 34 Am. Dec. 228.

A note payable in foreign bills is not a cash note, as cash does not include foreign bills, and therefore is not negotiable. *Jones v. Fales*, 4 Mass. 245, 253.

Checks are deposited as cash, pass current as cash, the amount thereof is paid out by the bank as cash, and the same check is often used to liquidate several debts. Often-

times the holder of a check obtains cash for it, instead of depositing it; and under such circumstances a check is valid in the hands of the holder for value, without evidence that he took it under circumstances rendering him guilty of bad faith. It is not enough that the circumstances are suspicious, or sufficient to put a prudent man on inquiry. *Glines v. State Sav. Bank* (Mich.) 94 N. W. 195, 197.

#### **Confederate currency.**

The term "cash" did not embrace Confederate treasury notes, even during the Civil War, and therefore a commissioner appointed to sell land for cash during the war was not authorized to sell for such notes. *McNeill v. Shaw*, 62 N. C. 91.

"Cash," as used in Rev. Code, § 2228, requiring the sale of the lands of a deceased person to be made for cash, means money; that is, such a currency as was given as a legal tender in payment of debts under the Constitution and laws of the United States, or such a currency as was convertible into such a legal currency without loss to the estate to which it was paid. It does not mean the law currency of the so-called Confederate States. *Kitchell v. Jackson*, 44 Ala. 302, 304.

#### **Gold dust.**

Gold dust is not cash, within the meaning of a contract calling for payment in cash, since the price of gold dust is constantly fluctuating in its market value. It is an article of merchandise. *Gunter v. Sanchez*, 1 Cal. 45, 49.

#### **Promissory notes.**

"Cash means ready money, either in current coin, or in legal tender, or in bank bills or checks payable and received as money, and does not include promises to pay money in the future." *Palliser v. United States*, 10 Sup. Ct. 1034, 1035, 136 U. S. 257, 34 L. Ed. 514.

A note is an agreement to pay money, and cannot be treated as cash. *Pierce v. Bryant*, 87 Mass. (5 Allen) 91, 93.

In Sess. Laws 1891, p. 274, c. 33, § 8, providing that members of a mutual insurance company shall at the time of effecting the insurance pay such percentage in cash, the word "cash" means current money, and a note or promise to pay is not cash. *State v. Moore*, 67 N. W. 876, 878, 48 Neb. 870.

A requirement in a deed of trust that the property should be sold for cash was construed to be satisfied by a part payment of cash and the giving of notes for the balance, which notes were received by lien holders, and the liens discharged, as such notes were equivalent to cash in the hands of the trustees. *Mead v. McLaughlin*, 42 Mo. 198.

**Treasury notes.**

"Cash," as used in a request to send cash by mail, should be construed to mean money, and not to include treasury notes. *Foquet v. Hoadley*, 3 Conn. 534, 536.

In an advertisement for the sale of mortgaged property, the word "cash" imports ready money, in contradiction to credit, and permits payment in United States treasury notes. *Meng v. Houser* (S. C.) 13 Rich. Eq. 210, 213.

**CASH CAPITAL.**

The cash capital of a commercial firm, whose business comprehends the purchase of cotton upon commission and the buying of bills of exchange upon domestic and foreign places, upon which said bills of exchange and cotton they draw and sell their own bills of exchange, is that much cash in gold or silver ready at hand in the strong box to be paid out for cotton purchased on commission or in the purchase of bills of exchange; and this cash capital comes under the description of personal estate. *St. John v. City of Mobile*, 21 Ala. 224, 226.

**CASH CONTRIBUTION.**

Where, on the formation of a limited partnership, the special partner gave his certified check, which was deposited to the credit of the new firm, and then the firm gave him its check for a part thereof, appearing to his credit on the books of a former firm composed of the same members, it was not an actual "cash contribution," and such partner was liable as a general partner. *Lineweaver v. Slagle*, 64 Md. 465, 2 Atl. 693, 54 Am. Rep. 775. The payment to the general partnership must be unrestricted, unqualified, in good faith, and left absolutely subject to the risks of the business; and, however the special partner may have acquired the money he contributes, if it is obtained by a contrivance to evade the statute, and if he depletes the firm's assets by his method of procuring it, the means used by him are at once of the greatest consequence. *Moorhead v. Seymour*, 77 N. Y. Supp. 1050, 1061.

**CASH ENTRY.**

"Cash entry," when applied to the purchase of land from the government, means the purchase of land at the government price. It is simply a cash transaction, and requires no affidavit of settlement, residence, or cultivation, or of nonalienation. *Fideler v. Norton*, 30 N. W. 123, 136, 4 Dak. 258.

**CASH MARKET VALUE.**

In proceedings for condemnation of land for a right of way, an instruction defining "cash market value" as the price which the

owner, if desirous of selling, would under ordinary circumstances surrounding the sale of property have sold the property for, and a person desirous of purchasing the property would under such circumstances have paid for it, means the fair cash market value; and the fair cash value and the actual cash value mean the same thing, and both mean the fair or reasonable cash price for which property can be sold in the market. *Conness v. Indiana, I. & I. R. Co.*, 193 Ill. 464, 474, 62 N. E. 221 (citing *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598).

**CASH NOTES.**

A promise to pay in cash notes is not a promise to pay the nominal amount in money. *Ward v. Lattimer*, 2 Tex. 245, 248.

**CASH ON HAND.**

"Cash on hand," as used in Revision 1875, tit. 12, c. 5, § 6, requiring the payment by railway companies of a tax upon the valuation of its property after deducting the cash on hand, etc., means "ready money, or that which in ordinary business usage is the same thing. Bank notes, checks, drafts, bills of exchange, certificates of deposit, or other like instruments, which pass with or without indorsement from hand to hand as money, or are immediately convertible into money, fall properly enough within the words 'cash on hand.' Loans to other railroads on long time, stock of other companies not intended to be sold, and other investments of like kind, are clearly not cash on hand. 'Cash on hand' means money at hand ready to be used; actual cash or its equivalent, and actually on hand." *State v. New York, N. H. & H. R. Co.*, 22 Atl. 765, 767, 60 Conn. 323.

**CASH PAYMENT.**

See "Actual Cash Payment."

A cash payment in ordinary parlance is understood, in contradistinction to a credit payment, and there is no more reason for supposing that a cash payment is to be paid in money than that a deferred or credit payment is to be paid in money when due. *Foley v. Mason*, 6 Md. 37, 51.

**CASH POLICY.**

A stock policy of insurance must not be confounded with a cash policy. They are essentially different. The payment of a cash premium does not decide the character of a policy, as to whether it is mutual or stock. A mutual company may insure for either note or cash, and so may a stock company. A stock policy is issued solely upon the credit of the capital stock of the company to one who may be an entire stranger to the

corporation. *Given v. Rettew*, 29 Atl. 708, 704, 162 Pa. 688.

### CASH PREMIUM PLAN.

On the cash premium plan, on which loans are made to members of a building and loan association, a certain amount of money is advanced to the borrower as a loan upon his taking the requisite number of shares in the association, on which he pays a certain amount each month as interest on the whole loan, a certain amount each month as premium, and a certain amount each month as dues on his shares. The borrower each month pays, in addition to the interest on the money borrowed and the amount due upon his shares, a further sum in cash, called a "cash premium," in the nature of a bonus. Such an agreement is made upon the implied condition that the association shall remain a going concern. *Curtis v. Granite State Provident Ass'n*, 38 Atl. 1023, 1024, 69 Conn. 6, 61 Am. St. Rep. 17.

### CASH PURCHASE.

A cash purchase is a payment of the purchase money and a delivery of the thing purchased. *Powell v. Dayton, S. & G. R. R. Co.*, 12 Pac. 685, 687, 14 Or. 356.

### CASH SALE.

In common ordinary popular acceptance of the language, a direction to sell for cash is a clear and unqualified direction not to sell or pass title to the goods without cash in hand. A sale for cash means that the money shall be paid when the title to the property passes. *Hall v. Storrs*, 7 Wis. 253, 259.

A sale for cash is a sale for money in hand, and on such sale the owner is not bound to deliver the goods until the price is paid. *Steward v. Scudder*, 24 N. J. Law (4 Zab.) 96, 101.

A cash sale is a sale for the money in hand. *Dazet v. Landry*, 30 Pac. 1064, 1066, 21 Nev. 291.

The term "cash sale" means a sale for cash, in contradistinction to a sale on credit. It means a sale in which the price is immediately paid. *Philadelphia & R. R. Co. v. Lehigh Coal Navigation Co.*, 36 Pa. (12 Casey) 204, 210.

The expressions "cash," "cash down," or "cash on delivery," as used in sales, may be used in two different senses—one where the words indicate simply that the goods must be paid for before the buyer is entitled to possession, and the other where they indicate an intention not to part with the title until the price is paid. A cash sale is not necessarily, in law, either a conditional or unconditional sale. If by the use of these terms the parties understand merely that no

credit is to be given, and the seller will insist on his right to possession until the payment of the price, the sale is so far complete and absolute that the property passes; but if it is understood that the goods are to remain the property of the seller until the price is paid the sale is conditional, and the title does not pass. *Austin v. Welch*, 72 S. W. 881, 883, 31 Tex. Civ. App. 526 (citing *Scudder v. Bradbury*, 106 Mass. 422; *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450).

#### As affected by custom.

The term "cash sale," within the meaning of a direction to a factor to sell produce for cash, renders the factor liable for a loss resulting from his act in permitting a purchaser to take away the produce without paying the money at the time, even although there is a usage among factors of allowing purchasers a week or fortnight to pay when the sale has been for cash. *Barksdale v. Brown*, 1 Nott & McQ. 517, 522, 9 Am. Dec. 720.

Where a factor, having orders to sell goods for cash, sold and delivered to a person in good credit, and the next day sent a bill to the purchaser for the price, which was not paid, it was held that the sale, being according to usage, was a sale for cash, and that the factor, even if he had the right, was not bound to receive such part of the goods as remained unsold by the purchaser. *Clark v. Van Northwick*, 18 Mass. (1 Pick.) 343, 344.

A sale for cash or a sale, which is called a "cash transaction," the term being interpreted in the sense in which the merchants of St. Louis use it, is something different from a sale of goods to be paid for on delivery. The interpretation put on the phrase "a cash transaction" or "a cash sale" by the course of dealings in St. Louis demonstrates that often what is thus characterized repudiates the idea of payment at the time when the goods come to the possession of the purchaser. It is quite consistent with the definition practically given to this phrase that an interval of 30 days may elapse between delivery and payment, and yet the transaction be called and recognized by every one as a cash transaction. *St. Louis Type Foundry v. Union Printing & Publishing Co.*, 3 Mo. App. 142, 149.

A cash sale is a sale for a sum of money actually paid at the time of the sale, and proof that custom sales on a credit of 30 days were ordinarily called and regarded as cash sales will not be allowed to alter the meaning of the term. In this connection the court says: "We know that usage and custom will accomplish almost anything, except impossibilities, but when it proposes to change the intent of language it does not thereby change the nature of things. If any term of credit is not credit, then no term of

credit is credit, and the very import of the term is abolished and expunged, and the thing becomes impossible." *Chapman v. Devereux*, 32 Vt. 616, 622.

A cash sale is one wherein the money is paid when the property is delivered. It cannot be contended that a sale for cash is a sale on credit of a week or ten days, nor can a duty to sell for cash be satisfied by a sale on a short credit, as a week or ten days, by a common custom of merchants so to dispose of goods sent them for sale. *Bliss v. Arnold*, 8 Vt. 252, 255, 30 Am. Dec. 467.

Where a declaration stated that plaintiff agreed to employ defendant as a coal factor, and that defendant promised the plaintiff that he would not sell "otherwise than for ready money," an alleged breach was not sustained by evidence for sale at two months' credit under a letter by plaintiff to defendant containing the following instruction: "Please sell me 250 tons at such price as will realize me not less than 15s. per ton net cash, less your commission for such sale." *Boden v. French*, 10 C. B. 886.

#### As authorizing credit.

A sale of property for cash means that the money shall be paid down when the title to the property passes, and a sale and delivery for a bank check payable the next day is not a sale for cash. *Hall v. Storrs*, 7 Wis. 253.

Under authority to sell goods for cash or not on credit, a sale to a person who promised to pay for them within a few days is not a sale for cash. *Catlin v. Smith*, 24 Vt. 85, 86.

Where one ordered to sell goods for cash sells them to one in good credit, expecting payment within a week, it was no violation of orders. *Clark v. Van Northwick*, 18 Mass. (1 Pick.) 343.

A positive direction to convert property assigned into "cash" as soon as possible, and upon the best terms possible, can hardly be construed into a discretionary authority to sell on credit, without doing violence to the well-established rule that power to sell on credit will not be inferred from language susceptible of a different construction. *Muller v. Norton*, 10 Sup. Ct. 147, 182 U. S. 501, 33 L. Ed. 397.

When a commission merchant is directed to "sell for cash," he cannot sell and deliver the goods, and wait a week or ten days for the price, though such is the custom among such merchants. "In all sales for cash the money must be paid when the property is delivered." *Bliss v. Arnold*, 8 Vt. 252, 255, 30 Am. Dec. 467.

The word "cash" may be employed at all times as a synonym of money in general.

But Webster declares that primarily it means ready money—money in your chest or in your hand. Where a person, by expression or limitation, stipulates for cash, he reserves the right to collect his money at will; and where persons have actually settled upon a definite period, however short, during which payment may be withheld, the sale is not for cash. *De Laume v. Agar*, *McGloin*, 97, 105.

#### CASH SURRENDER VALUE.

The term "cash surrender value," in Bankr. Act 1898, § 70a (Act July 1, 1898, c. 541, 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3451]), providing that, when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may pay or secure to the trustee the sum so ascertained and stated, and continue to hold such policy free from the claims of creditors, "has a defined and legal meaning, namely, the cash value, ascertainable by known rules, of a contract of insurance, abandoned and given up by the owner having contract right to do so. The surrender of the proviso is not the subject of negotiation or agreement, but of right. The proviso does not include those policies where the right of surrender is not given by the contract." In *re Welling* (U. S.) 113 Fed. 189, 192, 51 C. C. A. 151.

#### CASH VALUE.

See "Actual Cash Value"; "Estimated Cash Value"; "Fair Cash Value"; "Full Cash Value."

The cash value of an article is measured by the amount of cash into which it can be converted. *State v. Central Pac. Ry. Co.*, 10 Nev. 47, 48, 68.

An estimate of homestead property as being of the "cash value" of three thousand dollars is equivalent to the requirement of the statute that the estimation be of the "actual cash value," as the "value" of a tract of land is its true and absolute value. The value is its actual existing value as opposed to its potential or possible value. *Read v. Rahm*, 4 Pac. 111, 112, 65 Cal. 343.

#### In tax law.

"Cash value," as used in the statute of California declaring that real estate shall be assessed at its cash value, means the amount at which the property would be appraised if taken in payment of a just debt due from an insolvent debtor. *Huntington v. Central Pac. R. Co.* (U. S.) 12 Fed. Cas. 974, 976; *County of Cochise v. Copper Queen Consol. Min. Co.* (Ariz.) 71 Pac. 946, 949.

By the express provisions of Tax Law, § 53, the words "cash value," as used in

such act, means the usual selling price at the place where the property to which such term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale. *State Board of Tax Com'rs v. Holliday*, 49 N. E. 14, 17, 150 Ind. 216, 42 L. R. A. 826.

The expression "cash value," as used in a direction to assessing officers, means the same thing as salable value and actual value. *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 162, 25 L. Ed. 903.

The words "cash value," whenever used in the act relating to the collection of taxes, shall be held to mean the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale. *Comp. Laws Mich.* 1897, § 3850.

## CASHIER.

See "Cash."

As trustee of an express trust, see "Express Trust."

A "cashier" is defined to be one who has charge of money, or who superintends the books, payments, and receipts of a bank or moneyed institution. His actual powers and duties, like those of all other agents, must be more or less qualified, restricted, or enlarged by the corporation, institution, or party for whom he acts. *Sturges v. Bank of Circleville*, 11 Ohio St. 158, 167, 78 Am. Dec. 296.

The cashier "is the executive officer of a bank, who transacts its business under the orders and supervision of the board of directors. He is their arm in the management of its financial operations." *Martin v. Webb*, 3 Sup. Ct. 428, 433, 110 U. S. 7, 28 L. Ed. 49; *Luna v. Mohr*, 1 Pac. 860, 868, 3 N. M. (Johns.) 56.

The inherent duties of a cashier of a bank are superintendence of the books and of the payments and receipts of the bank, to take charge of the notes, securities, and other funds of the bank, and of the business of negotiating, managing, and disposing of them, the superintendence of the collection of protested notes, the receipt of all moneys and notes of the bank, the giving up of discounted notes and securities when paid, the drawing of checks to withdraw funds of the bank on deposit elsewhere, and as executive officer the transaction of most of the business of the bank. The cashier is the principal officer of a bank, and is properly the executive agent of the directors. *Sturges v. Bank of*

*Circleville*, 11 Ohio St. 158, 167, 78 Am. Dec. 296, 8 Am. Law Rev. 617.

"A cashier of a bank is held out to the public as having authority to act according to the general usage, practice, and course of business conducted by such institutions, and his acts done in the scope of such usage, practice, and course of business will, in general, bind the bank in favor of third persons possessing no other knowledge. Such an officer is, *virtute officii*, intrusted with the notes, securities, and other evidence of the bank, and is held out to the world by the bank as its general agent for the transaction of its affairs, within the scope of authority vested by such usage, practice, and course of business. Where the by-laws of a bank require that the transfer of the shares of the capital stock shall be entered in the books of the bank, the entry is usually made by the cashier. Official acts may be performed by the cashier which constitute the ordinary and customary functions of such an officer, and the persons dealing with the bank are warranted in believing that the cashier is duly authorized to perform any customary duty falling within the scope of that category, and may to that extent hold the bank responsible as if he was so authorized, however the fact may be, save only in cases where his want of authority is affirmatively proved, and actual knowledge of that fact is brought home to the third party." *Case v. Citizens' Bank of Louisiana*, 100 U. S. 446, 454, 25 L. Ed. 695.

A cashier is the business officer of the bank, but only in the sense of one who transacts, and not one who regulates or controls, its affairs. His duty has reference to daily routine business, and not to matters involving discretionary authority, which belongs, unless delegated, to the board of directors. As has been quaintly said, they are the minds and he is the hands of the corporation. It will not be disputed that when a special authority is conferred upon him, or when he acts in conformity with a general usage or an established acquiescence of his board of directors, the bank will be responsible for such acts, though beyond the ordinary scope of his duties. *Gray v. Farmers' Nat. Bank*, 32 Atl. 518, 521, 81 Md. 631 (citing *Chemical Nat. Bank v. Kohmer* [N. Y.] 8 Daly, 530; *United States v. City Bank*, 62 U. S. [21 How.] 356, 16 L. Ed. 130).

The cashier of a bank is its general executive officer, whose place it is to manage all the affairs of the corporation not particularly committed to the directors. Such being his office in general, his acts will be binding upon the bank if within the general scope of the business of the bank, though the cashier may not in fact have power to act in some regards to which his authority apparently extends. *First Nat. Bank of Birmingham v.*

First Nat. Bank of Newport, 22 South. 976, 979, 116 Ala. 520.

The cashier of a bank is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction,—as it were, the arms by which designated portions of his various functions are discharged. It is his duty to receive all the funds which come into the bank, and to enter them upon its books, and he has the authority to give certificates of deposit and other proper vouchers. Where the money is in the bank, he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. *Merchants' Nat. Bank v. State Nat. Bank*, 77 U. S. (10 Wall.) 604, 650, 19 L. Ed. 1008 (cited in *Ellis v. First Nat. Bank*, 48 Atl. 936, 938, 22 R. L. 565); *Rosenberg v. First Nat. Bank (Tex.)* 27 S. W. 897, 898. See, also, *Commonwealth v. Reading Sav. Bank*, 133 Mass. 16, 22, 43 Am. Rep. 495; *Asher v. Sutton*, 1 Pac. 535, 537, 31 Kan. 286. The cashier of a bank is the executive officer or agent of the financial department of the bank, and in all the duties imposed on him by law or usage as such cashier he acts and speaks for the bank. *Ellicott v. Barnes*, 1 Pac. 767, 768, 31 Kan. 170. The cashier of a bank is judicially defined to be an executive officer by whom its debts are received and paid, and its securities taken and transferred, and whose acts, within the ordinary course of his duties as such cashier, are binding on the bank. *Bank of Commerce v. Hart*, 55 N. W. 631, 632, 37 Neb. 197, 20 L. R. A. 780, 40 Am. St. Rep. 479.

The duties of a cashier of a bank are strictly executive. He is properly the executive agent of the board of directors, to carry out what it devises as to the management of the business of the bank. There are certain functions which, by long and universal usage, have come to be recognized as belonging to the office of cashier. They are inherent in the office, and unless restricted or enlarged they, and they only, can be performed by him by virtue of his appointment. *Taylor v. Commercial Bank*, 66 N. E. 726, 727, 174 N. Y. 181, 62 L. R. A. 783, 95 Am. St. Rep. 564 (citing *American Surety Co. v. Pauly*, 18 Sup. Ct. 552, 170 U. S. 133, 42 L. Ed. 977).

"Cashier," as used to define an officer of a bank, is the officer who, by virtue of his office, is generally intrusted with the notes, securities, and other funds of the bank, as its general agent in the negotiation, manage-

ment, and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and indorse negotiable securities held by the bank for its use and in its behalf. *Wild v. Bank of Passamaquoddy (U. S.)* 29 Fed. Cas. 1215, 1216.

The authority of the cashier of a bank to receive money and issue certificates of deposit therefor seems to be implied by the very name of his office. So that where a receipt or certificate is signed by him it must, in the absence of proof to the contrary, be taken to be the act of the bank. *Abbott v. Jack*, 69 Pac. 257, 258, 136 Cal. 510.

The word "cashier," in a designation of the ownership of stock upon the books of a bank as in the name of another person as "cashier" of another bank, suggests a qualified or representative holding, which puts all persons on inquiry, and the bank of which the holder is cashier is not estopped to show that it held the stock as collateral only. *Frazer v. Old Nat. Bank (U. S.)* 101 Fed. 391, 42 C. C. A. 133.

The term "cashier," as used in Code Civ. Proc. § 5421, subd. 5, requiring a writ of attachment on a foreign corporation to be served on the president of the corporation, or the secretary, cashier, or other managing agent thereof, does not include a clerk employed in the store of a foreign mining corporation, although he has the custody of money belonging to the corporation, and keeps the accounts of and pays the men employed in the mine of the corporation. *Blanc v. Paymaster Min. Co.*, 80 Pac. 765, 767, 95 Cal. 524, 29 Am. St. Rep. 149.

An employé of a state insurance agent, who is given the title "cashier," is not thereby impliedly authorized to indorse and discount drafts in the name of his principal. *Exchange Bank v. Thrower*, 45 S. E. 816, 317, 118 Ga. 433.

## CASHIER'S CHECK.

A "cashier's check," so called, differs radically from an ordinary check. The latter is merely a bill of exchange drawn by an individual on a bank payable on demand; or, in other words, it is an order upon a bank purporting to be drawn upon a deposit of funds for the payment of a certain sum of money to a person named or to order or bearer on demand. As between himself and the bank the drawer of the check has the power of countermanding his order of payment at any time before the bank has paid it or committed itself to pay it. A cashier's check is of an entirely different nature. It is a bill of exchange drawn by the bank upon itself, and is accepted by the act of issuance, and, of course, the right of countermand as applied to ordinary checks does not exist as to it. *Drinkall v. Movius State*

Bank, 88 N. W. 724, 726, 11 N. D. 10, 57 L. R. A. 341, 95 Am. St. Rep. 693.

## CASK.

Any cask, see "Any."

"Casks," as used in a charter party providing for the bringing of a cargo of molasses from Cuba, and that the charterers were to pay a certain amount for hogsheads of 110 gallons, gross gauge, of casks delivered, means casks actually brought into port, whether such casks contained any molasses or not, provided the loss of the molasses was caused by dangers incident to the voyage, and was not due to the negligence of the master or crew of the vessel. *The Cuba* (U. S.) 6 Fed. Cas. 935.

### Half barrel.

Wherever the term "barrel" or "cask of flour" is used in the chapter relating to inspections, it shall be construed to include a half barrel, unless the same be repugnant to the enactment. Code N. C. 1883, § 3020.

## CAST.

See "Votes Cast."

The definition of "cast," as given by Webster, is to form into a particular shape by pouring liquids into a mold. The Century Dictionary defines it as that which is formed by founding; anything shaped in, or as if in, a mold. Where iron in ore is reduced to a metallic sponge, or pasty mass, and in that condition delivered from the furnace, and then, by a second operation, melted and run into molds, it is clearly a "cast" steel. *Gary v. Cockley* (U. S.) 65 Fed. 497, 501.

### CAST AWAY.

"Cast away," as used in Act Cong. March 26, 1804, § 2 (2 Stat. 290), providing that if any person on the high seas shall willfully and corruptly cast away, burn, or otherwise destroy any ship or vessel of which he is owner in part or in whole, or in any wise procure the same to be done, with intent or design to prejudice any person that has underwritten any policy of insurance thereon, shall be punished, etc., means such an act as causes a vessel to perish or be lost, so as to be irrecoverable by ordinary means, and is synonymous with "destroy," which means to unfit a vessel for service beyond the hope of recovery by ordinary means. "'Destroy' is a generic term, 'cast away' is a species of destroying, as burning is." *United States v. Johns* (U. S.) 28 Fed. Cas. 616, 620.

Where a hole was bored in the bottom of a vessel so as to render it necessary to abandon her, and she was left on the high seas

completely waterlogged, beyond the power of the vessel into which the captain and crew were taken to save her, and filling with such rapidity as to render her loss almost certain, it was a "casting away," within Act Cong. March 26, 1804, punishing such an act. *United States v. Van Ranst* (U. S.) 28 Fed. Cas. 380.

### CAST OF SCULPTURE.

In the technical or professional sense, a "cast of sculpture" is one taken from an original creation in clay, as part of the process of making the completed statue in bronze or marble. In a broader sense the term embraces casts from sculptured objects in marble or bronze which reproduce the original objects. *Benziger v. United States* (U. S.) 107 Fed. 257, 258.

## CASTIGATORY.

A "castigatory" was an instrument of punishment known to the ancient common law, by which a woman convicted of being a common scold was punished by being plunged into the water. "Lord Coke says that in law it signifieth a stool that falleth down into a pit of water for the punishment of the party in it." *United States v. Royall* (U. S.) 27 Fed. Cas. 907, 908.

## CASTING VOTE.

"By a 'casting vote' is meant one which is given when the assembly is equally divided, and when the question pending is in such a situation that a vote more on either side will cast the preponderance on that side and decide the question accordingly, and not merely a vote which, if given on one side, will produce an equal division of assembly and thereby prevent the other side from prevailing. This principle extends to cases of election by ballot. In these cases the speaker does not vote by ballot, but waits until the votes are reported, and then votes orally, not for whom he pleases, but for one, or for the requisite number of candidates voted for who have received an equal number of votes. This principle applies equally in those cases where a less number than a majority is permitted, or a greater is required, to decide the question in the affirmative. Thus, if one-third only is permitted or required, and the assembly on a division stands exactly one-third to two-thirds, there is then occasion for the giving of a casting vote, because the presiding officer can then, by giving his vote, decide the question either way." *Cush. Law & Prac. Leg. Assem.* § 306. Thus, under the provisions of a city charter authorizing the common council to designate by vote two official newspapers, and providing that no member of either branch of the council shall vote for more than one, and requiring



both papers to be selected on one ballot, the mayor, who has the right of casting a tie vote in the case of a tie, may, when three papers receive the same number of votes, vote for two of the papers. *Wooster v. Mullins*, 30 Atl. 144, 145, 64 Conn. 340, 25 L. R. A. 694.

The words "casting vote" in Waterville city charter, providing that the mayor shall preside in the board of aldermen and joint meeting of the two boards, but shall have only a casting vote, means a vote to be thrown by the mayor as presiding officer when the votes cast by the members are equally divided. The provision does not authorize the mayor to vote, when there is not a tie, for the purpose of making a tie. *Brown v. Foster*, 33 Atl. 662, 663, 88 Me. 49, 31 L. R. A. 116.

By common law a "casting vote" sometimes signifies the single vote of a person

who never votes, except in case of a tie, and sometimes the double vote of a person who first votes with the rest, and then, upon an equality, creates the majority by giving a second vote. St. (4th Ed.) 1179, § 1, relative to religious corporations, and providing that no board of trustees shall be competent to transact any business unless the rector, if there be one, or at least one of the churchwardens, be present, and that such rector, if there be one, and, if not, then the churchwarden present, shall be called to the chair and shall preside and have the casting vote, does not mean that the chairman shall have the casting vote only in case of a tie arising on the votes of the other members, but authorizes the chairman, after having first voted with the rest, upon a tie occurring, to give a second vote. *People v. Church of the Atonement* (N. Y.) 48 Barb. 603, 606.

C. E. F.

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